PRIVY COUNCIL JUDGMENTS

ON

APPEALS FROM INDIA,

BY

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PREFACE.

This volume contains cases from 1871 to 1878. Our original plan was to give cases only from Knapp's Reports and Moore's Indian Appeals and Law Reports of Indian Appeals. But we found that there were some cases reported in the Bengal Law Reports and Indian Law Reports which were omitted in the said Reports and *vice versa*, and that there were some cases which were not reported in any of those Books. We have therefore given a complete series of cases contained in all those reports as also some other cases not published in either of them, and tried to make our reports as complete as possible.

This—the third volume of the present compilation—contains all the cases published in Law Reports on Indian Appeals vols. I. to VI., the Supplemental Volume of the same series, the Bengal Law Reports vols. X. to XV., the Indian Law Reports Calcutta series vols. I. to IV., and in the Madras, Bombay and Allahabad series of the same reports vols. I. & II., and all the cases in Moore's Indian Appeals vol. XIV., not already given in our second volume. There are also, included some cases not to be found in the above reports.

We trust that this Book will be of great assistance to legal practitioners in the country and supply a real want. The original reports are bulky and costly. Some of them are entirely out of print, and most beyond the reach of the average practitioner.

It remains to apologise for the delay which has occurred in the completion of this work, owing to the death of our printer and the consequent disorganization in the business. But for this accident this volume would have been out long ago, and we hope our subscribers will excuse us.

CALCUTTA,
August 1884.

PRAN NATH PANDIT.
BIDHU BHUSHAN BANERJEE.

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1871—78.

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PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA.

6th November, 1871, 11th May, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Chancellor Lord Hatherly, the Right Hon. Lord Westbury, the Right Hon. Sir J. W. Colvile, the Right Hon. Sir John Stuart, and the Right Hon Sir M. E. Smith.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Chief Court of the Punjab.

G. C. W. FORESTER and others, (Plaintiffs,)*... } *Appellants,*

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, (Defendant,) ... } *Respondent.*

Jurisdiction—Act of State—Evidence—Lost Sanad.

Where lands were held by a *jagirdar* under the sovereign of an independent State on a *jaidad* tenure, i. e., on a grant of land, together with the public revenues thereof, on the condition of keeping up a body of troops to be employed when called on in the service of the sovereign, and on the conquest of the State by the East India Company, the *jagirdar* remained in the same position to the Company, *Held* that the resumption of the lands by the Company, and the seizure of the arms and stores appertaining to the tenure, on the death of the *jagirdar*, was not an act of State, and therefore the Municipal Courts had jurisdiction to entertain a suit by the representatives of the *jagirdar* against the Government for the possession of the land, and for the value of the arms and stores. This was so, although at the time of the resumption, the Regulation law was not introduced into the territories in which the *jagir* was comprised.

Where an alleged original *sanad* was lost, the Judicial Committee, in view of the strict nature of the proof required in cases of claim under ancient *sanads* by Regulations II. of 1819, s. 28, and XIV. of 1825, s. 3, and taking all the circumstances into consideration, refused to consider the title under it established.

Where the evidence showed that the arms and stores seized had been purchased by the *jagirdar* before the resumption, and there was no authority or evidence to show that those who held by *jaidad* were not entitled to things so purchased, *Held* that the representatives of the *jagirdar* were entitled to recover the value of the arms and stores so seized.

11th May, 1872.

THE judgment of their Lordships was delivered by

THE RIGHT HON. THE LORD CHANCELLOR LORD HATHERLY:—

BADSHAPORE SUIT.

In this suit the representatives of the late Mr. *Dyce Sombre* claim to recover from the Government of India possession of a valuable estate called *Pergunna Badshapore Jhursa*, with mesne profits since August, 1836. They do not claim merely a *zemindari* interest in the lands; they claim to hold them rent-free,—that is, free from assessment to Government revenue: and the total value of the claim is assessed in round numbers at a sum little short of a quarter of a million sterling.

* 12, B. L. R., p. 120; Cowell's I. A. Sup. Vol., p. 10.

The defence to this suit, on the part of the Government of India, is two-fold. It is alleged, first, that, on the death of the *Begum Sumroo*, in 1836, the estate, whatever were the nature and extent of her interest therein, was resumed by an act of Government, which, having regard to the status of the *Begum* as an independent, or *quasi*-independent, sovereign, was an act of State, the propriety and validity whereof are not cognizable by any Municipal Court; and in support of this proposition they rely on the case of the *Rajah of Tanjore* (1), and similar authorities. It is further alleged that, if the case is cognizable by the Municipal Courts, the appellants have failed to establish by trustworthy evidence the title to this estate on a rent-free tenure, capable of passing to Mr. *Dyce Sombre* by the deed of gift or subsequent will of the *Begum Sumroo*.

In order to test the sufficiency of the first defence, it is necessary to come to a clear conclusion touching the status of the *Begum Sumroo* both before and after the acquisition by the East India Company of the Doab, and the territories on the west of the *Jumna*, comprised in the treaty of peace concluded with *Dowlut Rao Scindia* on the 30th of December 1803.

It will be convenient to consider the question with reference to the *Begum's* possessions at *Sirdhana* and elsewhere within the Doab; because the negotiations and correspondence with her were, up to the time of the final agreement or treaty with her in 1805, confined to those possessions; no mention being made therein of *Badshapore*, which is on the western side of the *Jumna*; and because the acts and powers of the Government in the resumption of *Badshapore* cannot be put upon higher ground, than their acts and powers in the resumption of *Sirdhana*.

The status of the *Begum*, in respect of her Doab possessions before 1803, is admitted to have been that of a *jagirdar*, holding upon a *jaidad* tenure,—*i. e.*, upon a grant of a certain district together with the public revenues of it, on the condition of keeping up a body of troops, to be employed, when called upon, in the service of the sovereign of whom the *jagir* was held. The *de facto* sovereign of the Doab at this time was *Dowlut Rao Scindia*. There is nothing in the record to show what powers over the inhabitants of the district included in such a *jagir* were, as incident to the tenure, vested in the *jagirdar*. But it cannot be doubted that, practically, the whole administration of the territory included in her *jagir*, whether civil or criminal, was vested in the *Begum*, who exercised a sort of delegated sovereignty therein.

This being the condition of the *Begum* in the early part of 1803, Lord *Wellesley*, in pursuance of the policy by which he succeeded in detaching certain French adventurers from the service of *Scindia*, appears to have entered into negotiations with her before the actual commencement of hostilities with the Mahratta prince. War, though previously certain, was not declared until August 1803, and Lord *Lake's* force broke up from *Cawnpore* on the 7th of that month. But the earliest letter from Lord *Wellesley* to the *Begum* that is set forth in the record is dated the 20th of May. That letter shows that a previous correspondence had taken place between them, having for its object the diversion of the *Begum* and her battalions from the service of *Scindia* to that of the English. The negotiation so begun was continued throughout the war. Though this negotiation may not have prevented such of the *Begum's* troops as were actually with Scindia, under her Lieut.-Colonel *Saleur*, from fighting against us at the battle of *Assaye*, yet it kept her friendly to us in her own district. Nor can it be doubted that, at the time when peace was concluded, and by the treaty of the 30th December 1803, the sovereignty over the Doab, and the territories west of the *Jumna* in which *Badshapore* is situate, passed from Scindia to the East India Company. The Governor-General had fully determined that the future relations of the *Begum* and the Company, though not as yet precisely defined, were to be friendly, and that our rights of conquest were not to be exercised to her prejudice. This appears from Lord *Wellesley's* letter to

(1) 7 Moore's I. A., p. 476; 1 P. C. J., p. 684.

Lord *Lake*, of the 23rd of December 1803,* which admits that the Government could not in fairness establish British authority, or introduce British law, into the territory composing the *Begum's* Doab *jagir;* and the nature of the equivalent proposed, in the event of her agreeing to exchange those possessions, is also a circumstance which has some bearing upon the present question. It appears for some time to have been in Lord *Wellesley's* contemplation to make the *Jumna* the western boundary of the purely British territory, and to form the territories conquered from *Scindia* on the western bank of that river into independent and protected principalities. And it being then considered desirable to remove the *Begum* out of the Doab, it was proposed to give her one of these principalities, reconciling her to the inconveniences of the exchange by the accession of dignity implied in treating her as a sovereign under the protection of the British Government. This seems to be the fair construction of Lord *Lake's* letter of the 23rd November 1803 to the Governor-General† and of all that was done upon it. This negotiation was continued after the ratification of the treaty of the 30th December 1803, and when the sovereignty of the East India Company in the territories ceded by that treaty had become complete. The project, however, was ultimately abandoned by Lord *Cornwallis;* and the final treaty or agreement with the *Begum* was made in August

* "The conduct of the *Begum* on this occasion appears to merit the entire approbation of this Government, and to justify her pretensions to any indulgences, consistent with the security and interests of the British Government, calculated to reconcile her to the arrangement to which she has consented for the transfer of her possessions in the Doab.

"I have therefore deemed it advisable to adopt the suggestion contained in the last paragraph of your Excellency's despatch, by permitting the country to be now assigned to be considered as a sovereignty under the protection of the British Government, without any other condition than the customary stipulations of service whenever her troops may be required, and of submitting to the arbitration of the British Government any differences which may eventually arise between her and any other State or Chieftain.

"I have accordingly addressed a letter to the *Begum*, signifying my approbation of her conduct, and my satisfaction at her consent to the proposed transfer of her possessions, apprising her of my resolution to guarantee to her the independent dominion over the territory which will be assigned to her on the western side of the *Jumna* in exchange for her present *jagir*, and referring her to your Excellency for the details of this arrangement.

"My letter to the *Begum* is enclosed, together with a copy, for your Excellency's information.

"It is of the most urgent and serious importance that the British authority should be established in the territory composing her present *jagir* at the earliest practicable period of time, and I request that your Excellency will immediately adopt the necessary measures for that purpose, and for the assignment of an equivalent portion of territory on the western side of the *Jumna*.

"I trust that the *Begum* may be induced to admit the introduction of the British authority into her *jagir*—without awaiting the actual transfer of an equivalent territory, which it may require some time to effect—under an assurance of ample compensation for any loss of revenue which may be occasioned by the delay.

"It will be proper that written engagements should be executed on the part of the British Government and the *Begum*, stipulating for the proposed exchange of territory, and the obligations to be imposed on both parties by the projected arrangement."

† "From the correspondence of Lieut.-Colonel *Ockterlony*, I learn that the *Begum* has frequently intimated an earnest wish to receive from the British Government some title expressive of friendship, or some dignity which may evince the confidence which Government reposes in her. Your Excellency may perhaps be inclined to indulge this wish in the terms of the transfer of her *jagir*, either by some addition to the titles hitherto used in the address to the *Begum*, or by permitting the country to be now assigned to be considered as a sovereignty under the protection of the British Government, with the customary stipulation of service when her troops may be required."

1805.* The substance of that agreement is that "those places in the Doab which have formed the *jaidads* of *Zeboolnissa Begum* shall remain to her (as before) from the Company as long as she may live." What follows may either be the expression of conditions *quæ tacite insunt* in a *jaidad* tenure, or conditions superadded thereto. But the fair construction of the instrument, and of the correspondence which led up to it, seems to be that the *Begum* was, for her life, to hold her territories in the Doab from the Company, as she had held them under Scindia; and that, as she was not a sovereign princess, but a mere *jaidadar* under Scindia, she was to remain such under the Company, the project of conferring upon her the new dignity of a sovereign princess having been only part of the larger project for an exchange of territory, and abandoned with it.

Up to this time there is little, if any, express mention of *Badshapore*. It is, however, admitted on both sides that the *Begum* was *de facto* in possession of it when the cession of 1803 took place, and that she continued during her life to hold it, and to exercise therein the same powers of Government and administration which she exercised at *Sirdhana*. This view of the status of the *Begum* is confirmed by the 9th paragraph of Lord *Metcalfe's* letter of the 4th May 1836.† The authority upon such a subject of a man of his experience and character is of the highest value.

This being so, the present case is distinguishable from that of *The Secretary of State for India* v. *Kamachee Boye Sahaba*.* There the *Rajah* of *Tanjore*, though he may have had less substantial power than that exercised by the *Begum Sumroo*, retained at least the shadow of original and independent sovereignty. Lord *Kingsdown* thus puts the question:—"What was the real character of the act done in this case? Was it a seizure by arbitrary power, on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State—an act not affecting to justify itself on grounds of municipal law;—or was it, in whole or in part, a possession taken by the Crown, under color of legal title, of the property of the late *Raja* of *Tanjore*, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up has no foundation."

The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under color of a legal title; that title being the undoubted right of the sovereign power to resume, and retain, or assess to the public revenue, all lands within its territories, upon the determination of the tenure under which they may have been exception-

* Those places in the Doab which have formed the *jaidads* of *Zeboolnissa Begum*, shall remain to her (as before) from the Company as long as she may live. The troops of the *Begum* shall, according to custom, be always ready in the service of the East India Company. The *Begum*, in every instance, considering herself a faithful dependant and friend of the Company, shall perform all the duties required from a dependant and friend, and shall not hold any intercourse whatever, either by agent or by letter, with any State or Power, or with the friends or dependants of any State or Power, or with the enemies or refractory subjects of the Company, or with any State or Power whatsoever, but that of the Honorable East India Company."

† "9. At the peace, *Scindia's* territory in the *Doab*, and vicinity of *Delhi*, including all in her (the *Begum's*) lands became ours by cession, as they were before by conquest; we might have resumed the land, discharging her and her brigade, or have retained her and her troops in service on any terms that we approved. The course pursued was to enter into engagements with her by which she was allowed to retain the territory on the former footing, and the troops were to be at our disposal, three battalions or one-half to be always employed on our service; we were equally entitled to the use of the whole, but such was the engagement entered into, and we adhered to it to the day of her death."

* 7 Moore's I. A., p. 476; 1 P. C. J., p. 681.

ally held rent-free. If by means of the continuance of the tenure, or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would, *primâ facie*, be cognizable by the Municipal Courts of India.

The particular case was, no doubt, somewhat complicated by the peculiar nature of the powers exercised by the *Begum* in her *jagirs*; and the practical exclusion of her territories during her life-time from the operation of British law and the jurisdiction of British Courts.

Their Lordships think that the Regulations, which were the written law of that part of British India, and whatever else may be held to constitute British law, were not introduced into these territories by Regulation VIII. of 1805, or until after the passing of Act XVII. of 1836. The *Begum's* territories were treated as excepted from the conquered territories: and although the sovereign rights of *Scindia* over these territories passed under the treaty of 1803, they passed, subject to the rights of the *Begum*, the precise definition whereof was then the subject of the negotiations which resulted in the agreement of 1805. Accordingly, on the *Begum's* death, it was thought necessary to pass an Act of the Legislature in order to legalize the introduction of Regulation law into these territories by order of the Governor-General. That this was done by legislation, and not by proclamation, affords, perhaps, another argument against treating the annexation of these territories as an act of conquest or arbitrary power, or as the exercise of an original right of conquest which had remained in suspense during the *Begum's* life-time. It is probable, however, that the abnormal condition of these territories was one reason why the resumption took place, not, as it would have taken place in a province or district wherein the action of Government is fettered by the Regulations, by a resumption suit, but in what is called the Political Department; and thus both parties seem, for some time at least, to have considered that the act was in the nature of an act of State. For it is to be observed that Mr. *Dyce Sombre* himself asserted his supposed rights by memorials and appeals to one political authority after another, beginning with the Lieutenant-Governor of the North-West Provinces, and ending with the Prime Minister; and that it was not until after his lunacy, and the order of Lord Chancellor Lyndhurst in that matter, that any recourse to the Municipal Courts was had, or apparently even contemplated.

These considerations, however, though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, and arbitrary act of sovereign power against an independent State. And, even if the state of the law in the territories in question at the time when the act of resumption took place, gave—as perhaps it did—a larger power of resumption to the East India Company than it possessed in the Regulation Provinces, that circumstance would not exclude the jurisdiction of the Courts. For these reasons their Lordships are of opinion that the first ground of defence, being that on which the Courts below have mainly proceeded, fails.

This being so, it is next to be considered whether the appellants have established their title to *Badshapore Jharsa* as held in perpetuity by a rent-free tenure; in other words, whether they have proved a grant by the sovereign power of the rent of the lands, which rent would otherwise be payable to the State.

The original suit having been brought in 1848, to recover the estate from the East India Company, which had been in possession since 1836, the burden of proving a title sufficient to disturb that possession necessarily lies upon the appellants. This, however, would not have been otherwise had the commencement of the litigation been in 1836, and by proceedings in an ordinary resumption suit. For the Regulations touching such suits cast upon the person who claims to hold land *lakhiraj*, or free from assessment to Government

revenue, the burden of establishing a title recognized by law as sufficient to give that exceptional immunity, and require very stringent proof in such cases.

Regulation II. of 1819 which the appellants, in their original pleading, invoke as one of those by which the claims of Mr. *Dyce Sombre* ought to have been determined in 1836, by its 28th section provides that an ancient *sanad* shall not be treated as sufficient proof of its contents on the faith of its seal, or without confirmatory evidence. And s. 3 of Regulation XIV. of 1825 also shows the high degree of proof required. Nor are such provisions unreasonable; since every grant of this kind implies a perpetual alienation, in favor of some individual and his heirs, of a portion of the land revenue—the impost, if impost it is to be called, which immemorial custom has made the most natural and tolerable to the natives of India,—and thus operates not only in derogation of the rights of future Governments, but to the injury of the subject, on whom the incidence of taxation for the necessary purposes of Government will be the heavier, in proportion as the public revenue is wasted by such alienations.

It is of the utmost importance in a case like the present to observe in what manner and upon what proofs the case of any claimant is first advanced.

In the plaint filed in August 1848 by the committee of Mr. *Dyce Sombre*, it was stated generally, and without condescending on the name of the grantee, that the *altamgha jagir Badshapore Jharsa* was originally granted by the Emperor *Shah Alum*, and subsequently confirmed by *Madho Rao Scindia*. But in the substituted plaint, which was filed in January 1864 by the appellants, and must be taken to be the foundation of the existing suit, the statement is more specific. It is this:—"The *Pergunna* of *Jharsa*, inclusive of *Badshapore*, was granted as an *altamgha jagir* to the *Begum Sombre* (or *Sumroo*) by His late Majesty *Shah Alum*, in the 30th year of the ascension; and this grant, according to the *sanad* dated the 2nd *Zuffer*, the 37th year of the ascension, was confirmed by the *Maharajah Madho Rao Scindia*." And the fourth, fifth, and sixth of the issues settled in the cause upon which the parties went to trial were:—"Whether the *Pergunna* of *Badshapore Jharsa* was granted by the *Shah Alum* to the *Begum Sumroo*, as mentioned in the plaint? Whether, if it were so granted, *Shah Alum*, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated? And whether, if the same were granted, the grant was confirmed by *Madho Rao Scindia*, as in the plaint mentioned?"

It will be convenient here to state the history and character of the alleged grant from *Shah Alum*, as disclosed by the documents upon which the appellants mainly rely, *viz.*, the papers procured from *Delhi*.

The case which the Counsel for the appellants make on these documents is, first, that in the month of *Shuwall*, in the 30th year of *Shah Alum*, the *Begum* presented a petition, praying that a new and complete *altamgha sanad* of *Pergunna Jharsa* might be granted to her in substitution for one previously granted to *Zuffer Yab Khan*, the son of *Sombre* or *Sumroo*; secondly, that a report was made, recapitulating the prior devolution of the estate, showing that it had been held by certain great officers of the Court of *Delhi* in succession, as part of their respective *jagirs*, that it had for some time "continued released" as *jaidad* of the battalion of *Sumroo Bahadoor Feringee*, and, on the 15th of *Rajeb* of that year, (with the exception of certain villages) had been granted in *altamgha* to *Zuffer Yab Khan*, on a representation that an *altamgha sanad* under the seal of *Maharajah Puttail* (said in one part of the record to be a title of *Scindia*) had been lost; thirdly, that on this report and on the 19th of *Shuwall*, the King issued a *firman* to the effect that an *altamgha* grant of *Badshapore Jharsa*, with the exception of the villages excepted from the grant to *Zuffer Yab Khan*, should be made to the *Begum* on the terms therein expressed; fourthly, that whether the formal grant or *sanad* was or was not issued to her in pursuance of that *firman*, she, two months afterwards, presented another petition, in which she

made no reference to the preceding grant to *Zuffer Yab Khan*, but stated that all the estate, including the excepted villages, had, since the death of *Sumroo*, been in her possession as *jaidad*; and that in consequence of that petition, a *sanad* of the whole estate, including the villages before excepted, was granted to her in *altamgha* under the *khas* seal and golden *togra* of the Emperor on the 9th of *Zilhij* in the 30th year of his reign.

If these facts are true, it follows that until the month of *Shuwall*, or that of *Zilhij*, in the 30th year of *Shah Alum*, whatever interest the *Begum* had in *Badshapore* was in the nature of a *jaidad* tenure; that *Zuffer Yab Khan* never had an *altamgha* grant of that estate under a *sanad* of the Emperor, except for a period of, at most, three months; and that, so far as appears, he was never in possession under that grant.

The original documents, of which the foregoing is the effect, were not produced, and the copies, or alleged copies, produced in evidence are admitted to have had no existence before 1847. They are said to have been then copied from old records at *Delhi* at the instance of the committee of Mr. *Dyce Sombre*, or his legal advisers, with a view to the proceedings being commenced in the following year. If the transactions which they represent to have taken place really took place, an original *sanad*, in the terms of what in the record is called "*sanad* No. 3" (1), must have been issued to the *Begum Sumroo* under the seal of *Shah Alum*. But of this original *sanad* there is no trace. It is not produced: its loss is not accounted for: there is no evidence that anybody ever saw it.

It has been strongly argued for the Government that the non-production of the original not being accounted for, secondary evidence of its contents is not admissible. Their Lordships are by no means prepared to say that an Indian Judge would not do right, according to the practice of the Courts of that country, in rejecting a copy if the absence of the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best evidence producible to be produced, has no application to Courts of which the Judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence. This Committee undoubtedly enforced the rule in the case of *Syud Abbas Ali Khan* v. *Yadeem Ramy Reddy*.(2) There have, however, been other cases in which their Lordships have declined to apply to Indian cases the strict rules of evidence which obtain in this country on trials at *nisi prius*. And, considering that in this case the Judge of first instance has commented on the copies in question, their Lordships propose to treat them as admitted in point of fact, and to consider what credit and effect ought to be given to them. Nevertheless, in weighing the whole evidence given in support of the appellants' title, the absence of proof that the original *sanad* once existed, and was subsequently lost or destroyed, is a very grave circumstance, which cannot be excluded from consideration.

The case as to the copies of the *sanad*, put forward by the learned Counsel for the appellants, is that they are proved to be copies taken from ancient documents at *Delhi*, since destroyed in the mutiny,

(1) These *sanads* were as follows, the first one being called in the record *sanad* No. 3, by which the *pergunnah* of *Jharsa*, and the villages of *Badshapore* and *Bhutgong* (among others) were bestowed upon *Zeboolnissa* (the *Begum*), and upon her descendants.

"From the autumn crop, *viz.*, from the month of *Tingo Zuil* (last month of the *Fasli* year), as an *altamgha* grant to her from generation to generation, to her children, and those related to her. This grant is to be considered as safe from the strokes of change or alteration. No *peshkash*, or the fees of *sobahdari*, *faujdari*, revenue, or other kinds of cess, such as tax or exaction, &c., is to be demanded from this estate; all increase in the revenue or proceeds of the estate proceeding from a good cultivation to go to the grantee. This *sanad* or grant is all sufficient; fresh confirmation is not to be required year by year. Nothing ought to be done contrary to this grant.

Dated 9th of *Zillah* of the 30th year of the reign (11th September 1788)."

(2) 3, Moore's I. A., p. 156; 1 P. C. J., p. 259.

which, whilst they existed, were public records, and of the same value as a duplicate original of the missing *sanad*.

But what is the evidence as to these papers? The proof of the most important of them, that called *sanad* No. 3, depends on the testimony of the witness, *Balmokund*, given in 1865. He has deposed that, in 1847, he was ordered, by the then *Peshkar* of the King of *Delhi*, to make the copy in question from an old paper which the latter took out of a cloth. The words of the witness are:—"It was out of a dozen or so of the papers of the former times which had 'escaped,' and had been tied up by him in his *busta*, or record cloth." He goes on to say:—"There had been countless papers in the charge of his (the *Peshkar's*) forefathers; many of them had doubtless been destroyed by insects, or perished in other ways. By 'escaped,' I mean those old papers or records which had come down from his forefathers into his actual possession." In answer to the inquiry, what had become of the paper from which he made the copy, he said:—"The *Peshkar* died in 1850, and all trace of his documents has disappeared;" and added that the different servants of the King had each in their possession a few pounds' weight of documents that had been handed down from father to son, besides those relating to their own time. He had previously said, when asked whether he lived in the *Peshkar's* house, "no; I went there for business; after the taking of *Delhi* by the British" (which words, as the *Peshkar* died in 1850, must be taken to refer to the original introduction of British authority in *Delhi*, rather than to the taking of the city in 1857), "the *duftur* (registry office) of the King hardly existed." Hence it appears that the paper from which the copy is said to have been made was anything but a record regularly kept and preserved, which afterwards perished in the storming of *Delhi*, if full credit be given to the witness and to his means of knowledge. It came to the *Peshkar* with a few pounds' weight of other documents, was accidentally preserved when many others perished, and disappeared with him. Their Lordships cannot treat such a paper as having the validity of an authentic record, the value of which depends on its custody in an authorized registry by a responsible officer. The evidence of *Chujo Singh*, as to the other and less important paper, is of the same character.

An attempt was made to cast further suspicion on these copies, and the transactions which they are produced to prove, by the dates. It is contended on the part of the respondents, that the months of *Shuwall* and *Zilhij* of the 30th year of *Shah Alum* fall within the autumn of 1788, when he was a helpless prisoner in the hands of *Gholam Khadir*, the *Rohilla*, who put out his eyes. On the other hand, the appellants assert that the date in question corresponds with the autumn of 1789. There is much that may be urged to support the respondents' contention. It seems to be certain that *Shah Alum's* reign, notwithstanding a short interregnum, was calculated from the death of his father *Alamgir* II., which Mr. *Elphinstone* and the best historians fix in November 1759, corresponding with *Rabi* II., A.H. 1173. It follows that the *jalus* or accession of *Shah Alum* is correctly fixed by Mr. *Princep* in his tables as 1 *Jumadi* I., A.H. 1173; and if the 30th year of that prince's reign is to be calculated in the ordinary way from that date, it would begin on the 1 *Jumadi* I., A.H. 1202, and end with the 1 *Jumadi* I., A.H. 1203. The months of *Shuwall* and *Zilhij* of the 30th year would then fall within 1203, and correspond with the autumn months of 1788. On the other hand, the appellants have referred to some coins and seals, from which it would appear that the 30th year of *Shah Alum's* reign was treated as identical with A.H. 1203; and from this, and a passage in Mr. *Seton's* letter, afterwards referred to, they have argued that the dates in question must be taken to correspond with the autumn months of 1789. This view may perhaps be capable of being reconciled with the date of *Shah Alum's* accession by some peculiar mode of calculating the *jalus* year; and their Lordships would be sorry to make their decision turn in any way upon a disputed point of Indian chronology. They may observe, however, that, even if the dates in question are taken to

fall within the year 1789, there is reason to doubt whether *Shah Alum* was at that time in a condition effectually to alienate any part of the revenues of the territories within which *Badshapore* is situated, at least, without the concurrence of *Scindia;* and that there is no suggestion that the alleged grant received the sanction of the *Mahratta* power until 1795.

Their Lordships, considering the nature of the documents under consideration, and the testimony by which they are supported, have come to the conclusion that the appellants have not given evidence which can be accepted as sufficient proof of a grant, of which the original is neither forthcoming nor accounted for, unless the presumption of its existence can be assisted by the other evidence in the cause.

The corroboration chiefly insisted upon was of this kind: it was argued that copies of certain *sanads*, showing his title to *Badshapore*, were proved to have been sent by Mr. *Dyce Sombre* in 1836 to the officers of Government; that these were not shown to have been returned by the Government, and have not been produced by them in this suit; that they must therefore be assumed to have been identical, or, at all events, not inconsistent with the documents subsequently procured from *Delhi*. It was further insisted that, inasmuch as Government did not question the genuineness of these *sanads* in 1836, they must be taken to have been then satisfied of their authenticity. This argument is confined to the copies of *sanads* supposed to have been sent by Mr. *Dyce Sombre* after the *Begum's* death. It is hardly pretended that the Government ever received from her any document of title except a copy of *Scindia's perwanna*. The *sanads* sent to Mr. *Fraser*, whatever they may have been, were returned by her messenger. Mr. *Forsyth*, on the other hand, argued strongly that Government was not shown to have received from Mr. *Dyce Sombre* copies of any documents corresponding with those now relied upon; or, indeed, the copy of any document of title except *Scindia's perwanna*. The evidence on the point is as follows:—

Mr. *Dyce Sombre*, writing in the beginning of March 1836 to Mr. *Hamilton*, says:—"I beg to say I have already forwarded to you the copies of the *sanads*, by which Her late Highness held her *jaidad*, and the *Pergunna* of *Badshapore* in *altamgha*, assigned to her by the former rulers of *Hindustan*, being antecedent to the British sway of this adjoining district." These words would be grammatically accurate, if nothing relating to *Badshapore* but a copy of *Scindia's perwanna*, previously called by the *Begum*, in her letter of 1832, a *sanad*, had been sent. And Mr. *Hamilton*, writing to Mr. *Hutchinson*, says:—"I also annex a copy of the *sanad* referring to *Badshapore*," having in the preceding sentence spoken of the *sanads* relating to *Sirdhana*. The argument that he would not have applied the word *sanad* to the *perwanna* does not appear conclusive. Their Lordships can give no credit to the alleged copy of the letter set out at p. 29 (1). It was hardly pressed by Sir *Roundell Palmer* in reply. But Mr. *Hamilton's* letters of the 20th May 1836 (2), and of December

(1) "With reference to the 2nd para. of your letter, I beg to say that I have already forwarded to you the copies of the *sanads* by which Her Highness held her *jaidad*, and the *Pergunna* of *Badshapore*, in *altamgha* assigned to her by the former rulers of *Hindustan* long antecedent to the British sway of this adjoining district. I also annex a copy of the agreement with his Excellency Lord *Lake*, when the *jagirs* which had been so assigned to Her Highness were confirmed to her by the British Government. In virtue therefore of these *sanads* I claim as my private property all the lands, arms, &c., in fact, property of every denomination (belonging to Her late Highness), which is not otherwise mentioned in the said agreement; or in other words, that I consider only her *jagirs* within the *Doab* to have devolved on the Hon'ble Company by the wording of that agreement; all the lands situated beyond the two rivers having been devised to me by Her late Highness."

(2) "Copies of the tenures (on which the *Begum* held the *pergunnas* situate in the *Doab*, and that of *Badshapore*) are herewith submitted, and a reference to them will at once show that the *Doab pergunnas* were held for the maintenance of troops, whilst that of *Badshapore* was enjoyed as a private possession, without any stipulation or agree-

1836 (3), have been strongly relied upon by the appellants. They were written by him as Collector of *Meerut*, with the object of having applied to the back rents of *Sirdhana*, which was within his jurisdiction, a more stringent rule than that which his superiors were disposed to apply either to *Sirdhana*, or to *Badshapore* (with which he has no official connexion). He draws a distinction between the two tenures, treating *Sirdhana* as *jaidad*, and *Badshapore*, whether resumable or not, as the *Begum's* personal *jagir*. That this was the nature of the *Begum's* claim would perhaps appear from the copy of *Scindia's perwanna*; but it must be admitted that these letters are, on the whole, more consistent with the appellants' than with the respondent's theory, concerning the number and nature of the documents sent by Mr. *Dyce Sombre*.

One great and unexplained difficulty, however, touching the copies of *sanads* supposed to have been sent by Mr. *Dyce Sombre* is this:—From what were these copies made? If from originals, where are the originals? If from other copies (and it was admitted at the bar that he must be presumed to have retained copies of whatever he sent), what became of those copies? Mr. *Dyce Sombre* was in correspondence with the home authorities touching his claim up to 1842. He was presumably then in possession of all the documentary proof he ever had of his title. He was found a lunatic on the 30th of July 1843, and Mr. *Larkins* was appointed his committee in 1844. There was a faint suggestion at the bar that his documents of title were lost or destroyed during his lunacy. But there is not the slightest proof of this; and the non-production of any such documents in the suit affords grounds for supposing that neither Mr. *Dyce Sombre*, between 1836 and 1842, nor Mr. *Larkins*, when he took the advice of Counsel in 1847, had any copies of the alleged *sanads* from *Shah Alum*: and, if so, it seems difficult to fix the Government with clear notice in 1836 of the previous title now sought to be established by the copies procured from *Delhi* in 1847.

Their Lordships are of opinion that, even if the Government were fixed with the notice of the claim of such title, it is not to be inferred that, because they did not then dispute, they admitted, its genuineness. It is clear from all the proceedings that they did not profess to investigate the title. Their position throughout was that the tenure was, either in its nature, or by arrangement, resumable on the *Begum's* death; and they resumed it when that event happened.

The appellant's case, however, presents still graver difficulties. When a doubtful title is in dispute, the first question that suggests itself is, when was it first asserted; and has it been continuously and consistently asserted? In the present case it is clear that this particular title was never asserted by the *Begum* in her life-time, but that, on the contrary, she repeatedly asserted a different one, and acted in a manner wholly inconsistent with the presumption of its having existed. The following is the short summary of the correspondence of the *Begum* in her lifetime with the Government, touching *Badshapore*.

The first mention in the printed correspondence of any special title to the *per-*

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ment. There could, therefore, be no question as to the right of the heirs to whatever might be due to the *Begum* (although succession to the *jagir* may be barred) in the *pergunna* of *Badshapore*, but the same private right has never been recognized in the *Doab pergunnas*; on the contrary, they are viewed as having been only a life-grant for a specific purpose, wholly public, not investing any private or personal right in property devisable by will."

(3) "I have already, in my letters to your predecessor, observed that the grant under which the *Begum* enjoyed *Badshapore* differed from that under which she held the *pergunnas* in the *Doab*, in that the former was for her own benefit, while the latter was solely for the maintenance of a military contingent, without conferring a property either on the *Begum* or her heirs. I am not aware whether copies of the *sanads* were furnished to the Board, but they were transmitted to the Government, and as the question is one of considerable importance, its decision is looked forward to with much interest."

gunna is to be found in Mr. *Seton's* letter of the 24th February 1808, when he complains of the attempt of the *Begum* on the 25th of November 1807, to obtain from the King of *Delhi* a new *firman*, granting this *pergunna* as an *inam altamgha* to Mr. *George Dyce* (the father of Mr. *Dyce Sombre*) and his descendants (1). Mr. *Seton's* statement as to the property is that it was bestowed as a *jagir* (which may be a mere state for life) by *Shah Alum* in the thirtieth year of his reign, which he treats as corresponding to 1789 A. D. upon *Zuffer Yab Khan*; that the *Begum* had obtained possession of it in that person's life-time, and retained such possession after his death; and had now obtained a new *firman* bestowing *Pergunna Jharsa* and the town of *Badshapore*, formerly the *jagir* of *Zuffer Yab Khan*, as an *altamgha* upon Mr. *George Dyce* and his descendants. The Government of the day objected to this proceeding; insisted that *Badshapore*, like the *Begum's* possessions in the *Doab*, would revert to the East India Company on her death; and was obviously determined not to recognize as valid any grants of that nature which might be made at that date by the King of *Delhi*; but recommended that, in deference to the King and to her, she should be induced by friendly negotiation to give up the new *sanad*. The negotiations for this purpose went on still 1811, when the *Begum* did give up the new *sanad*. But the important fact in this transaction is that the case she then put forward (by her letter of the 16th of February 1811) was the following:—"I had, as I still retain, a firm conviction in my own mind that the *pergunna* of *Badshapore* and the villages of *Bhogeepoor* and *Bhutgong* were held as *altamgha* to my late son, and would consequently revert to my adopted son, *George Alexander David Dyce*, in virtue of his marriage with my grand-daughter. On this subject doubts have arisen respecting the nature of the grant, which is not now to be found in the family records. I consequently cannot urge a positive right, but," &c. (1). This letter contains most important admissions, which

(1) This application was not made with any secrecy; and the matter having, therefore, come to the knowledge of Mr. *Seton*, the Resident at *Delhi*, he addressed a letter, dated the 24th February 1808, to Mr. *Edmonstone*, the Secretary of the Government of India, in which he informed the Government of the circumstances under which the grant had been made, and expressed his opinion that what had occurred was an irregular exercise of power on the part of the King, considering the position in which he stood with regard to the Government, who in taking the King, and royal family of *Delhi*, under its protection, and in paying to His Majesty a larger stipend than the amount of the annual produce of the assigned territory, virtually acquired a right to expect to be consulted by His Majesty previously to the adoption of any measure, the operation of which tended, either directly or indirectly, to diminish the value of the assigned territory, and that it had more especially the privilege of interfering for the regulation, and even the prevention, of all alienations of land from either the taxed or taxable portion thereof. The Resident also informed the Government of another grant of a similar nature by the King of the village of *Bhutgong* in *Pergunna Soneeput* to Mr. *George Dyce* and his descendants as an *inam altamgha*.

(1) "At the time I solicited a provision for my family and dependants, I had, as I still retain, a firm conviction in my own mind that the *pergunna* of *Badshapore*, and the villages of *Bhogeepoor* and *Bhutgong*, were held as *altamgha* to my late son, and would consequently revert to my adopted son *George Alexander David Dyce*, in virtue of his marriage with my grand-daughter. On this subject, doubts have arisen respecting the nature of the grants, which are not now to be found in the family records. I consequently cannot urge a positive right; but trusting to the munificence of British Government, and to the extensive possessions which will revert to them at my death, as well as to the local position of *Badshapore*, I am induced to hope that you will extend the friendship you have ever shown to me, to the interests and prosperity of my adopted son (for whom I feel a truly maternal affection), and that, by your representations to the Right Honorable the Governor-General, you will second and support my earnest entreaties that the provision made for my said adopted son may not depend on the uncertain tenure of his life, but be extended to his family and

are utterly fatal to the title set up in the amended plaint. It shows that at that time no grant could be found; furthermore, it asserts "the firm conviction" in the *Begum's* mind that *Badshapore* was held as *altamgha* to her late son, but that, in consequence of doubts respecting the nature of the grant, which could not be found in the family records, she could not urge "a positive right." Now it is inconceivable that, if she had obtained a grant to herself from *Shah Alum*, she should not, at this date (1811), have remembered it, and remembering it, should not have put it forward; and if such a grant ever had existence, and could not then be found among her family records, what reason can be suggested why she should not then have applied to the registry of the King at *Delhi* for a copy of it? In 1825, after an interval of fourteen years, she proposed to surrender the *jagirs* held by her, including *Badshapore*, a proposal which was never carried into effect. She seems to have then made no statement of her title: but the representation of Colonel *Dyce*, with whom she was then on bad terms, was that the *sanad* on which the *jagir* was held, whatever its effect, was in favor of *Zuffer Yab Khan*. Had the *Begum* at that time been in possession of *sanads* in her own favor, superseding the grant to *Zuffer Yab Khan*, she would hardly have failed to produce them. In 1831 she first expressed a desire that her *jagirs* should be assigned to Mr. *Dyce Sombre*, whom she designates as her adopted son and intended heir. In her letter to Government she speaks of *Badshapore* and its dependent villages as property "which the deceased *Nawab*, his grandfather, was possessed of on *altamgha* tenure" (1). The Government, then as before, appears to have refused its assent to the alienation after her death of any of the lands held by her rent-free; treating the whole as revertible to Government after her death. Sometime in 1832, as it is supposed, she made a further application to Government by the letter, of which the substance is set forth in the record (2). This letter is the only one which can be taken to contain the assertion of an *altamgha* title to *Badshapore* in herself. She speaks of the estate as "my *altamgha*;" and forwards with some other documents a copy of *Scindia's perwanna*. But even in this letter, when combating the supposed objection of Government that *Badshapore* was included in the arrangement made with her, through Mr. *Guthrie*, she says:—"I beg to observe that the country of the *Doab* only is mentioned in it (Mr. *Guthrie's* letter); while the *pergunna* of *Badshapore*, *alias Jharsa*, my *altamgha*, and the gardens, &c., were bestowed on *Nawab Zuffer Yab Khan*, the maternal grandfather of Mr. *Dyce*, for his expenses." This sentence would imply that the title was that of *Zuffer Yab Khan*, though the *de facto* possession was hers. In March 1833, she again renewed the attempt to get the Government to consent to the transmission of this estate to Mr. *Dyce Sombre*. The Government again refused to give its consent, treating the

descendants, male or female, and bear some proportion to the value of the lands, which are well known to you, and to which I at first supposed he would succeed by right of inheritance."

(1) On the 20th October 1831, the *Begum* wrote to the Government expressing a desire to settle the *Pergunna* of *Sirdhana* on her great-grandson *D. O. Dyce Sombre* in perpetuity, "so that he may enjoy the same, together with *Pergunna Badshapore*, and other villages, which the deceased *Nawab* his grandfather was possessed of, on an *altamgha* tenure."

(2) To this a reply was sent on the 7th November 1831; and another, on the same subject, on the 14th March 1832, in reply to a letter of the *Begum* to the Governor-General relating to her will; but the *Begum* was informed, in general terms, that she could not be allowed to alienate in perpetuity her *jadlad* land (referring to *Sirdhana*), and which, under the terms of the engagement of August 1805, she was told she was entitled to only for life. A letter, from the *Begum* to the Governor-General, without date, but written sometime in 1832, apparently in reply to the last-mentioned letter, appeared to have contained copies of title-deeds, on which she relied to show her right to an hereditary estate in *Badshapore*, and which she described as "my *altamgha*."

estate as held on a life-tenure only. But, on this occasion, the *Begum* once more clearly rested her claim upon an alleged *altamgha* grant to *Nawab Zuffer Yab Khan;* and referred to *sanads* importing such a grant as being in her possession. There was not on this occasion the slightest suggestion of a grant in her own favor (3).

The discussions, therefore, between the Government and the *Begum* touching *Badshapore* and the tenure on which it was held, cover a period from 1808 to 1833. The Government, throughout that period, insisted that her interest was limited to her life, and that, on her death, the estate would revert to the State. The *Begum*, on three or four several occasions, at considerable intervals of time, contended that the tenure was *altamgha*; sometimes appealed to the Government to continue it after her death as a matter of favor; sometimes attempted to raise a claim as of right; but on every occasion, except, perhaps, in her ambiguous letter in 1832, rested on the alleged grant to the son of *Sumroo*, and never pretended that that grant had been superseded by the *sanads* in her own favor, on which the appellants now rely. Her letters, moreover, point to a substantial grant of the estate to *Zuffer Yab Khan* in *altamgha*, and to the possession of it by him under that tenure. They are quite inconsistent with the case made by the *Delhi* document, *viz.*, that the *altamgha* grant to him endured only three months, and was never perfected by possession. The correspondence also concerning the pensions, and the negotiations she entered into on that subject, are wholly inconsistent with the theory that she held, or claimed to hold, *Badshapore* in *altamgha* by a valid grant to herself.

Sir *Roundell Palmer* endeavoured to meet the strong presumption which this continued course of conduct, and these repeated representations on the part of the *Begum*, raise against the validity of the alleged *sanads*, by an ingenious theory that she may have conceived that claims founded on an alleged grant to *Nawab Zuffer Yab Khan* would be more likely to find favor with Government, than one founded on *sanads* in her own favor; because they might treat the latter as superseded by the agreement of 1805. This suggestion, which after all is pure speculation, does not really afford a probable explanation of her conduct. If an *altamgha jagir* had been granted to *Nawab Zuffer Yab Khan*, the *Begum* had virtually usurped his rights before the cession of the territories west of the *Jumna* by *Scindia* to the East India Company. The British Government would, in no way be bound, and certainly would be little disposed, to recognize a title which had been *de facto* defeated before the territories in question were ceded to them;—they would be less inclined to recognize it, if the title of *Zuffer Yab Khan* had been of so flimsy a character, and short duration, as the case now made represents it to have been—and had been *de jure* superseded by a grant to the *Begum* in 1789. If the case of the appellants is true, these circumstances might easily have been ascertained by enquiry through the British officers at *Delhi*. Again, the *Begum* could not make title to the estate through the son of *Sumroo*. In seeking to transmit the estate to *Dyce Sombre*, she sought to transmit it as from herself. It was, therefore, more natural, if she had a title in her by valid *sanads* from *Shah Alum*.

(3) "I now most earnestly entreat your Lordship's attention and consideration to the grants of the *pergunna* of *Badshapore Jharsa* and the village of *Bhogcepoor Shahgunge*, in the name of my husband's son, *Louis Balthazer Sombre*, known by the style and title of *Moozuffer-ood-dowlah Moontazool Mooluck Nawab Zuffer Yab Khan Bahadur Moosuffer Jung*, these grants, one *altamgha* or hereditary, and one entirely independent of the public revenue, having been given in rent free hereditary possession, by *altamgha*, to my husband's son as before-mentioned, *sanads* of which I have in my possession. And therefore it is my fervent wish to obtain your Lordship in Council's decision upon this point in my life-time, as I have given to my adopted son *David Ochterlony Dyce* (grandson of my husband's son,) the above-mentioned *pergunna* and village as his inheritance, it being the only property his grandfather possessed, and which is, as before mentioned, quite independent of public revenue."

that she should put forward and rely on that title, than that she should rest on the old grant to *Sumroo's* son, which she herself had practically set aside. Nor is it easy to explain why, in 1807, she should have obtained from the Court of *Delhi* a *sanad*, little likely to be recognized by the British Government, and founded on the alleged title of *Zuffer Yab Khan*, when, if the present case be true, that title had been already superseded by a valid *sanad* in her own favor. If the validity of the documents on which the appellants now rely were supported by strong and independent evidence, it might be reasonable to endeavour to account for the *Begum's* silence concerning them by theories, more or less plausible, of the nature of that put forward by Sir *Roundell Palmer*. But if, as has been shown, the direct evidence in favor of the documents is weak and suspicious, then the presumptions arising from the acts and conduct of that astute woman should be allowed to have their full and natural weight against them.

The only remaining question is, what effect is to be given to the *perwanna* alleged to be *Scindia's* confirmation of the *sanads?* Can it be taken to supply the deficiency in the proof of the *sanads*, and to establish, or corroborate, the title of the *Begum?* It is known to have existed in the *Begum's* life-time, since a copy of it was sent by her to Government in 1832. There is no other proof, except the seal, of its origin. And the seal, if not fatal to it, casts the greatest suspicion on this document. It is pleaded as a confirmation by *Madho Rao Scindia*. But the evidence proves that, at its date, *Madho Rao Scindia* was dead. If, as it has been contended on behalf of the appellants, the confirmation pleaded is to be taken as a confirmation by *Dowlut Rao Scindia*, the difficulty arises that the document bears the seal of his then deceased predecessor. There was no proof that this seal was adopted and used by *Dowlut Rao Scindia*, but it was attempted to get over the difficulty by a reference to the case of *Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai* (1). In that case there was evidence that the seal of the deceased *zemindar* had in several instances, other than that in question, been used after his death. Here there is no proof that *Dowlut Rao* ever in any other instance used the seal of his predecessors; it is highly improbable that he should do so: and it would be dangerous, as well as unreasonable, to hold that, because a loose practice has been shown in one case to have prevailed in the cutcherry of a *Bengal zemindar*, it may be inferred in another that the same practice prevailed in the *durbar* of a powerful sovereign prince. Their Lordships, therefore, cannot treat the alleged confirmation of the *Begum's* title by the *Mahratta* prince, in 1795, as established.

Weighing, then, the direct evidence in favor of the *sanads*, weak and suspicious as it is, against the presumptions arising from the non-production of the original *sanad*, and the failure to account for it; and against the still stronger presumptions arising from the acts, representations, and conduct of the *Begum* in her life-time, their Lordships have come to the conclusion that the appellants have failed to establish the title which they have set up. To decree in favor of a title to an hereditary and transmissible *lakhiraj* estate, on evidence so untrustworthy, would be contrary to the long-established practice of the Courts in India; and such a decision would be a dangerous precedent.

The proceedings in this case undoubtedly disclose many things which, in their Lordships' opinion, are to be regretted. It is particularly to be regretted that the Government did not, in some way or another, investigate the title of Mr. *Dyce Sombre*, in 1836, as a question of right, instead of dealing with it by an act of power. It is to be regretted that, in 1849, they did not fairly try the question of title, instead of meeting it by a plea of the statute of limitations. But after the fullest consideration of the case, and with every desire to give to the appellants the benefit of any inference which may be legitimately drawn from the circumstances of this protracted litigation, their Lordships see no grounds for believing that, if the cause had been tried in 1836, as an ordinary resumption suit, under the Re-

(1) 10, Moore's I. A., p. 192; 2, P. C. J., p. 101.

gulations, Mr. *Dyce Sombre* would not equally have failed to show a good title to an *altamgha* tenure in the *Begum*. If it were necessary for their Lordships to express an opinion of the nature of the *Begum's* interest in *Badshapore*, they would incline to the opinion that her persistent statement of there having been some grant *Zuffer Yab Khan* was not without foundation; that she had in some way usurped his interest when she got undisputed command of the troops; and that the British power found her in the enjoyment of the estate, and left her so during her life. Any such opinion, however, must be, more or less, matter of speculation. For the determination of this appeal, it is sufficient to say that the appellants have, in their Lordships' judgment, wholly failed to prove the fourth and sixth of the issues settled in the cause, and, therefore, to establish the title pleaded by them; and their Lordships have come to the conclusion that the appeal in this suit ought, on this ground, to be dismissed, and the decrees of the Indian Courts affirmed; and their Lordships will advise Her Majesty accordingly.

ARMS SUIT.

In "The Arms Suit," their Lordships are of opinion, for the reasons already given in the *Badshapore* suit, that the seizure of those arms and stores was not an act of State, but an act done under a supposed legal right, on the resumption of the *jaidad* upon the *Begum's* death. They think that the evidence shows that the arms and stores were purchased by the *Begum*, and that there is no authority or evidence to show that those who hold by *jaidad* are not entitled to things so purchased. They are entitled to all the rents on performance of a certain duty, which duty ceases on their death, and the next *jaidadar* would be bound to provide arms by virtue of his tenure.

Their Lordships think the decree in this suit should declare the appellant entitled to recover from the Government of India the value of the arms and military stores seized, with interest on such value, from the date of seizure, at the ordinary rate of 12 per centum per annum; and that unless the parties agree to name a sum as representing such value, or agree to refer to arbitrators in this country the question, what, at the date of the seizure, was the value of the articles seized, the case must be remitted to India, with instructions to the Court there to ascertain such value, and give a decree accordingly. Her Majesty's order on this appeal may be suspended until the parties shall come to a conclusion as to the course to be pursued. The costs in India of each suit will follow the result; and their Lordships think that each party should bear their own costs of these appeals.

21st and 22nd November, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. Sir Montague Edward Smith.

On Appeal from the High Court, North-Western Provinces.

THOMAS NEWTON,* ... *Appellant*,

versus

THE HON. C. A. TURNER, R. SPANKIE, and G. D. TURNBULL, Puisne Judges of the High Court, North-Western Provinces, ... *Respondents*.

Barrister—Suspension—Malus Animus.

An order of a High Court suspending a barrister from practice for five years set aside on the ground that, although there had been grave irregularity, there was no *malus animus* to show an intention to commit a fraudulent act.

9th December, 1871.

JUDGMENT was reserved, and now pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This appeal is brought by Mr. *Thomas*

* 14, Moore's I. A., p. 267; 10, B. L. R., p. 88.

Newton, a Barrister-at-Law and an Advocate of the High Court of Judicature for the *North Western Provinces*, against two Orders of that Court, dated respectively the 13th and the 27th of August, 1870.

The particular terms of these Orders will be afterwards considered. It is sufficient for the present to state, that they were made in the exercise of the power vested in the Court by the 8th section of the Letters Patent constituting it; and that by the latest of them Mr. *Newton* was suspended from practising as an Advocate of the Court until the further Order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the Order, to apply for permission to resume practice, which, on the production of satisfactory proof of good conduct in the meantime (it was said,) would be conceded to him. The effect, therefore, of the Order was to suspend Mr. *Newton* from practising as an Advocate of the Court, certainly for five years, and possibly for a longer and indefinite period.

The following are the proceedings which resulted in this suspension:—

On the 19th of July, 1870, Mr. *Bramly*, the officiating Judge of *Allyghur*, forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. *Newton* on behalf of one Mrs. *Saunders* for letters of administration to the estate of her deceased Son, *Paterson Tandy Saunders*, imputing improper conduct to Mr. *Newton* in that matter, and submitting to the Court whether such conduct was becoming a Barrister. The precise nature of the charges against Mr. *Newton* will appear from the next proceeding.

On the receipt of this communication the High Court passed an Order, dated the 30th of July, 1870, calling upon Mr. *Newton*, on the 10th of August following, to answer the matters stated in Mr. *Bramly's* Letter and report, whereby it had been brought to the notice of the Court that he, *Thomas Newton*, had been guilty of grossly improper conduct in that, whilst acting as Counsel for one Mrs. *Saunders*, on application to Mr. *Bramly* for letters of administration of the estate of her deceased Son to be granted to her, he, well knowing the said Mrs. *Saunders* not to be the administratrix of the deceased *Paterson Tandy Saunders'* estate, obtained from the said Mrs. *Saunders*, and indorsed and put in circulation, a Government loan note for the sum of Rs. 3,000, belonging to the estate of the said *Paterson Tandy Saunders*, and also certain other Government loan notes the property of the said estate, the said Government notes having been indorsed by Mrs. *Saunders* as Administratrix, although the said *Thomas Newton* was well aware that administration of the estate and effects of the said *Paterson Tandy Saunders* had not been granted to the said Mrs. *Saunders;* whereby also it had been brought to the notice of the Court that Mr. *Thomas Newton* had been guilty of grossly improper conduct in the discharge of his professional conduct as an Advocate in having wilfully deceived the said Mr. *Bramly* in the course of the hearing of the said application for Letters of administration, by informing him, on or about the 9th of July, 1870, that he was greatly surprised to hear that the said *Paterson Tandy Saunders* was illegitimate, whereas he, the said *Thomas Newton*, was well aware of the illegitimacy of the said *Paterson Tandy Saunders*, with some circumstances of aggravation concerning this latter charge which it is unnecessary to state.

Mr. *Newton* appeared before the Court under this Order, and made a verbal statement in explanation of both charges; evidence was taken, and a number of Letters were produced in the course of the inquiry. On its termination the Court acquitted Mr. *Newton* of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and, having commented on his conduct in respect of various new matters which had come out in the course of the inquiry, and on the perusal of the Letters produced, determined to take further proceedings against him. The result was that, on the 13th of August, 1870, an Order, being the first of those under appeal, was drawn up in the following terms:—

"In the matter of *Thomas Newton*, an Advocate of the Court. It appearing to the Court that the above-mentioned *Thomas Newton*, an Advocate thereof, has been guilty of grossly improper conduct in the discharge of his professional duty as an Advocate in procuring his Client, *Catherine Saunders*, to indorse, as 'Administratrix to *Paterson Tandy Saunders*' estate,' three Government promissory notes, of the aggregate value of Rs. 14,000, or thereabouts, viz., No. $\frac{000647}{6478}$ of 1854-55, for Rs. 1,000; No. $\frac{002130}{5895}$ of 1856-57, for Rs. 10,000, both bearing interest at 5 per cent.; and No. $\frac{001785}{1846}$ of 1859-60, for Rs. 3,000, bearing interest at ($5\frac{1}{2}$) five and a half *per cent.*, and belonging to the estate of *Paterson Tandy Saunders*, deceased, he, the said *Thomas Newton*, well knowing that the said *Catherine Saunders* was not the Administratrix of such said estate, and in indorsing and putting in circulation one of the said notes, to wit, the Government promissory note No. $\frac{001785}{1846}$ of 1859-60, for the sum of Rs. 3,000, bearing interest at $5\frac{1}{2}$ per cent. And also in drafting a certain Letter, dated on or about the 14th day of April, 1870, and in procuring the same to be copied by one *Maria Hill*, and signed and sent by the said *Catherine Saunders* to the firm of *Gillanders, Arbuthnot*, & Co., of *Calcutta*, which said Letter contained a statement, or introduction, in the words following, to wit:—'With reference to your kind offer to advance money for the coming Indigo season,' which statement or introduction was known to the said *Thomas Newton* to be false, and inserted with the intention of inducing the said firm of *Gillanders, Arbuthnot*, and Co., to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said *Catherine Saunders* to pay to him the said *Thomas Newton* out of the moneys if and when so advanced a sum or sums of money on account of his fees as an Advocate, and also in procuring employment as an Advocate, by means of a threat contained in a certain Letter written and sent by the said *Thomas Newton* to the said *Catherine Saunders*, and dated on or about the 27th day of January, 1870, in the words following, to wit:—'If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.' And generally in his behaviour and conduct in connection with his employment as an Advocate by the said *Catherine Saunders*, at divers times in the months of January, February, March, April, May, June, and July, 1870. Now, the said *Thomas Newton* is hereby ordered to attend at the sitting of this Court, to be held at the Court House, *Allahabad*, on Saturday, the 27th day of August instant, at eleven of the clock in the forenoon, to show cause why he, the said *Thomas Newton*, should not be suspended from the practice of his profession as an Advocate of this Court within the jurisdiction of this Court."

Mr. *Newton* duly appeared to show cause against this rule; and, on the 27th of August, 1870, the Court gave final judgment. It acquitted Mr. *Newton* on all but the two first charges, viz., the imputed misconduct in inducing Mrs. *Saunders* to indorse the Government notes; and the imputed misconduct in causing her to write the Letter to *Gillanders, Arbuthnot*, & Co.; and finding that these two charges had been wholly or in part established against him, passed the Order of suspension, which is the second of those under appeal.

Exception was taken at their Lordships' Bar to this course of procedure. It was argued first, that the Order of the 30th of July, 1870, was objectionable, inasmuch as it prejudged the Appellant's case by assuming that he "had been guilty of grossly improper conduct." Their Lordships, however, are of opinion that, although this Order may not have been very happily worded, the true construction of it is, that Mr. *Newton* was thereby merely called upon to answer the matters stated in Mr. *Bramly's* Letter and report; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the Order; and that there was no intention on the part of the Court to prejudge the case, or to prevent Mr. *Newton* from having the full benefit of any expla-

nation of the matters charged, which he might be able to offer. That this was so, is shown, their Lordships think, by the subsequent proceedings.

It was next objected, that the Judges improperly placed themselves in the anomalous position of being at once Accusers and Judges; and that they ought to have committed the conduct of the proceedings against Mr. *Newton* to some third person. And in support of this latter proposition, the case of *Emmerson* v. *The Judges of the Supreme Court of Newfoundland* (*a*), was cited. In that case, whilst litigation between an Attorney with his former Client was still in some sort pending, though after payment under protest of the sum claimed, the Court, of its own mere motion, and not on the application of the opposite party, and without previously calling upon the Attorney to explain his conduct, served him with a notice to show cause within four days, why he should not be struck off the Rolls, and refused to enlarge the rule, and give him further time to prepare his defence; and on his failing to show cause within the four days, made the rule absolute. It is obvious, that several of the circumstances which induced this Committee to reverse that Order, do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord *Kingsdown* said, that an explanation should have been required; and that upon that explanation proving insufficient, "the proper course would have been that some person should have been instructed on behalf of the Crown, to apply to the Court for a rule for this Gentleman to show cause why further proceedings should not be taken (*b*).

Looking to the substance of the objection as applicable to this case, their Lordships think, that there is a broad distinction between the charges originally brought by Mr. *Bramly*, and those made for the first time by the Order of the 13th of August, 1870.

The High Courts in *India* exercise peculiar powers of superintendence and control over the subordinate Courts, and the proceedings therein. It was, their Lordships apprehend, in the regular course of practice that Mr. *Bramly* should make the report which he did make of the proceedings in his own Court; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a Practitioner over whom he had no direct power; but who, by virtue of being an Advocate on the Rolls of the High Court, had the right of appearing in the Lower Court; and their Lordships are of opinion, that the High Court was perfectly justified in taking action on that report and complaint, by calling upon Mr. *Newton* to explain his conduct.

Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. *Newton* in the hands of a third party, is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement; and they are disposed to think that even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings.

Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on Letters which came to their knowledge in the course of the first inquiry, should have thought fit, on the instant and without further inquiry, to frame new charges against Mr. *Newton*, and thus assume the functions of Accuser and Judge. A very strong and clear case may arise, in which such a course would be justified. But the inconvenience of it is great; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed.

Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form, would be far from satisfactory; and they, therefore, proceed to consider it upon its merits.

(*a*) 8 Moore's P. C. Cases, 157.
(*b*) 8 Moore's P. C. Cases, 167.

They are relieved from the necessity of considering any but the two charges upon which Mr. *Newton* was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the Order of the 13th of August, 1870, he was also acquitted, the Court being of opinion that, though the conduct imputed to Mr. *Newton* by those charges may have been inconsistent with the rules and traditions which regulate the conduct of Barristers in this Country, and may not have been altogether unobjectionable even in *India*, it did not amount to that *mala praxis* on which the Court, having regard to the position and functions of an Advocate in the *North-West* Provinces, could fairly found any proceeding of a penal character.

Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. *Newton*, viz., that of having counselled Mrs. *Saunders* to write to Messrs. *Gillanders, Arbuthnot*, & Co., the Letter of the 14th of April, 1870.

The facts admitted or proved concerning this Letter are as follows :—

Mrs. *Saunders* was a native woman who, after cohabiting for several years with Mr. *George Saunders*, an Indigo planter, in the *Allyghur* District, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th of October, 1856. Under the Will of her deceased Husband she seems to have been tenant for life of his Indigo Factory and other property. She had several children by him, born either before or after the marriage. One of them was a Son, *Paterson Tandy Saunders*, who, under his Father's Will, or otherwise, was possessed of several Government notes aggregating Rs. 14,000. Another was a Daughter who had been married first to a person of the name of *Nichterlein*; and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. *Kelly*. *George Saunders* had been indebted to Mr. *Nichterlein's* estate, which was in the hands of the Administrator-General. Mrs. *Nichterlein*, before her second marriage, had made a gift of her share of this debt to her Mother, or to her Father's estate; but this gift was disputed by her second Husband; and the original debt, and the effect of Mrs. *Nichterlein's* gift, appear to have been, at the beginning of 1870, subjects of pending or contemplated litigation. Mrs. *Saunders* had likewise a cross claim against *Nichterlein's* estate for the proceeds of indigo of a former season.

On the 15th of December, 1869, *Paterson Tandy Saunders* died, under age and unmarried. Shortly after his death, and on the 10th of January, 1870, Mr. *Newton*, who had acted in at least one lawsuit on behalf of Mr. *George Saunders*, and appears to have kept up friendly relations with the family, wrote to Mrs. *Saunders* condoling with her on the death of her Son, and volunteering, if he were not then retained, to act for her in that matter, some advice concerning the litigation between her and the Administrator-General.

It further appears, that she was then pressed for money, and that she required funds both for the purposes of the Indigo Factory, and for carrying on the suits pending or about to be commenced, and that in respect to the latter Mr. *Newton* was to receive certain fees. In these circumstances she, under the advice of Mr. *Newton*, wrote and sent to Messrs. *Gillanders, Arbuthnot*, & Co., Merchants of Calcutta, the following Letter:—"*Coel Factory, Allyghur*, 14th April, 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming Indigo season, I write to inquire whether you would place at my disposal Rs. 30,000. On hearing from you I will commence my Indigo advances."

On the first inquiry, that of July, 1870, it came out on the evidence of Miss *Hills*, the Governess and amanuensis of Mrs. *Saunders*, that if any money had been received from *Gillanders, Arbuthnot*, & Co., Mr. *Newton's* fees would have been paid.

Messrs. *Gillanders, Arbuthnot*, & Co., however, declined to make any advance, and nothing came of the application to them.

The Judges of the High Court, nevertheless, saw fit to make this transaction matter of charge against Mr. *Newton*. The view of it which they took when they framed the charge in respect of it, which is contained in the Order of the 13th of August, 1870, was thus stated by the acting Chief Justice:—"Again you induced an uneducated woman whom you were advising, whether wisely or unwisely matters not, to carry on certain litigation, whereby you hoped to secure to yourself, what I must call, under the circumstances, the exorbitant fee of Rs. 3,800, to write to a *Calcutta* firm a Letter drafted by you, containing a false assertion, whereby that firm was to be induced to advance to Mrs. *Saunders*, for the purposes of her Indigo Factory, certain moneys, and which moneys that firm would naturally consider was to be employed for the legitimate purposes of the Factory, whereas a large portion was to be paid to you for the purposes of carrying on litigation. It is abundantly clear that *Gillanders, Arbuthnot*, & Co., had never promised to advance moneys to Mrs. *Saunders*. That Lady, from her manner to-day, we cannot doubt, had never heard their names before. The Court cannot but come to the conclusion that the statement made in the Letter to *Gillanders, Arbuthnot*, & Co., as to their previous offer of assistance, was, to your knowledge, false, and that it was made for the purpose of obtaining money to pay your fees."

When, however, cause was shown against the rule, it came out that Mrs. *Saunders*, so far from having never heard the names of Messrs, *Gillanders, Arbuthnot*, & Co., had been in correspondence with them at various times between the years 1866 and 1870, and had had various business transactions with them. It was further urged, that the assumption that *Gillanders, Arbuthnot*, & Co. had offered to advance money to Mrs. *Saunders*, if erroneous, had deceived, and could deceive, nobody. And the High Court in its final judgment of the 27th of August, 1870, expressed its willingness to assume "That it was from information given him by Mrs. *Saunders*, that he (Mr. *Newton*) introduced the passage relating to a former offer of advances." The gist, therefore, of the offence imputed to Mr. *Newton* in respect of this transaction is reduced to this, viz., that he, knowing that a portion of the moneys to be received from *Gillanders, Arbuthnot*, & Co. was to be employed in payment of his fees, drafted for his Client a Letter calculated to induce the firm to believe that this advance was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the Letter cannot be taken to constitute such grave professional misconduct as would justify any part of the severe sentence passed on Mr. *Newton*. The Letter is an application in the most general terms from an Indigo planter for an advance of money for the coming season. It is clear that Mrs. *Saunders* did want money for the purposes of her Factory. Their Lordships are not aware that such an application implies any undertaking that the money if advanced is to be ear-marked; is not to be mixed with the general funds of the Planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of Indigo. If the lender chooses, he can of course take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance. But here the loan was declined. All that is established is, that Mrs. *Saunders*, pressed for money to provide both for carrying on her Factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this Letter under Mr. *Newton's* dictation, meaning to apply part of the money in the first instance to the payment of his fees in the suit. Looking to all that is established in respect of this Letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion, that the Order against Mr. *Newton* cannot be maintained on this charge.

They next proceed to consider the graver

charge against him of having induced or advised his Client to indorse the Government notes as Administratrix of *Paterson Tandy Saunders*, when she was not entitled to assume that character. The facts proved which particularly relate to this transaction are as follows:—

On the 5th of April, 1870, Mrs. *Saunders* wrote to Mr. *Newton* enclosing one of the notes belonging to the estate of *Paterson Tandy Saunders*, and standing in his name, being a note for Rs. 10,000, and asking him to get the note renewed in her name, and broken up into ten notes for Rs. 1,000 each. On the 9th of April, 1870, Mr. *Newton* wrote to Mrs. *Saunders* to the effect that he had spoken to Mr. *Clarke*, the Treasury Officer at *Allyghur*, who had informed him that the note could not be renewed, nor interest paid upon it, until she had taken out administration to her Son's estate. Thereupon Mr. *Newton* was instructed to make, and did make, as Counsel for Mrs. *Saunders* in Mr. *Bramly's* Court, the application for Letters of administration to the estate of her deceased Son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd of May, 1870. On the 6th of May, the day before the usual citations were issued by the Judge, Mr. *Newton*, who had advanced some small sums to Mrs. *Saunders*, received from her the security for Rs. 10,000 and two other Government notes standing in *Paterson Tandy Saunders'* name, and part of his estate, all being indorsed by her as Administratrix of that estate. At the same time she executed to him a receipt admitting the loan of Rs. 200, and he executed to her a receipt for the notes; and Miss *Hills*, in her account of the transaction, has deposed as follows: "Mr. *Newton* wrote the indorsements in pencil on the notes, and told me to write it small on the pencil marks; and I said at the time, 'Mrs. *Saunders* has not got the administratrixship, how can I write that?' and he said, 'Whatever blame there is will fall on me.' I said nothing more. I then wrote the indorsements. Mrs. *Saunders* signed them."

The indorsements were special to Mr. *Newton*. One of these notes, being one for Rs. 3,000, he afterwards specially indorsed to the *Delhi* Bank, and that Bank having demanded in *Calcutta* a renewal of it, inquiry was made concerning the fact of the grant of administration to Mrs. *Saunders*, and so the transaction was brought to the notice of Mr. *Bramly*.

In the meantime a question had arisen in Mr. *Bramly's* Court touching the legitimacy of *Paterson Tandy Saunders*, and whether administration of his estate ought to be granted to Mrs. *Saunders* as his Mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain, that *Paterson Tandy Saunders* was born out of wedlock; but it suggested on behalf of Mr. *Newton* that he might, nevertheless, as the Son of a Scotchman retaining his domicil though resident in *India*, have been made legitimate *per subsequens matrimonium*.

Their Lordships think that it is fortunate for Mr. *Newton* that the determination of this case does not depend upon this point. If it appeared that Mr. *Newton*, knowing that *Paterson Tandy Saunders* was born out of wedlock, had applied for Letters of administration as if the deceased had been born in wedlock, and, pending that application, had caused Mrs. *Saunders* to endorse these Bills in the character of Administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. *Saunders*, in the expectation that he might ultimately succeed in showing that the *status* of *Paterson Tandy Saunders* was to be regulated by Scotch law, and that under that law, though born out of wedlock, he was legitimate, their Lordships are of opinion, that his conduct would have been almost without excuse. For the proof of legitimacy and of the right of Mrs. *Saunders* to administration, and to a beneficial interest in any part of her Son's estate, would in that case have depended on the determination of a disputable, and possibly, very nice question, viz.:—Whether Mr. *George Saunders*, if his domicil of origin were Scotch, had not lost that domicil, and acquired an Indian domicil by settling as an Indigo planter in *India*

and there dying. In the cases of *Campbell* v. *Campbell* (a), and *Munro* v. *Munro* (b), one of the principal issues was, whether the Father of the person whose legitimacy was in question had retained his Scotch domicil. And in both cases the facts on which the issue was determined were very different from those on which the like issue would have been tried in the case of Mr. *Saunders*.

But, in truth, this was not the defence of Mr. *Newton* in the High Court, nor need it be his defence here. The case which he made there was, that when he first made the application for Letters of administration, and when he caused Mrs. *Saunders* to indorse the Notes, he did not know or believe that *Paterson Tandy Saunders* was born out of wedlock; and, therefore, had good reason to believe that in a few days she would possess the character which the indorsement attributed to her. And this fact has been found in his favour by the High Court. On the occasion of the first hearing the acting Chief Justice says:—"When you procured your Client to sign the promissory notes as Administratrix, you doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the act as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge's report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your Client, enables us to assume in your favour that, when you procured your Client's signature as Administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her Son's property."

If the High Court had found upon sufficient evidence that Mr. *Newton* had advised Mrs. *Saunders* to make the indorsements as Administratrix, knowing that she had no title, or a doubtful title, to obtain the grant of letters of administration, their Lordships would have felt that the sentence upon Mr. *Newton* ought to be confirmed. But the finding of the High Court negatives this knowledge; and upon this finding of the High Court, their Lordships feel that, although in this matter Mr. *Newton* has been guilty of a grave irregularity, which, in their opinion, is well deserving of censure, he has been acquitted of having acted with the *malus animus* which is a necessary ingredient in every fraudulent act, and, therefore, that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of *India* in repressing professional misconduct and maintaining a high standard of honour amongst those who are admitted to practise before them, have come to the conclusion, that in this case, it is their duty humbly to advise Her Majesty to allow the appeal, and to reverse the last of the Orders against which it is brought, and that in lieu thereof to order that the rule to show cause of the 13th of August, 1870, be discharged. They do not propose to recommend the reversal of that Order, inasmuch as such reversal would imply that no rule to show cause ought to have been made. They make no order or recommendation as to costs.

(a) Law Rep., 1 H. L., Sc., 182.
(b) 7 Cl. & F., 842.

22nd and 23rd November, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty,) and the Right Hon. Sir Montague Edward Smith.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, at Fort William, Bengal.

JUGGUT MOHINI DOSSEE, and others, (*Plaintiffs*)* ... ... } *Appellants,*

versus

MUSSUMAT SOKHEEMONEY DOSSEE, and others, (*Defendants*) ... } *Respondents.*

Religious Endowment—Devatrá—Trust—Burthen of Proof—Limitation—Act XIV. of 1859—Act XIII. of 1848.

In 1813 certain lands were dedicated by deed to the religious service of an idol, and in 1820 that dedication was confirmed in a partition-deed. The plaintiff sued to set aside alienations of the property and to have the trusts of the dedication-deeds declared. The holders of the property alleged that a subsequent partition-deed had been executed in 1845, and that the dealings of the family had shown an intention to revoke the trusts. *Held*, that it lay upon the holder to prove the revocation of the trust, and that, on failure to do so, they could not set up the law of limitation in answer to the plaintiff's suit.

9th December, 1871.

JUDGMENT was reserved, and now delivered by

THE RIGHT HON. SIR ROBERT PHILLIMORE:

This is an appeal from a Decree passed by Mr. Justice *Kemp* and Mr. Justice *Campbell*, forming a Division Bench of the High Court of *Calcutta*, affirming a decree of the Judge of *East Burdwan*, by which the suit of the Plaintiff, now represented by the Appellants, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence; Mr. Justice *Kemp* expressed his opinion in favour of the Plaintiff as to part of the relief which was prayed against *Kalidoss Chunder*, the only Respondent who appears on this appeal, but as the Judges were not unanimous, the decision given in the Court of First Instance stands unreversed.

The Plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands; he made title to the possession of these lands, for which he sued on this special ground, that they had been dedicated to the religious service of the family Idols, by virtue of two Instruments of dedication in the Christian years 1813 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by his suit he sought to have declared. This was the foundation and main character of his claim, though somewhat inconsistently with the nature of the dedication, he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession, under these instruments of dedication.

He asked also to be appointed *Sebaet*, or Manager of the lands so dedicated. His plaint embraced other charges of breach of trust, relating to other properties, which are no longer insisted on. The properties which this appeal relates to are one called lot *Pilkhundee*, to which Respondent makes title as a Purchaser, *bonâ fide*, for value without notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as *Lakhiraj*, were resumed by the Government as held under an invalid *Lakhiraj* title, and were permanently settled for with Government by *Sokheemoney Dossee*. The appeal against her was heard *ex parte*. All these properties were comprised in, and dedicated by, the two instruments of dedication before mentioned.

The first *Sebaet* was the Husband of *Sokheemoney*, and after his death she held a portion at least of the dedicated lands by the title of *Sebaet* in succession to her Husband. Notice of the trust, if it be valid, is clearly established against her.

* 14, Moore's I. A., p. 289; 10, B. L. R., p. 19.

Her claim as to the lands resumed, is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered.

The title of *Kalidoss Chunder* to lot *Pilkhundee* is derived through successive alleged alienations under a Deed, which will be described as a second Deed of partition, by which, as he contends, a valid partition of the family property was first constituted.

He admits that a Deed, purporting to be one of partition between the five Brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the Plaintiff had been in fact made under those instruments of dedication before mentioned, but he seeks to avoid the effect of all upon the same grounds which were unsuccessfully advanced on the case lately decided by their Lordships on appeal (*a*,) when the earlier Deed was established as the valid deed of partition of the family property. This decision, which is partly stated in the Appellant's case, and which was read in full on the argument, need not be further referred to, except to state, that the facts there decided cannot be considered to have been established against *Kalidoss Chunder*, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burthen of proof, the general Law of Limitation, the special Law of Limitation under Act, No. XIII. of 1848, the claim to possession, and the limitation of that claim to a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names, and to have possession decreed to the Plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1813, confirmed by that of 1820. It is not constituted by the first partition Deed. If any vice existed to defeat this partition Deed, that vice would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real and not merely a colourable dedication.

The two Deeds which create and confirm the dedication are *primâ facie* valid. Nothing is proved to lead to the belief that they are at variance with the usages of the Country, or family, or that regard being had to the value of the property dedicated and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family, of the portion of the family property thus set apart, such as to generate distrust of its reality.

It was argued that such dedications of property without the assent of the State, should be regarded as merely revocable appropriations, which the founders might vary the use. No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature.

A family trust of this nature has never in modern times, at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in *Norton's* Leading Cases on Hindu Law of Inheritance, part ii., p. 406.

The argument of Mr. *Leith*, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first Deed of partition, viz., that they constituted in effect one instrument, and rested on the sole foundation of the first Deed of partition, was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on.

The trust declared on appears then to

(*a*) *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 Moore's Ind. App. Cases, 270, 2, P. C. J., p. 528.

be established as to the lands dedicated by these two prior instruments; and it lies on the Respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second Deed is said to work this conversion, and the question arises which of the two Deeds of partition is to prevail.

The first Deed of partition is an instrument, which but for the existence of the second, would have been exposed to no suspicion.

A partition is favourably viewed by the Hindoo religion and law. It wants no extrinsic support.

The alleged presumption against the first Deed, that it may have been a mere device because one member of the family was indebted, may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an inquiry into the state, condition, extent, and uses of their joint property; and no suggestion has been made that the partition under the first Deed was unequal.

The second Deed, however, does afford ground for suspicion. It makes no reference whatever to the first Deed; it professes to be the ordinary partition of a, till then, joint family property; it appoints as a *Sebaet* one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindoo family having several and more competent members, from the fear of the scrutiny to which it might lead if the Creditors of the *Sebaet* traced the property to his possession. Again, as a dedication, in fact, was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this Deed seeks to effect. All comparison, therefore, supports the Deed prior in time, which priority alone, in a balanced state, would establish the first instrument.

It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second Deed, has either actually declared it invalid, or stated it to be subject to grave suspicion. A decision against the Plaintiff generally in this suit would be, in substance, deciding against a trust, *primâ facie*, well established, on evidence of a subsequent Deed of revocation not only not proved but on every judicial examination of it, discredited. Their Lordships, therefore, think that a trust was created by the deeds of dedication of the *Pilkhundee* property.

It remains to be considered, whether the Respondent can support the Decree in his favour upon the ground that he is a Purchaser for value without notice. Now, the very origin of his title, as well as the contention on the mutation of names, prove that he must have had notice of the original trust. The devolution of the title to him from *Gooroochurn* under the second Deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany an attempt in a Hindoo family to put property out of the reach of an apprehended claim. He is not shown to have made any inquiries as to the grounds for supposing that the trust was legally at an end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of *Sokheemoney Dossee* to hold the resumed lands free from this trust on the grounds advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second Deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary right in the land, but is made with Government as to their claim to their *Khiraj*, or revenue. The settlement and the possession under it being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not devest and destroy trusts to which the Settlor was subject. The claim supposes a mere Settlement for revenue to have the same effect in clearing away preceding

titles which a sale under the Revenue Laws works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this Tribunal on estates, acquired even under these revenue sales. (See the cases referred to in Mr. Justice *Macpherson's* work on Mortgages, p. 86, 5th edition.) *Sokheemoney Dossee* could not get rid of her *Sebaet* title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore, the claims of the Plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the law as to limitation of suits, or from the terms of the settlement for revenue with her.

It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged, that the evidence shows that the family had, in several instances under the first Deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties, since the identity of the name was perfectly consistent with properties held separately under *Malguzary* and under *Lakhiraj* titles, which might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property not designed otherwise than for the benefit of the endowment would not be questioned in a Court of Justice. The correctness of each position cannot be gainsaid, and the argument for the Respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships, on the evidence, to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a Trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *Sebaet*. The Court could not with any propriety say, We will decline to protect the property and leave it further exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the Plaintiff with its administration.

The title being one founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *primâ facie* at least, attaching to it, the *onus* of the proof was on them. They did not discharge themselves by proving a Deed as to which Mr. Justice *Campbell* declares that he probably would not have made it the foundation of a decree in their favour. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the Plaintiff's case. The old *Sebaet* title was recorded in the Collector's Registry. A mutation of names —in itself a change—was applied for on the part of *Kalidoss Chunder*, and resisted on the part of the Plaintiff, claiming as Trustee. The Plaintiff was, in effect, referred to a civil suit, and the very reason of such a reference, viz., that the matter is not in the jurisdiction of the revenue Officer, cannot, either in reason or law, invert the ordinary course of proof and presumption in a civil suit to establish a trust. Their Lordships think the judgment of Mr. Justice *Kemp*, on the facts of the case, correct, and the Decree which, but for the supposed application of the law of Limitations, Mr. Justice *Kemp* would have given as to the resumed lands, as well as to *Pilkhundee*, is that, which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed; that the Decrees of the High Court and of the Court below be reversed, so far only as they dismiss the claim of the Plaintiff to set aside the alienation of Lot *Pilkhundee*, and to have the truth of the dedication instruments declared, and that it be declared, that the lands specified in the schedule to the plaint, and the said Lot *Pilkhundee* were and continue dedicated under the instruments of dedication

of 1813 and 1820 to the religious uses specified in those instruments of endowment; and now add a declaration, that the Decree is to be without prejudice to any further suit or proceedings for the enforcements of the religious trusts declared on the appointment of a proper *Sebaet*.

Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a Plaintiff recovers part of his demand, and that the Appellant should have the costs of this appeal.

24th, 25th, 26th November, and 7th and 8th December, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. Sir Montague Edward Smith.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ALEXANDER JOHN FORBES, *(Plaintiff)** — *Appellant*,

versus

BABOO LUCHMEEPUT SINGH, DHUNPUT SINGH, SHEIKH JOWHUR ALI, & MUSSUMAT AMEEROONISSA BEGUM, *(Defendants)* ... — *Respondents*.

Sale of Sub-tenure for arrear of Rent—Encumbrances—Regs. VII. of 1799 (1), VIII. of 1819, I. of 1820, and VIII. of 1831 (2)—Act VIII. of 1835 (3)—Act X. of 1859, s. 105 (4).

Where a sub-tenure had been granted, but no power was reserved to the grantor in the *sunnud* to sell the tenure free from encumbrances in case of default in payment of rent, *held* that, in a sale for arrears of rent under Reg. VIII. of 1831, the purchaser did not take free from encumbrances created by the grantee.

The decision in *Shahabooddeen* v. *Futteh Ali* (5) affirmed.

26th January, 1872.

THEIR Lordships' judgment having been reserved, was now delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH:

This is an appeal from a Decree of the High Court of *Calcutta* on review. In effect, dismissing a suit brought in the *Zillah* Court of *Purneah* in 1856 by the Appellant, as Mortgagee after foreclosure, to recover possession of certain *Talooks* in *Pergunnah Havalee*, and to set aside a judicial sale of them made at the instance of *Baboo Pertab Singh*, the *Zemindar*, under a claim for arrears of rent.

The main question in the appeal is, whether the sale of the *Talooks* made to *Sheikh Jowhur Ali*, the Respondent who alone appeared at the hearing of this appeal, under a Decree in a suit instituted by the *Zemindar* against the heirs of *Shah Ali Reza*, the Mortgagor, for arrears of rent, treating them as defaulting tenants, is a valid sale as against the Appellant, the Mortgagee, who was not a party to that suit.

Shah Ali Reza, a Mahomedan, held the property by an hereditary tenure created by *Sunnuds* granted prior to 1793 to the ancestors of *Shah Ali Reza*. These *Sunnuds* are not set out in the present record; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the Appellant and the representatives of *Shah Ali Reza*. Their Lordships thought it right to ascertain with accuracy the contents of these *Sunnuds*, inasmuch as the High Court based their judgment in a great degree on the assumption, that the tenure was made saleable for arrears of rent by special terms contained in them.

It appears from the *Sunnuds*, thus veri-

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* 14, Moore's I. A., p. 330; 10 B. L. R., p. 139.

(1) Reg. VII. of 1799, ss. 1 to 20, repealed by Act X. of 1859.

(2) Reg. VIII. of 1831, repealed by Act X. of 1859.

(3) Act VIII. of 1835, repealed by Bengal Act VIII. of 1865.

(4) See Bengal Act VIII. of 1869, ss. 59 to 61.

(5) Case No. 992 of 1866; 13th March 1867.

fied, that this assumption is unfounded; and it was admitted by the learned Counsel for the Respondent that if they were the same as those set out in the former Record this was so. By the *Sunnuds* the *mouzahs* are given by way of *istemrar* to *Hossein Reza* and his descendants on a fixed and absolute *jumma* of Rs. 2,291.

On the 13th of March, 1850, the Appellant advanced to *Shah Ali Reza* Rs. 39,500; and to secure this advance the latter made, in ordinary form, a conditional sale of the *Talooks* to him, to be absolute if the money was not repaid on 13th of March, 1851.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits.

The mortgage-debt not having been paid, the Appellant took proceedings to foreclose under Reg. XVII. of 1806; and the foreclosure was completed in due course in August, 1852.

Thereupon, on the 28th January, 1853, the Appellant commenced a suit against *Shah Ali Reza* to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The *Zillah* Judge on the 18th of December, 1854 (a day material to be borne in mind,) made a decree in favour of the Appellant for the possession of the *Talooks*. On appeal to the *Sudder Dewanny Adawlut*, the suit was remanded, when the then *Zillah* Judge dismissed it, and the *Sudder* Court affirmed his decision; but both these judgments were reversed by Her Majesty on appeal, and the Order in Council declared, that the Appellant was entitled to the possession of the mortgaged premises as absolute Owner. The case is reported in 10 Moore's Ind. App. Cases, 340; (2, P. C. Judgments, p. 153.)

The Order in Council bears date on the 3rd of February, 1866.

Shortly after the decree of the *Zillah* Judge of the 18th of December, 1854, in the Appellant's suit for possession, viz., on the 6th of January, 1855, the *Zemindar*, *Baboo Pertab Singh*, brought a summary suit in the Collector's Court against the heirs of *Shah Ali Reza* for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th of February, 1855, an *ex parte* decree was made against them for the amount of the arrears claimed, viz., Rs. 712. On the 19th of March, 1855, the *Zemindar* prayed that the Decree might be put into execution and the *Talooks* sold, and they were sold accordingly on the 26th of April, 1855, to the Respondent, *Sheikh Jowhur Ali*, for Rs. 1,000. This is the sale which it is sought to set aside in the present suit.

It is plain that, when this summary suit against the heirs of *Shah Ali Reza* was commenced, they had no title or right whatever in the *Talooks*. The Appellant had become absolute Owner, and, moreover, he had obtained the Decree of the *Zillah* Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th March, 1858, the Appellant commenced the present suit to set aside the sale and for possession against the *Zemindar*, the Purchaser, *Sheikh Jowhur Ali*, and the heirs of *Shah Ali Reza*.

His right to recover was at first opposed in the Courts below, on the ground that by the judgments given in *India* in the first of the above-mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the *Zillah* and High Courts. On the reversal of these decrees by Her Majesty in Council, in 1866, the Appellant, in order to obtain the fruits of the long litigation, at last decided in his favour, obtained a re-hearing of his case on review, and the High Court then pronounced the judgment against him, now under appeal.

The contention of the Appellant is, that the *Zemindar* could only sell the interest of the heirs of *Shah Ali Rezah* (if any), and not the tenure and estate which had passed to him before the Decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive, and on objections founded on various alleged irregularities.

In the view taken by their Lordships, it will only be necessary to consider the first point, viz., the right of the *Zemindar* to sell, under the Decree in the summary

suit against the heirs of *Shah Ali Reza*, the tenure then vested in the Appellant.

The Respondent contends that the sale was, by law, valid. He relies on the facts that some rent was in arrear, that *Shah Ali Reza's* name was on the Register, and his heirs in possession, and that the Appellant did not tender the amount of the arrears.

But, on the other hand, it appears, that if the heirs of *Shah Ali Reza* were in possession, which is somewhat uncertain on the facts, their names were not put on the *Zemindar's* Register, and it also appears that, shortly after the commencement of the summary suit by the *Zemindar*, and before the Decree for sale, the Officers of the *Zillah* Court, in pursuance of the Decree of the 18th of December, 1854, gave the Appellant symbolical possession by planting Bamboos, which the *Zemindar's* Agents soon afterwards pulled up, and that the Appellant's Agent tendered the rent for December, 1854, at the *Cutchery* of the *Zemindar*, and that such tender was then refused, with the answer, that *Sazawals* had been appointed, and that until they were removed no rent would be received. It also appears, that the Appellant endeavoured to get his name placed on the Register of the *Zemindar*, and that before the sale he applied to the *Zillah* Judge for a *Perwañnah*, directing the *Zemindar* to place his name on the Register, who refused the Order. The Appellant did not then apply to the *Zemindar*, and it may be inferred that he did not do so because the proceedings of the *Zemindar*, who had then obtained the Decree against the heirs of *Shah Ali Reza*, had shown that such an application was useless.

It is apparent from these facts, that the *Zemindar* had the fullest notice of the title of the Appellant and of his claim to possession before the Decree for sale, and that having that notice, he proceeded, without notice to him, to obtain a decree for sale, *ex parte* against the heirs of *Shah Ali Reza*. There can also be no doubt that the Purchaser, *Sheikh Jowhur Ali* (who was, in fact, the *Mookhtar* of the *Zemindar*, and purchased at a grossly inadequate price), had in the same way notice of the Appellant's title, and his proceedings. It requires very plain positive law to support such a sale against the real Owner under a decree thus obtained.

The High Court, in the judgment under appeal, assume that the *Sunnuds*, in their terms, gave the *Zemindar* power to sell the tenure itself free from incumbrances; but in the event of that construction being unfounded the learned Counsel for the Respondent contended, that the *Zemindar* had that power either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, *Zemindars* had the power to sell tenures of this kind for arrears of rent, as a right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long and minute commentary was made, during the argument, upon the Regulations bearing on the subject from 1793 downwards, with the view, on the part of the Respondent, of showing that they authorized a sale of the tenure itself, free of previous titles and incumbrances, created by the defaulting tenant and his predecessors.

Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the full Bench of the High Court (the Chief Justice, Sir *Barnes Peacock*, presiding.) in which the Regulations are fully collated and examined, *Shahabooddeen* v. *Futteh Ali and another* (7 Weekly Reporter, 260.) This, which may be regarded as the leading decision in *India*, has been followed by the Courts there, *Tirthanund Thakoor* v. *Paresmon Jha* (13 Weekly Reporter, 449); *Mohesh Chunder Banerjee* v. *Chunder Monee Debee* (15 Weekly Reporter, 237.) It is true that the Courts in these decisions had to construe Act, No. X. of 1859, and not Regulation VII. of 1799, which had then been repealed; but powers of sale analogous to those found in the Regulation of 1799,

are provided in section 105, of Act, No. X. of 1859, with this difference—that the language of the latter Act is more favourable to the contention of the Respondent than that of Regulation VII. of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear, that the power to sell the tenure itself free from incumbrances, was not given by that Regulation.

The Regulations principally relied on by the Respondent are, VII. of 1799, sect. 15, cl. 7, and VIII. of 1819. The seventh clause of the Regulation of 1799 relied on, declares that "if the defaulter be a dependent *Talookdar*, or the holder of any other tenure which, by the title deeds or established usage of the Country is transferable by sale or otherwise, it may be brought to sale by application to the *Dewanny Adawlut*, in satisfaction of the arrear of rent."

The language is not well adapted to meet the case of incumbered tenures, but the words, if the defaulter be the holder of any tenure, it may be sold, may fairly mean that the tenure of the defaulter holds, or has, such as it is in his hands, may be sold, and it does not seem to be a forced construction, that the decisions above referred to have put on the Act, in holding that if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it is subject to the power of sale.

The older Regulations of 1793, 1795, and 1799 were referred to for the purpose of showing the general object to have been to give the *Zemindar* the same powers to recover rents from their dependent *Talookdars* as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the preamble of Regulation XXXV., 1795 (which relates to distresses), viz., that justice required that Proprietors should have the means of levying their rents and revenues with equal punctuality as the Government, is not found in Regulation VII. of 1799; and would not justify a construction of that Regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for.

Regulation VIII., 1819, section 11, cl. 1, no doubt gives an express power to sell the tenure free of all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or Assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation, in the engagements interchanged in the creation of the tenure.

The preamble of the Act, No. X. of 1859, shows the existence of such tenures, and the Regulation treats them as a distinct class.

It has been already pointed out that the *Sunnuds* in this case do not contain this special power, and that the High Court was in error in so assuming.

The present case is stronger in favour of the Appellant than that cited from 7 Weekly Reporter. In this case, before the *Zemindar* took proceedings against the heirs of *Shah Ali Reza*, the title of the Appellant had passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute Owner of the tenure itself, and the heirs of *Shah Ali Reza*, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the "holders of any tenure," to use the words of Regulation VII. of 1799, and were certainly not "Proprietors" in the words of the Regulation VIII. of 1819.

The judgment below was also grounded on the fact, that the heirs were in actual possession, and that the name of *Shah Ali Reza*, their ancestor, was on the Register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a Decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the *Zemindar* to be wrongful. With this knowledge the *Zemindar* could not properly treat the heirs as holders of tenure, so as to affect the rights of the Appellant, of whose title and efforts to obtain possession he had notice.

It is true the Appellant did not tender the rent which was the subject of the suit against the heirs, but on the other hand, when he tendered the rent due from the date of his Decree, at the *Cutchery*, the prior rent was not demanded of him, and, on the contrary, he was told that the *Zemindar's Sazawals* were in possession, and that no rent would be received. These facts, coupled with the other proceedings of the *Zemindar's* Agents, show that a further tender was useless, and, therefore, unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships, in effect, affirm the authority of the decision of the Full Bench in the case of *Shahaboodeen* v. *Futteh Ali*, referred to from the 7th Weekly Reporter, 260. It may be inferred from their judgment, that the High Court in this case would have followed that authority, if the terms of the *Sunnuds* had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that *Zemindars* may, by law, possess to enforce payment of their rents. What other powers and remedies the *Zemindar*, *Baboo Pertab Singh*, had, and might have exercised, it is not necessary, nor is it now of any general importance to determine, for the remedies for arrears of rent are at present mainly provided by Act, No. X. of 1859, and subsequent Acts. The only question their Lordships are called upon to decide is, as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time, and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the Appellant is entitled to the mesne profits from the time of the sale to *Sheikh Jowhur Ali*, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to *Baboo Pertab Singh* and his heirs should be deducted and allowed. The Appellant also claims to be entitled to a Decree for mesne profits against the heirs of *Baboo Pertab Singh*, on the grounds (1) that the *Zemindar* was acting in collusion with *Sheikh Jowhur Ali*; and (2) that he persisted in the sale of the *Talooks*, when he knew that the heirs of *Shah Ali Reza*, who alone were Defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion; but considering that the *Zemindar* proceeded to obtain a sale of the tenure, notwithstanding he had notice of the Appellant's title, and of the Order made by the *Zillah* Court for giving him possession, and that such sale has been the means of keeping the Appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the Appellant, they are of opinion, that the Decree for mesne profits should be against the heirs of *Baboo Pertab Singh* as well as against *Sheikh Jowhur Ali*, but that execution should not be had against such heirs in respect of them until after failure to obtain satisfaction from *Sheikh Jowhur Ali*.

Their Lordships will, therefore, humbly recommend to Her Majesty that the Decree appealed from be reversed, and that it be declared that the sale to *Sheikh Jowhur Ali* was invalid, and should be set aside, that the Appellant is entitled to possession, and to be registered as the holder of the *Talooks*, and that he has been so entitled since the Decree of the *Zillah* Court of *Purneah* of the 18th of December, 1854; and that it should also be declared, that the Appellant is entitled to mesne profits from the time and in manner above-mentioned; and, further, that the Respondents should pay the costs of the litigation in *India*, and if any costs have been paid in *India* they should be refunded, and their Lordships will direct that the Appellant should have the costs of this appeal.

9th December, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court at Fort William, Bengal.

JOGENDRO DEB ROY KUT, (*Defendant*)* ... } *Appellant*,

versus

FUNINDRO DEB ROY KUT, (*Plaintiff*) ... } *Respondent*.

Evidence—Judgment in Rem—Legitimacy.

In a case of disputed succession to a *raj*, *A*, one son of the *Rajah*, deceased, was put in possession under Act XIX. of 1841, and a suit, brought against him on behalf of another infant son *B*, failed on proof of the legitimacy of *A*. A third son *C* now claims to be entitled against *A's* son on the ground that *A* was illegitimate, or was the offspring of an inferior marriage. *Held*, the decree in the former suit was not a bar to the further prosecution of this suit, nor would it have been had the issues in the two suits been precisely the same.

Quære.—Does there exist in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize,) any Court capable of giving a judgment *in rem*? (See the Indian Evidence Act (I. of 1872, s. 41.)

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

THIS appeal is brought by *Jogendro Deb Roy Kut*, the Defendant in the suit out of which the appeal arises, against a decree of the High Court, which overruled a decree of the *Zillah* Court, whereby a judgment in a former suit which had been pleaded was declared to be a bar to the further prosecution of this suit, and directed that the suit should be remanded to the *Zillah* Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only question which is now legitimately before their Lordships. Mr. *Doyne* indeed suggested, that their Lordships might give certain directions concerning the further trial of the suit if it went back to be tried in the *Zillah* Court, but that course would be entirely contrary to the practice of this Tribunal. The ground of appeal to the High Court was that the learned Judge was wrong in holding that the decision of the late *Sudder* Court, dated the 8th of February, 1853, was a judgment *in rem*, and that as such a bar to the present suit. The High Court's judgment is to this effect:—"The Judge holds that that judgment of the *Sudder* Court was a judgment *in rem*, declaring the title of the Defendant, *Mukuruád Deb*, to the disputed *Raj*, and consequently that that judgment was a binding judgment not only against the party, in that case, but against all the world; and it follows, according to the opinion of the Judge, that that judgment was decisive against the present Plaintiff, and that the present Plaintiff cannot consequently succeed." The High Court then refer to the judgment of the full bench in *Kanhya Loll* v. *Radha Churn* (7th Weekly Reporter, 338), in which the law was laid down that judgments of this description were not judgments *in rem*, but judgments *inter partes*. They also say: "It is evident that the issues which were raised in the former suit are by no means identical with the issues which arise in this case. The Plaintiff or his representative was in no way a party to the former judgment and was not represented in that suit, and the decree then passed can in no way be binding upon him. The decision of the Judge must be reversed and the case remanded to him, in order that he may try the remaining issues which arise in it." Therefore, it is perfectly clear, that the question before stated, is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion with respect to the nature of a judgment *in rem*, technically so called. It appears to them to be extremely doubtful, whether there exists in *India* (exclusive of

* 14, Moore's I. A., p. 367; 11 B. L. R., p. 244.

the particular jurisdictions which are exercised by the High Courts in matters of Probate and the like, and which in the case of War might be exercised in matters of prize) any ordinary Court capable of giving, what can be called technically a judgment *in rem*, but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now, the circumstances of the former suit were these. *Surbo Deb Roy Kut*, the Father of the Respondent and Grandfather of the Appellant, died in 1850, and there arose a contest among the members of his family, children by various Wives or Concubines, as to who should succeed to the *Raj*, and, with the *Raj*, to the possession of the property. It is admitted that the succession is impartible, and on the death of a *Rajah* passes to the eldest of the Sons of equal rank; and it is further alleged, though not perhaps admitted, that according to the custom of the family the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On *Surbo Deb Roy Kut's* death, *Mukurund Deb* (the Father of the Appellant,) the eldest of his Sons was put into possession by a summary Award of a competent Court, under the Act, No. XIX. of 1841. Upon that, *Bissessuree*, one of the three surviving Wives of the late *Rajah*, in conjunction with another person, brought a suit on behalf of her infant Son, *Rajendro Deb*, in order to have that Order of the Court set aside and to recover from *Mukurund Deb* the possession of the *Raj* and the possession of the property that went with the *Raj*. The suit necessarily involved two issues; one of them was the legitimacy of the Plaintiff, who insisted that his Mother had been married to the deceased *Rajah* under the *Gundhurbo* form of marriage. If he succeeded in proving that, he had to go a step further, and to prove that *Mukurund Deb*, his elder Brother, was, as he alleged, illegitimate; that he was the Son of a woman who had not been married to the *Rajah* at all, but the Son of a slave-girl.

The Court of First Instance found in favour of the Plaintiff in that suit. It went by appeal to the *Sudder* Court. The Judges of that Court were divided, but the majority found that the Plaintiff in that suit had made out his title to be legitimate by the *Gundhurbo* marriage; and as regards *Mukurund Deb* they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of a marriage in the *Brahmo* form, which was what he had pleaded. They seem to have thought that by reason of the declarations and acknowledgment of his Father he must be taken to be legitimate; and that, being at least in equal rank with the Plaintiff in that suit, and being the elder, he was as between those two parties entitled to succeed to the *Raj*.

In the present case, the Plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit, as to the illegitimacy of *Mukurund Deb*, but he also raises the question of priority of right by reason of the superior nature of the marriage between the *Sarbo Deb Roy Kut* and his Mother. The issues in the two suits, therefore, are not precisely the same. But if they had been precisely the same their Lordships would still have been of opinion, that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any degree be likened to those which sometimes occur in *India*, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit, as the first suit, was brought here and tried according to the law of this Country there could not be a pretence for saying, that the judgment in it was anything like a judgment *in rem*, or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a prefer-

able right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It, therefore, seems to their Lordships unnecessary to consider, whether an ordinary *Zillah* Court in *India* could in any case pass a decision which would have the effect contended for at the bar in this case, viz., that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say, that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of *India*, which can be applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is, therefore, unnecessary to say anything about costs.

11th and 12th December, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, the Right Hon. the Lord Justice Mellish, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

HELEN SKINNER,* ... *Appellant,*

versus

SOPHIA EVELINA ORDE, WILLIAM ORDE, CHARLES GRANT BARLOW, AND SOPHIA SKINNER, ... } *Respondents.*

Guardian and Ward—Custody of Child—Act IX. of 1861—Religion—Adoption of Mahomedan Religion for Purpose of Marriage—Bigamy—Special Leave to appeal.

A child, the offspring of a Christian marriage, was living after her father's death under the protection of her mother. A married man, a Christian, came to live with her mother, and, in order to legalize their intercourse, he and the mother became Mahomedans, and were married in Mahomedan form. About three years after, when the child had attained the age of fourteen, some of her relatives applied for and obtained an order, under Act IX. of 1861, that the girl be removed from the guardianship of the mother and her second husband and placed under a Christian guardian. The girl deposed that she wished to remain with her mother and to become a Mahomedan. Special leave having been given to appeal to the Privy Council, the order was upheld.

Quære.—Whether a marriage according to Mahomedan rites between a married Christian man and a Christian woman, both of whom became Mahomedans in order to effect the marriage, is valid (1).

20th December, 1871.

THEIR Lordships' judgment having been reserved, was now delivered by

THE RIGHT HON. THE LORD JUSTICE JAMES:

This is an appeal from an Order of the High Court of the North-West Provinces, in substance, confirming an Order of the Judge of the Court of *Meerut*, removing an Infant Ward and her property from the custody and guardianship of her Mother, the Appellant, and the alleged second Husband of that Mother.

The application was made to the Judge under the provisions of the Indian Act, No. IX., 1861, which are as follows:—

"1. Any relative or friend of a Minor who may desire to prefer any claim in respect of the custody or guardianship of such Minor, may make an application by petition, either in person or by a duly constituted Agent, to the principal Civil Court of original jurisdiction in the District, by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the Petitioner, or his Agent, if he appear by Agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition

* 14, Moore's I. A., p. 303; 10, B. L. R., p. 125.

(1) See s. 15 of Act III. of 1872 (to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion) as to penalty on married person marrying again under that Act.

as having the custody or being in the possession of the person of such Minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such Minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such Minor shall produce him or her in Court, or on any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such Minor as may appear proper.

"3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their Agents, if they appear by Agents, and such evidence as they or their Agents may adduce, and thereupon shall proceed to make such Order as it shall think fit in respect to the custody or guardianship of such Minor and the costs of the case."

The Judge accordingly, after hearing the case, presented to him, made an Order, removing the Ward from the custody of her Mother. An appeal from this Order was presented to the High Court, which Court pronounced the final Order now complained of. The Act, No. IX. of 1861, gives no further appeal, but on the statement made to this Tribunal that the question really involved the religious education of a Ward, special leave was given by Her Majesty, on the recommendation of this Board, to prosecute the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the Judge of the Court of *Meerut*; and it is, obviously, of very great assistance to the Courts in *India*, and to this Board, to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this Country have thought it best to act for the protection and welfare of infant Wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court, that in the matter of religious education great, and in the absence of controlling circumstances, paramount, weight should be given to the expressed or implied wishes of the deceased Father. It was contended with some plausibility before their Lordships, that this rule had its origin in the statutory power of English Fathers to appoint Guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case, to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the Infant Ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the Infant; and no other power or duty.

In *India*, however, all, or almost all, the great religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of Husband and Wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a Child in *India*, under ordinary circumstances, must be presumed to have his Father's religion, and his corresponding civil and social *status*; and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a Guardian to train his Infant Ward in such religion.

What are the facts of the present case? Beyond all question the Ward was the child of a Christian Father, the issue of a

Christian marriage. She was left an infant of very tender years, her Father being one of the victims of the great outbreak and massacre at *Delhi* in the year 1857. She remained thenceforth under the protection of her Mother, a Lady, apparently, of ancestry not Christian, and with no great knowledge of Christian tenets, or attachment to Christian habits. But she was married to a Christian in a Christian Church, and does not appear to have professed any other faith, or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred. The House of the Widow became the House of one *John Thomas John*, a Clerk of inferior grade in the Judge's Court, and they lived and cohabited together as Husband and Wife, *John Thomas John* being already the Husband in Christian marriage of a living Christian Wife. It is suggested that this union was sanctified and legalized in this way—that the Widow became a Mahomedan, that *John Thomas John* became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the Widow, the Appellant.

The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining

But however this may be, their Lordships can entertain no doubt, that when the connection between *John Thomas John* and the Widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become, in fact, the home and guardianship of *John Thomas John*. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school —a proper Christian school; and *John Thomas John* and his alleged Wife, professing to yield to the suggestion, took the girl in June, 1869, up to *Simla*, with the avowed object of placing her in a Christian school there. They now represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the *purdah;* and that at some period (the time is not exactly fixed) a *Moulavie* was introduced, who confirmed her in her resolution to become a Mahomedan. The young Lady, who by this time had attained the age of fourteen years, or thereabout, made the following deposition:—

"I know Mr. *John*. I first knew him when we came to *Meerut*, and for the past two years know him well. No one has ever persuaded me to be a Mussulmani. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the *purdah* by my own free will. I went up to *Simla* with my Mother and Mr. *John*. They wished me to go to school, and pressed me very much to go, but I would not consent. I heard of the marriage of my Mother to Mr. *John* five or six days after it took place. I cannot say how long Mrs. *James Skinner* has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. *Skinner's* family must have known of it. I wish to return to my Mother. I believe Mrs. *James Skinner* to be a Mussulmani; Mrs. *Orde* to be a Christian. To Counsel for Petitioners.—My Mother can read very little—small story Books; but she cannot read Persian, nor write at all. She can only read the *Urdu* in print, not the written character, excepting very good text-hand. I have read easy Books on religion in *Urdu*, but not studied them.

I am studying the *Koran* with a Teacher. There was a picture of my Father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I, therefore, destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the Hills. I heard that to keep pictures was prohibited after my return from the Hills, from a Preacher, a *Moulavie*, who came to the house and preached a sermon. No one advised me otherwise. I had long thought of becoming a Mussulmani, but when I was young did not understand the different religions; when I returned from the Hills I turned my attention to it, and had the Preacher called to preach. Almost all my family are Christians. I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. *Benu*. Since I have been in their House I have not had any Letter of any kind from Mr. *John*. I had some Letters from my cousin *Sophy*, who is in *Calcutta*, and *Charlie*, which were on my Table. These I sent for. Two from *Charlie* I sent for the day before yesterday, which were old, and I tore them up; the other from *Sophy* I sent for yesterday, and showed it to Mrs. *Aldwell*. The two from *Charlie* I sent for by *Achakrai*, and the one from *Sophy* by my *Ayah*. To Counsel for Petitioners.—I know Mrs. *Benu*. I have seen her several times since I came from *Simla*. I know her to be a Christian." This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the Country, *Urdu*, recorded by the Court in English, and was read over to the Witness in *Urdu*, and by her acknowledged to be correct.

The case of the Appellant, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young Lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and Mother, and committing her to the care of a christian strange Schoolmistress. The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July, 1870, the Order for the appointment of the Guardian, which would have been the only possible Order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a Mother, under such circumstances, to procure from a young Daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school; and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to *Simla* and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are, therefore, of opinion, that the Order, in so far as it removed the Ward from her Mother and alleged stepfather, and placed her under a Christian Guardian, was right, and that is really the only matter that has been brought before them.

* * *

Their Lordships will humbly report to Her Majesty that, in their opinion, the Order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the Ward concerning her future position; and considering the present age of the young Lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the Order, their Lordships feel that it would be very difficult for an appellate Tribunal in this

Country to interfere without injury, as to the details of the particular guardianship and scheme, which must so essentially be a matter of *quasi* parental discretion to be exercised on the spot by those best acquainted, or best able to acquaint themselves, with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court in *India* in similar cases, that while selecting a School (such, for example, as Miss *Scanlan's* in this instance) it would be desirable, where practicable, to have some independent person as Guardian, to whom the Ward could apply, in whom the Court and the Ward could confide, and whose duty it would be to communicate to the Court any matter which might arise (*a*) (*b*).

(*a*) The Appellant having obtained special leave (In *re Skinner*, 13 Moore's I. A. Cases, 532; 2. P. C. J., 615) brought the present appeal against the Order of the Judge of *Meerut* of the 19th of May, 1870, and the Orders of the High Court of the 7th and 16th of July, 1870.

(*b*) The following Authorities cited for the Appellant :—

Barlow v. *Orde*, 13 Moore's I. A., 277 ; 2 P. C. J., 540.

Rex v. *Greenhill*, 4 A. and E. 624.

Reg. v. *Clarke*, 7 E. and B. 186.

In re Moore, 11 Ir. C. L. Rep. (N. S.) 1.

In re Curtis, 28 L. J. (Ch.,) 458.

Reg. v. *Shapuri Bezonji*, Perry's Oriental Cases, p. 91.

Reg. v. *Niskett*, Ibid, p. 103.

Austin v. *Austin*, 34 Beav. 257, 265.

In re Newbery, Law Rep. 1 Eq. 431.

In re Conner, 16 Ir. C. L. Rep. (N. S.) 112.

Stourton v. *Stourton*, 8 De G. M. & G., 760.

Witty v. *Marshall*, 1 Y. & C. (N. R.,) 68.

The following Authorities cited for the Respondents :—

In re North, 11 Jur. 7.

Jones v. *Powell*, 9 Beav. 345.

Hawksworth v. *Hawksworth*, L. Rep. 6 Ch. Ap. 542.

In re Darcys, 11 Ir. C. L. Rep. 298.

In re O'Malleys, Minors, 8. Ir. Ch Rep. 291.

Abraham v. *Abraham*, 9 Moore's I. A., 237 ; 2 P. C. J., 10.

12th and 13th December, 1871.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

MUSSUMAT BEBEE BACHUN, (*Plaintiff*)* ... } *Appellant,*

versus

SHEIKH HAMID HOSSEIN and MUSSUMAT DURJAHUN, (*Defendants*) } *Respondents.*

AND

MUSSUMAT BEBEE BACHUN, MUSSUMAT BEBEE SOORA and MOULVIE ABDOOL AZEEZ, (*Defendants*) ... } *Appellants,*

versus

SHEIKH HAMID HOSSEIN and MUSSUMAT DURJAHUN, (*Plaintiffs*)... } *Respondents.*

Mahomedan Law—Dower—Lien—Reversal of Concurrent Findings on Fact.

Where the widow of a Mahomedan obtained actual and lawful possession of the estates of her husband under a claim to hold them as one of the heirs and for her dower, it was *held* that she was entitled to retain possession until her dower was satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received.

The Courts below, without ascertaining the amount of the widow's dower, decreed possession of the estates to the heirs. Such decree was reversed on appeal, and the amount of dower was ascertained.

21st December, 1871.

JUDGMENT was reserved and now delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:

The principal questions in these appeals arise from a claim made by the Appellant, as the Widow of *Sheikh Willayut Ally*, a Mahomedan, to a dower of Rs. 40,000 and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late Husband until her dower is satisfied.

Other claims have been made by the parties in these suits, some of which have been included in the present appeals, and to which it will be necessary hereafter to advert.

The Appellant, and *Sheikh Willayut Ally*, who both appear to have belonged to wealthy Mahomedan families in *Behar*, were married in 1820.

The Husband died in March, 1851, without issue, leaving the Appellant his only Widow.

It is not now disputed that, on his death without issue, the Appellant became entitled as co-sharer to one-fourth share of her Husband's estate, and that the other three-fourths descended upon *Mussumat Rahecbun*, a Sister of *Sheikh Willayut Ally*, who died shortly after her Brother, leaving the present Respondents her heirs.

In April, 1851, proceedings were instituted by the Appellant in the Collectorate Courts to obtain the entry of her name in the Register in place of her Husband's. She alleged in her petition that she was in possession by right of inheritance, and also on account of her dower. Objection was made on the part of the Respondents, but it did not prevail; and the lands were registered by the Collector in the name of the Appellant "without specification of share."

An appeal was made on behalf of the Respondents to the Commissioner, who affirmed the decision of the Collector, declaring in his Order that, if the Objectors (the Respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court.

The Order of the Commissioner bears date on the 11th of March, 1852.

These proceedings relating to the possession of the lands are material, not only to show that the Appellant obtained the insertion of her name and possession soon after her Husband's death, but principally

* 14, Moore's I. A., p. 377; 10, B. L. R., p. 45.

because it is clear from them, that she claimed to hold not merely her one-fourth share to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower."

The Respondents, who were parties (Objectors) in these proceedings, notwithstanding that they had the fullest notice of the Appellant's pretension to hold the estate for her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

On the 31st of December, 1862, both the suits which are the subject of these appeals were commenced, one by the Respondents as the heirs of *Mussumat Raheebun* (deceased,) Sister and heiress of *Sheikh Willayut Ally*, against the Appellant (the Widow) to recover three shares of the estate, admitting her right as Widow to one-fourth share. The other was a suit by the Appellant against the Respondents to establish her claim to dower, on the alleged ground that her claim to dower might otherwise be barred by the law of limitation.

The Appellant in both suits asserted that the dower agreed to be given on her marriage was the sum of Rs. 40,000 and one gold mohur, and she claimed to hold the estate until this dower was paid; whilst the Respondents alleged that, in the family of *Sheikh Willayut Ally*, the dower was always fixed at 500 *dirrums*, and that this was the agreed amount of dower on this marriage.

The claim of *Mussumat Bebee Bachun* to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower,—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower, nor was there any agreement on the part of the Husband to pledge his estate for the dower. But the Appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied, and the Respondents cannot recover the possession of their shares unless that satisfaction has taken place.

It is not necessary to say, whether this right of the Widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein* v. *Mussumat Khodeja* (10 Weekly Reporter, Civil Rulings, 369). Whatever the right may be called, it appears to be founded on the power of the Widow, as a Creditor for her dower, to hold the property of her Husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received. This seems to have been the ground on which the claim of the Widow to retain the possession was put in *Ameer-oon Nissa* v. *Moorad-oon-Nissa* (6 Moore's Ind. App. Cases, 211; 1, P. C. J., p. 533.) Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause—What is the amount of the dower?

The question raised in the second issue in the dower suit was, whether the dower was fixed at Rs. 40,000 and one gold mohur, as alleged by the Widow, or at 500 *dirrums*, under the Mahomedan law, as contended for by the Respondents.

In the possession suit, the issue (4th) was, whether *Sheikh Willayut Ally* owed *Mussumat Bebee Bachun* Rs. 40,000 and one gold mohur for dower or not.

After a great deal of evidence had been given in the suits, the Principal *Sudder Ameen* held that the Appellant had not made out that the dower was fixed at Rs. 40,000; and he also held, that the statement of the Respondents that the dower was fixed at 500 *dirrums*, "was conjectural."

On the appeal, the Judges of the High Court were of opinion, that they could not declare that the Appellant was entitled to demand "the immense sum of dowry which she claims;" but they say: "In a Mahomedan marriage between contracting parties of rank and influence, there

must be of course some dowry, and it was probably a handsome one." They also say: "The omission of the Defendants to sue for their share of the inheritance indicates a consciousness on their part that *Mussumat Bebee Bachun* had a claim of dower to be satisfied from the estate, and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the Defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the judgment of the Lower Court in this case, with costs against *Mussumat Bebee Bachun*."

Their Lordships are unable to consider this judgment of the High Court as a final or satisfactory determination of the main question in the suit. The learned Judges, whilst holding that the evidence did not satisfy them that the dower was fixed at Rs. 40,000, declare that it "was probably a handsome one," and that the conduct of the Respondents indicates that it was "doubtless considerable" It appears to their Lordships that the Widow, on the view taken by the High Court, was, at all events, entitled to a proper dower, to be ascertained according to Mahomedan law. But no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and, therefore, that the decree so founded ought not to stand in its present shape.

Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see, whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule not to interfere, unless upon very clear grounds, with the findings upon questions of fact, where the Courts of First Instance and of appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The Appellant called nine Witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given, was a deferred dower of Rs. 40.000. About an equal number of Witnesses called by the Respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 *dirrums*. It is clear from the evidence that *Sheikh Willayut* and *Mussumat Bebee Bachun* were both "in opulence from the time of their Fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 *dirrums*, indeed the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long before holding that the Appellant had established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the District, and also from the conduct of the Respondents themselves.

The evidence of what was customary principally came from the Respondent's Witnesses, and its truth may, therefore, be relied on. It shows that, in the Province of *Behar*, and in the caste of *Sheiks*, Rs. 40,000 was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the Witnesses. One Witness, *Sheikh Shahamut Ally*, says:—"In the caste of *Sheiks* in the Province of *Behar* and in *Mahoonee* the custom is usually Rs. 40,000 and one gold mohur and the custom of inconsidered dowers is of recent date."

It was pointed out by the learned Counsel for the Respondents that, in some instances, this large amount of dower was fixed in marriages between persons, who,

apparently, were not wealthy; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it.

Three cases, also coming from *Behar*, were referred to from the Reports of the *Sudder Dewanny Adawlut*, where this sum of Rs. 40,000 was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause, but as matter of history they are consistent with the testimony of the Witnesses.

Their Lordships must not be understood to decide, that the evidence of what was customary in the District would be sufficient in itself to fix the amount of dower, for if there had been no evidence of an agreed amount, it would have been necessary to make inquiries into the usual amount of dower in the family of the Appellant; but it is impossible not to see, that this sum of Rs. 40,000 was a most usual amount to be fixed, and that fact gives probability to the statements of the Witnesses for the Appellant, who proved that such was, in fact, the dower agreed upon on this marriage.

Their Lordships are also disposed to attribute great weight to the presumptions which naturally arise from the conduct of the Respondents. It is plain that, from the pleadings in the Collector's Court, and from other transactions, they became aware shortly after *Sheikh Willayut Ally's* death of the claim for dower, and although they opposed the Widow's claim to possession, showing they were alive to their rights, yet after she had obtained it they took no step for ten years to interfere with her possession.

The proper inference from this conduct is, that they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 *dirrums*, which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty.

Whilst the Judges of the High Court treat this conduct of the Respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference, which we think may be fairly done, that it is also indicative of a consciousness on their part that what the Appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim.

In the result, their Lordships have come to the conclusion, that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of *India*, that the amount of dower set up by the Respondents has been disproved.

Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the Appellant to the dower she claims.

The Appellant also objected to the decree in the suit for possession, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the Appellant's Counsel in support of this contention, and there seems to be no ground for impeaching the concurrent decrees of the two Courts on this point.

Their Lordships will humbly report to Her Majesty, that the appeals should be allowed in both suits, so far as they relate to the claim for dower; that the decrees under appeal should be reversed; and that it should be declared in both suits, that the dower agreed to be given on the marriage was the deferred dower of Rs. 40,000 and one gold mohur.

With regard to the suit for possession, their Lordships have considered, whether they ought to advise Her Majesty to direct an account to be taken in that suit; but, considering the way in which the litigation

has been conducted, that no account has ever been asked for by the Respondents, and that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case of *Ameer-oon-Nissa* v. *Mooradoon-Nissa*, cited from 6 Moore's Ind. App. Cases, 211 (2 P. C. J., p. 533;) and to advise Her Majesty that this suit, so far as it prays possession, should be dismissed as against the Appellant, without prejudice to any suit that may be instituted by the Respondents for an account and administration of *Sheikh Willayat Ally's* estate, consistently with the above declaration as to the Appellant's dower.

Their Lordships are further of opinion, that the Order to be made in the appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits; the Order, therefore, which they will humbly recommend Her Majesty to make will be the following:—

That the appeal be allowed, and that the decrees under appeal be reversed, and the following decree be made in both suits:—

That it be declared, that the dower agreed to be given on the marriage of the Appellant with *Sheikh Willayat Ally* deceased was the deferred dower of Rs. 40,000 and one gold mohur; and that the Appellant, being in the possession of the estates of the said *Sheikh Willayat Ally*, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied.

That it be further declared, that the whole of the property claimed in the suit wherein the Respondents were Plaintiffs, with the exception of *Mouzah Poondareck* and *Mouzah Kurareea*, and the sum of Rs. 300 in the decree of the Principal *Sudder Ameen* mentioned, belonged to and formed part of the estate of *Sheikh Willayat Ally* deceased; and that the Respondents, as the representatives of *Mussumat Raheebun* deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the Appellant in respect of her before-mentioned dower.

That it be ordered, that the suit of the Respondents, so far as it seeks to recover possession of their shares of the said estate, do stand dismissed as against the Appellant, but without prejudice to any suit that may hereafter be instituted by them for an account and administration of the estate of *Sheikh Willayut Ally*, or to enforce their rights therein consistently with the above declarations.

That the costs of both the two suits in the *Zillah* and High Courts should be apportioned between the parties, according to the practice of those Courts in cases wherein a litigant is only partially successful; and that the costs (if any) which have been paid by the Appellant under the decrees under appeal should be repaid to her.

That the causes be remitted to the High Court, with directions to carry out this Order.

The Appellant having failed as to part of the subjects of her appeal, no costs will be given in these appeals.

14th and 15th December, 1871.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

BABOO LEKRAJ ROY, *(Defendant)** ... } *Appellant*,

versus

BABOO MAHTAB CHAND and others, *(Plaintiffs)* } *Respondents*.

Guardian—Infant—Compromise—Burthen of proof—Fraud—Reversal of Concurrent Findings on Fact.

It is not incumbent upon a guardian to contest every claim made against the infant's estate.

* 14, Moore's I. A., p. 393; 10 B. L. R., p. 35.

The Judicial Committee, reversing the finding of the Courts below, refused to set aside a compromise (confirmed by a decree of Court) by the former guardian of the Plaintiff of a claim against his estate for debt after sixteen years, the Plaintiff having failed to prove that the suit was fictitious, and the compromise fraudulent and collusive.

21st December, 1871.

THEIR Lordships having reserved judgment, it was now delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:

Salamut Roy, a Merchant and Banker, employed *Laljee Mull* as the principal Manager of his business. On the death of *Salamut Roy*, *Laljee Mull* continued to manage the business, which was carried on in the name of *Surbeshurry*, the Widow, and *Lekraj Roy*, the infant Son of *Salamut Roy*. *Laljee Mull* adopted *Mahtab Chand*, the infant Son of his Brother, *Inderjeet Mull*, and appointed by Will *Inderjeet Mull* and *Gunga Pershaud*, a *Gomastah* in his service, the Guardians of his adopted Son. *Laljee Mull* died in August, 1845, and on the 26th September, 1845, a certificate under Act, No. XX. of 1841 was duly granted to the Guardians, notwithstanding the opposition of *Surbeshurry*.

In January, 1846, *Surbeshurry*, as the Mother and Guardian of *Lekraj Roy*, instituted a suit against *Inderjeet Mull* and *Gunga Pershaud* to recover from the estate of *Laljee Mull* the sum of Rs. 176,152, 7 as. 4 p., being the amount of alleged defalcations or misappropriations on the part of *Laljee Mull*. After various proceedings had taken place in this suit, and Witnesses had been examined on both sides, it was settled by a *Ruffanamah*, or deed of compromise, whereby it was agreed that Rs. 74,000 should be paid by the Defendants, in instalments. This *Ruffanamah* was filed on the records of the Court on the 11th of January, 1847, and confirmed by a decree.

Mahtab Chand came of age in October, 1861, and on the 3rd January, 1863, commenced the present suit against *Lekraj Roy*, the Son of *Surbeshurry* (who had died in 1850) to recover from him, all that had been paid, together with interest thereon, under the above Deed of compromise, amounting to Rs. 68,753, 15 as. 6 p., on the ground that the suit of 1846 was a fictitious one, and that the compromise of it was fraudulent and collusive between *Surbeshurry* and the Guardians of *Mahtab Chand*.

Judgment was given in the Plaintiff's favour, to the full amount of this demand, in the *Zillah* Court; and that judgment was subsequently affirmed in the High Court. Against this judgment the Defendant appeals.

There is no allegation of fraud against the Defendant, who, at the time of the transaction which is impeached, was a child of ten years old. The Plaintiff took upon himself the burden of establishing fraud and collusion on the part of the Defendant's Mother, and his own Guardians, one of whom was his natural Father. It was contended that, inasmuch as the Guardians were dealing with the property of an infant, it was incumbent on the Defendant to show that such dealing was for the infant's benefit; and the case of *Hunoomanpersaud Panday* v. *Mussumat Baboee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393, 1 P. C. J., p. 552;) followed by *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (10 Moore's Ind. App. Cases, p. 454, 2 P. C. J., p. 167;) were referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the Guardian was clearly established, and that in the former, the question turned on the power of Guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the Guardians, who were also Administrators of the estate (having received a certificate in pursuance of Act, No. XX. of 1841,) to pay all just debts of the Testator.

Their Lordships have carefully examined the evidence on the part of the Plaintiff, and are unable to find in it anything amounting to proof, that either the institution of the suit, or the compromise, was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain

from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a decree of the Court. The evidence by which the Plaintiff seeks to set aside that decree which had been in force for sixteen years is, that *Gunga Pershaud* filled the double character of Guardian of the Plaintiff and *Gomastah* to *Surbeshurry*, that *Inderjeet Mull* was a man of weak understanding, under the influence of *Gunga Pershaud*, and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption, of the *mala fides* of *Gunga Pershaud*, while, on the other hand, there is a strong presumption against *Inderjeet Mull* entering into a conspiracy for the purpose of defrauding his own Son.

Their Lordships have further examined the evidence of the Defendant, with a view to ascertain, whether it supplies the defect of proof on behalf of the Plaintiff. It undoubtedly appeared that the Defendant absented himself in order to escape examination, that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of Arbitrators, to whom the accounts of *Laljee Mull* were submitted before the compromise in the former suit. It is further stated by the Judge of the *Zillah* Court, that the accounts when produced disclosed upon the face of them only a balance of about Rs. 18,000 as due from *Laljee Mull*, upon which two observations arise—first, that whatever the defalcations of *Laljee Mull* may have been, they would not necessarily have appeared on the mere inspections of the Books; and, secondly, that if a defalcation to the above amount appeared on *Laljee Mull's* own showing, the Defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the Witness called by *Gunga Pershaud*, apparently with the view of contradicting the Plaintiff's case, which was, that *Inderjeet Mull* was a tool in his (*Gunga Pershaud's*) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon *Inderjeet Mull*. Although the Plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the Defendant, still their Lordships cannot regard the case of the Defendant as supplying that proof of fraud which the Plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of Guardians scrupulously to regard the interest of Minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail, that Guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid down, that a very strong case on the part of the Appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion, that the Judge of the *Zillah* Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the Defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive lay upon the Plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *primâ facie* evidence of this before the burden of proof was shifted to the Defendant. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships, have given undue weight to the non-appearance of the Defendant (a mere child at the time of the

transaction in question,) and to his reluctance to produce the Books, their Lordships consider that they are not infringing the rule above referred to by deciding in favour of the Appellants.

On these grounds their Lordships will humbly report to Her Majesty, that the decrees of the High Court and of the *Zillah* Court ought to be reversed, and that in lieu thereof a decree ought to be made dismissing the Respondent's suit with costs, and their Lordships will direct that the Appellants have the costs of this appeal.

23rd December, 1871. 14th January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of Oude.

HYDER HOSSAIN, ... *Appellant*,

versus

MAHOMED HOSSAIN and ALI HOSSAIN, ... *Respondents*.

Registration—Presumption—Practice.

Registration of landed property in the name of one member of a family is not conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property.

In cases from Non-Regulation provinces, wherein the procedure is somewhat loose, and where the merits depend much upon local custom and local enquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation provinces, to act on the principle of not disturbing the judgment under appeal unless it is substantially wrong.

14, Moore's I. A., p. 401.

399 & 403

THEIR Lordships, without calling on

Mr. *Doyne*, who appeared for the Respondents,

Delivered judgment by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This is one of the appeals that have lately been brought from Judgments or Orders of the Revenue Officers engaged in making the Settlement of the land Revenue for the Province of *Oude*. The present case has been before several of the Revenue authorities, who have passed conflicting decisions upon it.

In October, 1864, the Respondents claimed to be entitled, as Proprietors, to one moiety of a village named *Beloulee* with its appurtenant Hamlets, and to be treated accordingly in the Settlement then in progress. This claim was originally advanced by distinct plaints or petitions in respect of different Hamlets, but these were consolidated into one suit by an Order of the extra Assistant Commissioner, *Mahomed Hossain Khan*, dated the 23rd of February, 1866; and the subject matter of the litigation may be treated as the village *Beloulee*.

The title asserted by the Respondents was, that the village had originally belonged to one *Sheikh Aleemoollah*, their Great-grandfather; that he had a Daughter, *Khyreeyutoonissa*, who left two Sons, viz., *Looft Hossain*, the Father of the original Appellant, and *Enayut Hossain*, the Father of the Respondents, who, as his representatives, were the proprietors of an undivided moiety of the village.

The case of the Appellant was that, on the death of the common ancestor, *Sheikh Aleemoollah*, the entire interest in the village had somehow become vested in his Widow; that she, about the end of the last century, transferred it by Deed of gift to *Looft Hossain*, who thenceforward held it as sole proprietor up to the time of his death, when it passed to his Son, the Appellant; and that during all that period the Respondents and their Father had no proprietary interest in it, being at most

dependents of the other branch of the family.

It was admitted, or hardly disputed on the part of the Respondents, that, after *Sheikh Aleemoollah's* death, his Widow first, and after her death *Lootf Hossain*, and after him the Appellant, had been registered as the persons responsible for the revenue assessed, from time to time, on the village; and, so far, as the ostensible proprietors of it. But it was insisted, that this was merely an arrangement for fiscal purposes (*a*), and that notwithstanding the registration in the name of one member of the family on behalf of the others, both branches continued jointly to possess the village, and to enjoy the revenues of it.

It is to be observed, that a suit so framed, though tried by the Revenue authorities, and in the course of proceedings for effecting a Settlement of the public revenue, does not, in the Province of *Oude*, merely determine who is to be *Lumbardar*, or the person entitled to engage for the payment of revenue, leaving the party excluded a remedy in the Civil Courts. Under the provisions of Act, No. XVI. of 1865, which, though passed after the commencement of this particular suit, seems to have a retroactive effect, such a suit involves a final adjudication on the question of proprietary right.

The following was the course of the litigation now brought under the review of their Lordships:—

The issues originally settled in the suit were,

First, did the Plaintiffs (the Respondents) ever receive the profits of the village or not?

Secondly, did the Plaintiffs live in common with the Defendant or separately;

Thirdly, did the Defendant give the Plaintiffs Rs. 881 for their Sister's marriage, in 1264 F. or not? and

Fourthly, did *Mussumat Hyat Bebee* make over this village with others to the Defendant's Father *Lootf Hossain*, and cause the engagement to be executed in his name, in virtue of which he remained in sole possession without the partnership of *Enayut Hossain*, and after his Father's death, did the Defendant himself remain in uninterrupted possession, or not?

On the 1st of February, 1866, *Mahomed Hossain*, the extra Assistant Commissioner, decided the case in favour of the Respondents.

On the 19th of June, 1866, this decision was reversed by the Settlement Officer, Major *Chamier*, on the ground that it was partly based upon the result of inquiries made out of Court, and the case was remanded for trial on the following issues:—

First, whether up to 1263 F. (1856) commensality existed between Plaintiffs and Defendant, and did Plaintiffs participate in the profits?

Second, if so, did the Plaintiffs enjoy a portion of profits by right or by favour?

Third, whether estoppel was created by the Plaintiffs having enjoyed *Seer?*

On the 7th of May, 1866, *Mahomed Hossain*, having tried these issues, again decided the case in favour of the Respondents.

There was a second appeal to the Settlement Officer, who, on the 19th of June, 1866, reversed the decision of this native Officer and dismissed the Respondents' claim.

This Order was confirmed on appeal by the Commissioner of the *Lucknow* Division (Major *Barrow*) on the 21st of September, 1866.

The cause, in the ordinary course of things, would next have gone before the Financial Commissioner, but Major *Barrow* having been intermediately raised to that office, it was transferred to the Judicial Commissioner, Sir *George Couper*, who, on the 16th of September, 1868, proceeding mainly on a recent decision of the late Financial Commissioner, Mr. *Davies*, reversed the Orders of Major *Chamier* and Major *Barrow*, and affirmed the decision of the Court of first instance in favour of the Respondents.

This ruling was afterwards reviewed by Mr. *Tucker*, who succeeded Sir *George Couper* as Judicial Commissioner, and was confirmed by him on the 2nd of December, 1868.

These conflicting judgments, and the

(a) *See Mussumat Thukrain Sookraj Koovarree v. The Government*, 14 Moore's I. A., p. 113, 2, P. C. J., p. 705.

argument addressed to their Lordships on behalf of the Appellant, clearly show, that the question between the parties is not merely one of fact, but one involving the *ratio decidendi* in cases of the like nature.

The judgments of Major *Chamier* and Major *Barrow* proceed upon certain former rulings of the Revenue Courts in *Oude*. These are not before their Lordships, but their effect seems to be, that the principle of the Settlement was to be based on the maintenance of the proprietary right as it existed prior to, and at the time of the annexation of the Province to *British India* in 1856; that if, under the Kings of *Oude*, one member of the family had been registered as the sole Owner of the estate, and the person responsible for the revenue assessed upon it, it lay upon those who claimed to be jointly interested in it to show, not merely that they had received some indefinite and casual sums out of the profits, or even certain *Seer* lands by way of maintenance, but that the ostensible Owner of the estate had accounted to them for the aliquot share of its profits receivable by the Owners of the share claimed. These two Officers seem accordingly to have come to the conclusion that, inasmuch as the proof of joint interest, given by the Respondents in the Court of first instance to whatever it amounted, fell short of this, their claim ought to be dismissed, and the ostensible title of the Appellant allowed to prevail.

The decision, however, of Mr. *Davies*, on which the Judicial Commissioners proceeded, is admitted on all hands to have qualified the former rulings.

In that case it appeared, that the party claiming a joint interest against the party who was the ostensible proprietor, had held 71 *beegahs Seer* land, and had also received sums averaging Rs. 86. And Mr. *Davies'* judgment, after stating the question to be, whether the Respondent had, by the adverse possession of the Appellant, been excluded from his inheritance under the Mahomedan Law, proceeds thus: "Under the Mahomedan Law, Grandsons are entitled to equal shares. Under the custom of the Country one Shareholder represents the family before the Government, and manages the estate. It is by no means a general practice to give each sharer an account of his share of the profits at the close of the year. No safe inference against a Shareholder can be made from the omission. It was very frequently the case for acknowledged sharers to take only a sufficient sum for their own expenses; but this involved no relinquishment of their rights, nor did any cause of action arise until some quarrel took place between the parties." And from these propositions he inferred, first, that there was a legal presumption in favour of a Grandson claiming against another Grandson, and that the *onus* of proof should properly be placed on the one claiming to be sole possessor, contrary to law and custom; and, secondly, that in the case before him the Appellant had cut the ground from under his feet by paying to the Respondent, in addition to *Seer*, a sum of money of a fluctuating amount.

If their Lordships are called upon by the present appeal to overrule the decision of Mr. *Davies*, and to restore the rule supposed to be estabished by the earlier cases, they must decline to do so. That decision, after full discussion, was followed in this present case both by Sir *George Couper* and by Mr. *Tucker*; the principle which it lays down, having been thus sanctioned, has probably governed other Settlement cases since decided; and it appears to their Lordships to be far more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. In so far as it depends upon the custom of Mahomedan families holding lands within the former kingdom of *Oude*, it receives some corroboration from the findings of the Mahomedan Officer (presumably conversant with such customs) who tried this case, in the first instance, before the date of Mr. *Davies'* judgment.

It remains to be considered, whether the principle of that judgment has been correctly applied to the present case.

It was argued for the Appellant, that he has not been allowed an opportunity of proving the alleged Deed of gift to his

Father. There was nothing, however, to prevent him from proving this Deed, if he had the means of doing so, on either of the two trials before the native Officer. He chose, however, then, to rest his case on the Order, or copy of the Order, which, at most, proves no more than that, with the consent of the family at the time, the village, which had been entered in the Revenue Register in the name of the Widow of *Sheikh Aleemoollah*, was transferred into that of *Lootf Hossain* on the suggestion that he had been appointed by her as her successor. Their Lordships apprehend that such an arrangement was not uncommon; nor, if proved, would it, under the ruling of Mr. *Davies*, or even according to the stricter rule of their earlier cases, be conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. The decisions differ only as to the degree of proof required, and as to the party on whom the burthen of proof lies.

It is no doubt true that, before Major *Chamier*, the Appellant's Pleader proposed to give further evidence in support of his client's title under the alleged Deed of gift; and that that Officer, who had decided the other issues in favour of the Appellant, refused to admit it, stating, "I consider that the fresh plea of gift should not be entertained at the late stage of the case." But their Lordships are far from thinking that this refusal would have been improper had the decision of the Settlement Officer on the merits been the other way. And, however that may be, it appears to them that no substantial injury has been done to the Appellant by it. For it is clear, that the real issue between the parties is, whether, notwithstanding the title registered on the Revenue records, both branches of the family continued, as a joint family, to possess and enjoy the village. If that were made out, very little credit would be due to an ancient Deed of gift, by whatever proof supported, since it would be inconsistent with the proved possession and enjoyment of the estate.

Have then joint possession and enjoyment been established in the degree which satisfies the ruling in Mr. *Davies'* case? Their Lordships are not insensible to the looseness of much of the evidence taken before the native Officer. But they are of opinion, that there was before him legal evidence which (if believed) would warrant his findings, at least to the extent that the *Seer* land was enjoyed by the Respondents of right and not by favour, and that their *status* was not that of dependents but of co-proprietors, although the sums drawn by them from the profits may have fluctuated in amount, and not have been the subject of a regular accounting. This would satisfy the ruling of Mr. *Davies*, though it might not satisfy the requirements of the earlier cases on which Major *Chamier* and Major *Barrow* proceeded.

Their Lordships, in considering this appeal, have felt that, in cases of this nature, wherein the procedure is somewhat loose, and the merits depend much upon local custom and local inquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation Provinces to act on the principle of not disturbing the judgment under appeal unless they are satisfied that it is substantially wrong.

Here, after full consideration of the arguments for the Appellant, they have been unable to satisfy themselves that there is substantial error, either in the finding of the facts or in the principle of law that has been applied to them, and, therefore, they have come to the conclusion that, without calling on the other side, they ought to advise Her Majesty to affirm the Decree or Order of the Judicial Commissioner of *Oude* and dismiss this appeal with costs.

16th, 17th, 18th and 19th January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, at Fort William, in Bengal.

MUSSUMAT ANUNDEE KOONWUR, Widow of GUNPUT LAL,* ... *Appellant,*

versus

KHEDOO LAL, ... *Respondent;*

AND

MUSSUMAT MANKEE KOONWUR, ... *Appellant,*

versus

KHEDOO LAL, ... *Respondent;*

AND

MUSSUMAT POONPOON KOONWUR, ... *Appellant,*

versus

KHEDOO LAL, ... *Respondent.*

Benamee—Presumption—Joint Hindoo Family.

Suit by plaintiff to obtain a declaration of his right to a share of an estate, which he claimed to be joint family property, and to have his share allotted to him; the defendant contending that it was not joint property, but separate acquisitions after the separation of the family. *Held*, that the cesser of commensality was only material to the determination of the issues in the cause, in so far as it removed or qualified the presumptions which the Hindoo Law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family, and as part of the family estate; and That, though a cesser of commensality had taken place, the property claimed was joint family property.

* 14, Moore's I. A., p. 412.

26th March, 1872.

JUDGMENT was reserved and now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

In this case three distinct appeals against a Decree of the High Court of Bengal have been consolidated, and heard as one appeal. The principal questions raised are, what was the *status* of the Hindoo family of which the Appellants and the Respondent were members; and whether certain acquisitions are to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stand, and by whom they were ostensibly acquired.

The following is the history of the family in question. *Choonee Lal*, the Father, who died in October, 1854, had for many years carried on business as a cloth Merchant at *Sahibgunj*, in *Zillah Behar*, within that part of *India* in which Hindoos are governed by the *Mithila* Law. At the time of his death this business was carried on in his sole name; but he had previously, and up to the year 1851 or 1852, been in partnership, first with one *Rhadha Lal*, and, after the death of that person, with his Son, *Sreeneshen*.

All parties are agreed, that he had no ancestral estate, and that whatever property belonged to him was of his own acquisition. He had three Sons, viz:—*Gopal Chund*, the Respondent, *Khedoo Lal*, and the Appellant, *Gunput Lal*. About 1839, and after his Sons had reached man's estate, he married a second Wife, who survived him.

Gopal Chund, the eldest Son, became of unsettled, if not of unsound mind, in or before the year 1848, when he left his home as a *Beiragee*, or religious mendicant, and wandered away on pilgrimage, to various holy places. His Wife, the Appellant, *Massumat Mankee Koonwur*, tendered some evidence in this suit to show that he had been seen alive as late as 1858, and might be still alive; but both

the Indian Courts, discrediting that evidence, have come to the conclusion, that he had not been heard of for twelve years before the date of the first Decree; and proceeding on the presumption of Hindoo Law, have treated him as then dead (*a*). There is nothing however to show that he did not survive his Father. He had no male issue, and is represented on the record by *Mussumat Mankee Koonwur*, who, if he be dead, would, as his Widow and heiress, be entitled to succeed to his separate estate.

Gunput Lal, the younger Son, has died since his appeal from the decree of the High Court was allowed. He, too, had no male issue, and his appeal had been revived by his Widow and heiress, *Mussumat Anundee Koonwur*. He left, however, a Daughter, *Mussumat Poonpoon Koonwur*, who has an infant Son, *Lulloo Baboo*; and she is an Appellant against the Decree in respect of the interest which she claims in part of the property in dispute. *Khedoo Lal*, the Respondent, and the Plaintiff in the suit, has at least two Sons, *Brij Bhookun Doss*, and *Muhamed Lal*, of whom mention is made in the suit, but who are not parties to it.

From this statement of the family it follows, that the property of which *Choonee Lal* died possessed, whatever it was, descended to his Sons living at the time of his death, in equal shares. If *Gopal Chund* were then dead, the estate would descend to *Khedoo Lal* and *Gunput Lal* in equal moieties. And even if *Gopal Chund* is to be taken to have survived his Father, but to have died subsequently, and before a partition, his share, according to the *Mithila* law, would pass to his Brothers, to the exclusion of his Widow, who would be entitled only to maintenance. This does not appear to be contested. The question in dispute is, which, if any, of the various acquisitions of the family, standing in the separate names of different members of it, are to be treated as part of the estate of *Choonee Lal*, and descendible to his heirs.

The suit was commenced by the Respondent on the 1st of November, 1859. It was originally brought against *Gunput Lal* and the Daughter, *Mussumat Poonpoon Koonwur*, described as the Mother and guardian of *Lulloo Baboo*; and the plaint treated the share and interest of *Gopal Chund* as vested in his two Brothers. The Appellant, *Mussumat Mankee Koonwur*, however, intervened as an Objector in respect both of the share in his Father's estate to which *Gopal Chund*, if alive, was entitled; and of that part of the property claimed, which she insisted was his separate estate. And by an Order of the Principal *Sudder Ameen*, in whose Court the suit was brought, she was made a Defendant.

The plaint claimed a moiety of all the property specified in the schedule annexed to it, and valued at upwards of two lacs of rupees, the Respondent alleging that he had been dispossessed of it. Some objections have been taken to the frame of the suit on the ground that the Respondent has not included amongst the subjects of it that property which is held by him and his Sons in their respective names. But their Lordships are of opinion that, on a fair construction of the plaint in connection with the Respondent's written statement, which will be afterwards referred to, it must be held that he does offer to account for the whole of what is so held as part of his Father's estate.

The plaint, though it prays for delivery of possession, seems to be framed rather with a view to obtain a declaration of the partibility of the disputed subjects, than to carry out a partition by metes and bounds of the estate to be consummated by the delivery of actual possession.

The following are the issues settled in the suit:—

First, whether, according to the statement of the Plaintiff, the whole of the property in dispute belongs to the paternal estate and is undivided; or whether, according to the averment of *Gunput Lal* and *Mussumat Mankee Koonwur*, Defendants, part belongs to the paternal estate, and part has been acquired by *Gunput Lal* and *Gopal Chund* during the time of their separation and messing apart.

Second, whether the property mentioned

(*a*) See Strange's "Hindu Law," Vol. I., p. 188.

in the written statement of *Mussumat Poonpoon Koonwur* belongs to her or not.

Third, whether *Gopal Chund*, the Husband of *Mussumat Mankee Koonwur*, is missing, or whether he is residing near or in the North-western Provinces; and if he is missing, whether the claim of the Plaintiff to a moiety is right or not: and,

Fourth, whether the estimate of the effects, and goods and chattels in litigation, and the amount expended, is correct or not.

Before considering these issues and the evidence applicable to them, their Lordships think it desirable to pursue the history of the family.

It is admitted on both sides that, when his two elder Sons came of age, *Choonee Lal* opened for each a separate Cloth shop, and established him in it. The precise dates at which these shops were opened are not quite certain. The Respondent admits them to have been in existence before 1835, and the Appellants insist, that they were established before 1829.

According to *Mewa Lal*, a Witness for the Respondent and the Brother of his step-mother, they were established in the years 1829 and 1831. The Respondent appears to have followed his Father's example and to have opened two other Cloth shops, one in the name of each of his Sons. He insists, however, that all these shops and their profits were and are part of *Choonee Lal's* estate; whilst the Appellants, of course, contend that each was and is the respective property of the person in whose name the business was carried on, *Choonee Lal* having no interest therein. *Gunput Lal*, the third, remained for some time in the Cloth shop of *Choonee Lal* and *Rhadha Lal*, but, as he says, only as a *Gomastah* employed at a salary of Rs. 50 *per mensem*. Afterwards, and about the year 1844, a banking firm was opened in the names of *Gunput Lal* and *Sreekrishen Lal*, which was carried on in their names until 1850, when *Sreekrishen Lal* retired, and the business was thenceforward, and until the death of *Choonee Lal*, carried on in the names of *Choonee Lal* and *Gunput Lal*. The question what interest, if any, *Choonee Lal* had in this concern is one of the material issues in the cause; the Respondent contending, that the beneficial interest in the half-share during the partnership with *Sreekrishen Lal*, and the whole interest after the dissolution, belonged to *Choonee Lal*; the Appellants insisting, that he never had any interest in that *Kotee*, the half-share originally, and afterwards the whole, being the separate and self-acquired property of *Gunput Lal*. Again, both parties are agreed that, at the time of the death of *Choonee Lal*, his three Sons had ceased to live in commensality with him, or with each other. But the time at which such separation took place is in dispute, the Appellants contending, that it was complete in 1829, and Respondent insisting, that each Brother withdrew from the state of commensality with his Father at a different time, *viz.*, *Gopal Chund* about the year 1839, the Respondent about 1846, and *Gunput Lal* as late as 1852.

The state of the landed property standing in the names of the different members of the family is as follows:—

The Respondent, in his written statement, says that *Mouzahs Budem*, and *Murchundpore*, and *Rughoonathpore*, and *Jhěkutea*, in *Pergunnah Kotumba*, and two Houses and a Coachhouse situate in Street, No. 4 of *Sahebgunj*, were all acquired with the profits of the Cloth-dealer's shop bearing his name, and were then "under his control." These, as was before stated, do not form part of the properties specified in his plaint; but they are covered by the general conclusion of his written statement, which is in these words: "The conclusion is, that all the properties and effects, and moneys, and common articles of this estate bearing the name of your Petitioner's Father, or of any of the Brothers, or of any of the Sons, constitute the estate left by, and that acquired with the funds of, my Father." Of the landed properties specified in the plaint, some are admitted to be part of *Choonee Lal's* estate. But as to the rest, *Mouzah Tilhara* and an upper-roomed House in *Sahebgunj*, in which the banking *Kotee* has been carried on, are claimed by *Mussumat Mankee Koonwur* as the separate and self-acquired property of her Husband, *Gopal Chund*. Other parts are alleged to be the separate

and self-acquired property of *Gunput Lal*; whilst the several properties specified in her written statement are claimed by *Mussumat Mankee Koonwar* as "her exclusive property, with which neither the Respondent nor *Gunput Lal* has any concern."

Before considering the conflicting claims to these properties, it seems to their Lordships to be desirable to ascertain and determine, if it be possible, when the Brothers first became separate in food from their Father and each other—in other words, when that commensality, which is the normal condition of an undivided Hindoo family, ceased.

The finding of the High Court on this point is as follows:—

"We are of opinion that, from the admissions of the parties, and the dates of the purchases of the Houses in which the different Sons were established by their Father, the three Sons began to live separate from their Father at different dates, concurrent with or subsequent to their Father's second marriage in the year 1246 (A. D. 1839,) in which year the eldest Son, *Gopal Chund*, got a House to himself, while *Khedoo Lal* and *Gunput Lal* went into separate Houses in the years 1253 (A. D. 1846) and 1259 (A. D. 1851) respectively. We think, too, that there was from those dates an undoubted separation in food between the Father and each Son as he left the paternal house." The Appellants contend that, as early as 1829, the three Brothers had all become separate in food from their Father and from each other, and have argued at the Bar that the fact has been so found by the Principal *Sudder Ameen*.

The judgment of the Principal *Sudder Ameen* does not, as their Lordships read it, expressly fix the date of the separation; but its general effect is undoubtedly on this point more consistent with the case of the Appellants than with that of the Respondent. The evidence in the cause is conflicting and far from satisfactory. The finding of the High Court seems to proceed upon the several dates of the purchases of the houses in which the three Brothers ultimately came to live; and to assume that each Brother withdrew singly and at a different time from the state of commensality. This does not appear to their Lordships to be probable. On the other hand, the Witnesses for the Appellants, speaking with the usual inaccuracy of native Witnesses as to time, are not agreed as to the date of the separation. *Thanoo Chowdhree* puts it as late as 1834; *Goureesunkur* makes it as late as 1832. On the other hand, *Gunga Ram Kandoo*, though a Witness produced by the Respondent, supports, on this point, the case of the Appellants. *Mewah Lal* says, "I do not recollect the year, but when the family increased *Choonee Lal* provided his Sons with separate Houses and paid their expenses." On the evidence, their Lordships are by no means satisfied that the separation took place so early as 1829. On the other hand, they do not think that the date of each Brother's separation can safely be determined by the date of the purchase of the House in which he ultimately lived. They are disposed to think, that the separation took place on or shortly after the second marriage of *Choonee Lal* in 1839.

Another observation which arises upon the evidence in the cause, is that this cesser of commensality, whenever it took place, does not appear to have operated as a complete separation of the different members of the family, or to have prevented *Choonee Lal* from continuing to exercise many of the functions which would ordinarily belong to the head of an undivided Hindoo family. The whole family continued to reside in the same Town. Some of the Witnesses depose that marriages and other family ceremonies continued to be performed in *Choonee Lal's* House, and at his expense, as they would have been had no separation taken place. And this testimony is confirmed in the case of the marriage of *Mussumat Poonpoon Koonwur*, the Daughter of *Gunput Lal*, by a passage in the correspondence which will be afterwards referred to. Again, it appears by the evidence, that after *Gopal Chund* went away, his separate establishment was broken up, and his Wife and family returned to live under the same roof with *Choonee Lal*.

The cesser of commensality is only material to the determination of the issues

in the cause, in so far as it removes or qualifies the presumptions which the Hindoo Law might otherwise raise, that an acquisition made in the name of an individual Son of the family was made by the head of the family, and as part of the family estate. According to their Lordships' view of the evidence, it is not proved to have taken place at the date of some of the acquisitions which are in question in this suit; and the effect to be given to it, in weighing the conflicting evidence concerning transactions of a date subsequent to that at which it took place, is necessarily diminished by such evidence as that which has been just referred to.

Their Lordships will, in the first instance, following herein the example of the High Court, consider the evidence touching the earliest of the acquisitions in question—*Mouzah Tilhara*.

That property was purchased in the year 1835, at a revenue sale, in the name of *Gopal Chund*, for Rs. 4,400. Their Lordships, for the reasons above-stated, are disposed to believe that, at that time, the cesser of commensality relied upon had not taken place. They will, however, consider the evidence relating to this property, independently of any presumptions which might arise from the fact that the family was then joint in food. It may farther be admitted, that there is no documentary evidence corroborative of the assertion made by some of the Respondent's Witnesses that the purchase money was paid out of the funds of *Choonee Lal*; and further, that if the Shop carried on in the separate name of *Gopal Chund* was his own separate property, he may well at that date have been in a position to pay out of the accumulated profits of that Shop a sum of Rs. 4,400. It happens, however, that we have evidence concerning the enjoyment of this estate, which is wanting as to the other properties in dispute.

It has been proved, that this property between the years 1841 and 1855-56, was under several successive leases demised to *Nundcoomar* (one of the Respondent's Witnesses, and the Brother of *Choonee Lal's* second Wife), sometimes jointly with other persons, sometimes alone. One of the leases, that granted to *Nundcoomar* on the 10th of December, 1849, of course purports to be granted in the name of *Gopal Chund*, and is signed by him. But it is also countersigned by *Choonee Lal*. It was, indeed, suggested at the Bar, that the *Choonee Lal* whose name is so subscribed, being described as *Putwarree* of *Mouzah Sahibgunj*, was not the Father of *Gopal Chund*, but some other person of the same name. Their Lordships, however, see no reason for adopting that conclusion. A circumstance of far more importance is, that *Nundcoomar* has produced a long series of Letters addressed to him as tenant of this property by *Choonee Lal* in his life-time, and after his death by *Gunput Lal*. The genuineness of those Letters their Lordships have no reason to doubt. They cover a period from the years 1841 to 1856-57, when the tenancy of *Nundcoomar* terminated. Many of them, therefore, are anterior in date to the year 1848, when *Gopal Chund* left his home, and were written at a time when there is no reason to suppose he was of unsound mind or incapable of managing his affairs. It is, however, impossible, in their Lordships' opinion, to read these Letters without coming to the conclusion, that they were such as the real Owner of the estate would write to his tenant, and that they are inconsistent with the case made by the Appellants, viz., that *Kusba Tilhara* was the separate property of *Gopal Chund*, and was only managed for him and his family, after his insanity had declared itself, first by his Father and afterwards by his Brother, *Gunput Lal*. In the earlier years, rent and produce are acknowledged by *Choonee Lal* as received by him on his own account, without reference to *Gopal Chund*.

In the Letter, which is dated in 1252 or 1845, A. D. he writes: "Pay *Meer Gholam* 6 rupees for rent of Shop occupied by *Baboo Gopal Chund* for three months, and place it to my account, and it will be deducted from the rents."

In the Letter, which is dated in 1845, he complains of the rent being in arrear; requires 800 C. Rs. to be sent immediately, and says, "Do not delay, as I am desirous of sending the revenue to *Patna*. Till the revenue is sent and the receipt taken my

mind is not at ease, because it affects my landed property." A Letter written in 1843 is cited by the Judges of the High Court. It may be inferred from it both that *Choonee Lal*, as the head of the family, was about to celebrate the marriage of *Mussumat Poonpoon Koonwur*, the Daughter of *Gunput Lal*, and that he was requiring the tenant of *Kusba Tilhara* to send part of the produce of the estate to be used on that occasion.

In the Letter written in 1852, he reproaches *Nundcoomar* with being in arrear, and says "You are well aware that I was in need of expenses this year; it would have been proper for you to have advanced 10 rupees more by way of assistance; you might have taken credit in the following year;" and he threatens *Nundcoomar* with a proceeding in the nature of a distress. This is the language rather of the Owner of the estate than of a Trustee for the Master and absent proprietor.

In like manner, after the death of *Choonee Lal*, *Gunput Lal* writes in the character of proprietor, not in that of Manager for the absent *Gopal Chund*. He considers what repairs should be made; threatens his Uncle when in arrears, and reproaches him with having ill-used the *Ryots* and dependents. In the Letter, No. 393, he, too, requires produce to be sent for the marriage of *Baboo Laljee's* Daughter, with which *Gopal Chund* would seem to have no concern. In the Letter, No. 395, he writes, "You requested me to write a Letter to *Patna* that you should deposit the rents of *Kusba Tilhara* there; but I have no desire that money should be deposited there, as a large sum of mine is deposited there; therefore, I request you to send in cash the rent of *Kusba Tilhara* up to *Phagun*, instalment in full and soon."

Again, No. 387, written in 1856, is a remarkable Letter, for it not only gives various directions which imply ownership, but it contains the following passages, which seem to point to the joint interest of the Respondent in this property: "Uncle, I have been laid up with fever, therefore, I have sent *Khedoo Lal's* Brother for inquiry." And again, "Uncle, I have already written to you the full particulars; I have also explained to *Khedoo Lal's* Brother; please give *Khedoo Lal* your good opinion regarding my point he might ask and act accordingly."

Their Lordships can find no trustworthy evidence that either *Choonee Lal* or *Gunput Lal*, whilst thus acting and writing, accounted for the rents of this property to *Gopal Chund* or to *Gopal Chund's* family; and finding the direct evidence on the part of the Respondent thus corroborated, they concur in the conclusion of the Judges of the High Court, viz., that *Kusba Tilhara* was purchased by *Choonee Lal* on his own account, though in the name of his eldest Son.

Their Lordships will next proceed to consider what is the effect of the evidence as to the banking *Kotee* established in 1844, from which a considerable part of the family wealth seems to have been derived. The Appellant, *Gunput Lal*, has contended broadly that in this *Kotee*, *Choonee Lal* had no interest. It is, however, unquestionable that, after the dissolution of the partnership with *Sreekrishen Lal*, the business was carried on in the joint names of *Choonee Lal* and *Gunput Lal*; and the Principal *Sudder Ameen*, though his decree in other respects was averse to the Respondent, gave effect to the ostensible title, and held that *Choonee Lal* had a half-share in this *Kotee*. *Gunput Lal* has represented that, after the establishment of his Brothers in separate Shops, he remained in his Father's original Shop as a *Gomustah* at Rs. 50 *per mensem*. It is very difficult to believe that, by his earnings in this capacity, or by means of any other separate employment, he accumulated money enough to pay, in 1836, Rs. 7,500 for the lease of *Koorkihar*; to pay the price of the 8 *annas* of *Gorabhurat* purchased in his name in 1842; and finally to establish this *Kotee*. It seems to be far more probable that this business, which was originally carried on in partnership with *Sreekrishen Lal*, the partner of *Choonee Lal* in the cloth shop, was, in fact, established and carried on by *Choonee Lal*, though in the name and with the aid of the personal services of his youngest Son. At all events, it lay upon *Gunput Lal*, in whose dominion the Books of this concern

were, to show far more clearly than he has done that his Father had either no interest, or only a limited interest, in this concern. And upon the evidence as it stands, their Lordships can find no sufficient grounds for dissenting from the conclusion of the High Court that the banking-house was, at the time of his death, the sole property of *Choonee Lal*.

In their Lordships' opinion the fate of the appeals must be determined by the findings upon these two questions—the real ownership of *Kusba Tilhara* and the interest of *Choonee Lal* in the banking *Kotee*. For, whilst the Respondent has broadly contended, that everything which stood in the name of any member of the family belonged to *Choonee Lal*; so the Appellants have as broadly contended, that nothing was *Choonee Lal's* except that which stood in his own name; and that *benamee* transactions were unknown to the family. It is hardly possible upon the evidence to draw a definite line between these two cases. The difficulty of doing so is greatly increased by the finding as to the *Kotee*; since, unless he had the separate interest, which he says he had, in that *Kotee*, it is difficult to see whence *Gunput Lal* derived the funds by means of which many of the purchases in his own name were made. Their Lordships are not insensible to the difficulties of the other side. If the evidence as to the Shops carried on in the separate names of *Gopal Chund* and of the Respondent and his Sons had stood alone, their Lordships would have inclined to the opinion, that they were separate property. It is, however, to be observed as to these, that the Respondent admits that the separate Shops opened in his name or in the names of his Sons, and all the investments made out of the profits of these shops form part of the joint family estate; and their Lordships for the reasons above given have found that *Mouzah Tilhara*, the principal and almost the only property alleged to have been purchased by *Gopal Chund* out of the profits of his Shop, was in fact purchased by *Choonee Lal* in the name of his Son. The *Ikrahnamah*, again, though it does not touch directly any of the properties in dispute, affords a strong inference in favour of the theory of separate interests and separate transactions; and it is difficult to explain why so elaborate a contrivance should have been adopted in order to shift property belonging to the Father from the name of one Son to that of another. The case is one which a native *Punchayet* composed of persons conversant not only with native customs, but with the circumstances of this family, knowing what questions to put to the parties, and what accounts to call for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in *India* or *England* to try satisfactorily. Their Lordships have, in this case, felt much doubt and difficulty in dealing with a record, the value of which is by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts. But, upon the whole, and for the reasons above stated, they have come to the conclusion, that it is their duty to advise Her Majesty not to disturb the carefully considered judgment of the High Court, so far, at least, as relates to the acquisitions of the family in the lifetime of *Choonee Lal*. As to those which have been made after his death, the eight *annas* of *Backergunj*, purchased in *Gunput Lal's* name, cannot be supposed to have been purchased otherwise than out of the family funds in *Gunput Lal's* hands. There is more difficulty in respect of the lease of *Koorkihar*, which has been renewed in the name of the Appellant, *Musumat Poonpoon Koonwur*. But their Lordships are of opinion, that she has failed to show, as she might have shown, that this renewal was paid for by her own funds. They believe, on the evidence, that the money came from *Gunput Lal*, and if it came from *Gunput Lal* it must be presumed, like the purchase-money of *Backergunj*, to have come from the family funds. Therefore, on this point also, their Lordships think the judgment of the High Court should be affirmed.

On the argument of the appeal it was contended for the Appellants, and admitted on behalf of the Respondent, that the Decree of the High Court would in any case require some qualifications. Their Lordships are also of that opinion; but, as

at present advised, they are not sure that it will require any alterations except the introduction of a declaration that the separate shops carried on in the separate names of the Respondent, and of his two Sons, and also the landed properties admitted by the Respondent to have been purchased out of the profits of those shops, and to be under his control, are also part of the estate of *Choonee Lal*, deceased; and that in estimating the half-share of the Respondent in that estate, he should give credit for those assets, and any other portion of the estate in his possession or control.

Having regard to the necessary alterations in the Decree, and to the nature of the suit, their Lordships think that each party should bear their own costs of the appeal.

The form of the Decree, as altered, in pursuance of their Lordships' recommendation, will be as follows:—

It is ordered and decreed that the Decree of the Lower Court be and the same is hereby reversed, and the suit of the Plaintiff, *Khedoo Lal*, for a half-share of all the property real and personal left by his Father, *Choonee Lal*, deceased, decreed: And it is declared that the estates and landed property standing in the names of *Gopal Chund* and *Gunput Lal*, or of any other person or persons, *benamee*, or in trust for them or any of them, are the property of the said *Choonee Lal* deceased, and acquired with his funds: And it is further declared, that the lease of *Mouzah Koorkihar* was renewed with the funds, not of *Mussumat Poonpoon Koonwur*, but of the family, which were then entrusted to the Defendant, the said *Gunput Lal*: And it is further declared, that the banking house, as well as the House property claimed, were the sole property of the said *Choonee Lal* deceased: And it is further declared, that the Shops carried on in the separate names of the said Plaintiff *Khedoo Lal*, and of each of his two Sons, and *Mouzahs Budun*, and *Hurchundpore*, and *Rughoonathpore*, and *Jheseteea*, in *Kotumba*, and the two Houses and Coachhouse in Street No. 4 of *Sahebgunj*, which are all mentioned in the written statement of the Plaintiff, *Khedoo Lal*, and any other property standing in the names of the Plaintiff and of his two Sons, or any of them or of any other person or persons, *benamee*, or in trust for them or any of them, were also the property of *Choonee Lal*, and part of his estate: And it is further declared, that the Plaintiff is entitled to a half share of the estate of his Father *Choonee Lal* deceased; but that in estimating such half-share the Plaintiff is to be charged with the value of such of the above-mentioned properties as are in the possession or control of him or of his said Sons or any of them, and with the mesne profits thereof: And it is further declared, that the said Plaintiff is entitled to recover Rs. 17,575. 13 as., being a moiety of the sum of Rs. 35,151. 10 as., being part of such estate, and fixed by the Lower Court as the mesne profits of the said Banking house: And it is further declared, that the said Plaintiff is also entitled to a half-share of all mesne profits obtained from the landed property left by the said *Choonee Lal* deceased since the date of his demise. And it is further declared, that the Defendant, *Mussumat Mankee Koonwur*, the Wife of *Gopal Chund*, one of the Sons of the said *Choonee Lal* deceased, who is said to be missing, is entitled to maintenance out of the said estate, which will be awarded by the Lower Court in execution, if required: And it is further ordered and decreed, that the said Defendant, *Mussumat Anundee Koonwur*, as the Widow and heiress, according to Hindoo law, of the said Defendant, *Gunput Lal* (now deceased), from and out of the estate and effects, if any, which may have come into her hands or into her possession, do pay the said Plaintiff the sum of Rs. 3,012, being the amount of costs incurred by him in the High Court of *Bengal*, with interest thereon at the rate of twelve *per cent. per annum* from the date of the Decree of the said High Court to the date of realization thereof: And it is further ordered and decreed, that the said Defendant, *Mussumat Anundee Koonwur*, as such Widow and heiress in like manner, and from and out of the same estate and effects, do pay to the said Plaintiff the costs incurred by him in the Lower Court, with interest thereon at the

rate aforesaid, from the date of the Decree of the said Lower Court to the time of realization.

19th & 20th January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Pool.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

MUSSUMAT AMEEROONNISSA KHANUM and MUSSUMAT PARBUTTY,* ... ... } *Appellants,*

versus

MUSSUMAT ASHRUFOONNISSA, ... } *Respondent.*

Resulting Trust.

The very principle of a resulting trust is, that the property has been purchased with money belonging to another, with an implied trust that it should belong to that other person.

But, if it was the intention of the person to whom the money belonged, that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts.

JUDGMENT was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:

This is an appeal from a judgment and Decree of a division Bench of the High Court of Calcutta which affirmed the Decree of the Principal *Sudder Ameen* of *Bhaugulpore*, dismissing the suit of the Appellants. The suit was brought to recover possession of the *Talook, Nisf Ambey*, which had been purchased by *Velayet Hossein* in his own name as long ago as the year 1848. The suit was not commenced till the 16th of February, 1859, nearly eleven years after the purchase.

The suit is brought upon the alleged ground, that the moneys with which the purchase was made were not the moneys of *Velayet Hossein* himself, but of a Lady named *Belkissoonnissa Begum*, with whom he was living as her Husband. It was admitted by Sir *Roundell Palmer*, that it was not a *benamee* transaction; that *Belkissoonnissa Begum* had not desired that the estate should be bought in her name, and that there was no intention on her part to purchase an estate for herself; but Sir *Roundell Palmer* put the case on the ground that the money, although it was her money, belonged in fact to an *Imambarah*, of which she was the Owner, as a sort of lay Owner, and that there was a resulting trust in favour of the *Begum*, in consequence of the money with which the estate was purchased having been so provided.

Now, it is plain, that if the money did not come from the source indicated, or if the purchase was made in the name of *Velayet Hossein*, with the consent of *Belkissoonnissa Begum* that it should be so purchased for him, there is then no resulting trust. The very principle of a resulting trust is, that the property has been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts.

The facts of the case are extremely simple. It seems that *Belkissoonnissa Begum* was a Lady of good family and considerable fortune and that one of the properties which she had was the *Imambarah*. She was, when young, betrothed to her Cousin, *Sha Ali Reza*, but it seems, either that she never cohabited with him, or that at all events she lived in his House but for a short time, and then they se-

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14, Moore's I. A., p. 333.

parated. The cause of the separation appears to have been, that *Sha Ali Reza* refused to pay her dower, and the Mother of *Belkissoonnissa Begum* then withdrew her from his House. That being her position, in the year 1842 she formed relations with *Velayet Hossein*, and it appears that she lived with him as her Husband until her death in January, 1849. It is plain, that during the period of seven years which elapsed whilst they were so living together, *Velayet Hossein*, although he might not have been possessed of property at the time when these relations commenced, had probably during that period gifts from her, or he may have been allowed to receive the income of her property and to appropriate a part of it to his own use. It appears that in the year 1848 the Lady was in failing health, and in that year this purchase was made. It appears to have been a purchase made at a revenue sale, and the purchase was made in the name of *Velayet Hossein*. All the instruments of title were made out in his name, and he was registered as the Owner of the estate. This happened ten months before the death of the *Begum*.

Now, an instrument has been put in and relied on by both sides, a *Mooktarnamah*, dated the 15th of April, 1848, in which *Velayet Hossein* appoints four persons as his *Mooktars* to purchase and pay for this estate, and one of those persons is *Mudun Gopal*, who was the *Dewan* of the *Begum*, with whom he was living.

It is said, that there is evidence that the earnest money and the consideration money were provided by the proceeds of jewels and other valuables which belonged to the *Imambarah*, and their Lordships cannot fail to see that the case, as originally put, was, that *Velayet Hossein* was the *Shajada* of the *Imambarah*, and that he had used the money which he held as *Shajada* in trust for the *Imambarah*, to make this purchase. The first two issues were framed to raise those questions, but the Principal *Sudder Ameen* has found, and he seems in that to have been well grounded upon the evidence, that there was no existing *Imambarah* in the sense of any place of worship which might be said to have its property belonging to it, as distinct from the ownership of the *Begum*; that it was a sort of lay *Imambarah*, and that, although he may have called himself *Shajada*, as he does in this document, it really was more a title of honour which he had assumed, or a nominal appointment of *Shajada*, than any real *status* which he had or anything which put him in the position of a Trustee for an *Imambarah* as distinguished from any property which his wife had. The property of the *Imambarah* belonged to the *Begum*, as her other property would do, and, as was admitted by the learned Counsel for the Appellant, she might have disposed of it as she thought fit.

Now, first of all, did the High Court come to a wrong conclusion in saying, that it was not proved to their satisfaction that the money which was paid for this estate was the proceeds of the property of the *Belkissoonnissa Begum*? There is a good deal in the evidence to show that the jewels belonging to the *Belkissoonnissa Begum* were brought to Bankers and others and sold, but a great deal of that evidence is hearsay, and the Court seems to have come to this conclusion, for they say, "Although there is some evidence which if entirely believed would establish that the money did come from that source, yet, taking all the circumstances of the case into consideration, we cannot act upon it; we cannot say with sufficient certainty that that evidence is true." One circumstance upon which they strongly rely is, that this suit was brought after the deaths of all the parties who knew the transaction and who could have explained it. *Belkissoonnissa Begum* was dead; *Velayet Hossein* was dead; the *Dewán* was dead. Those three persons knew exactly what the transaction was; and, certainly, when the suit is brought to set aside a purchase which was made eleven years before, which has remained unimpeached from the time when it was made until the institution of the suit, every Court would be bound to look with very great jealousy at the evidence which is brought forward in order to support such a case.

But assuming that the High Court are

not well founded in the conclusion to which they came, that no part of the money was proved to have come from the proceeds of the sale of the jewels belonging to the *Belkissoonnissa Begum*, still their Lordships think, that there was evidence to support the conclusion of fact to which the Principal *Sudder Ameen* arrived, and therefore, that it is unnecessary to decide the question which the High Court took upon themselves to determine. What the Principal *Sudder Ameen* thought of the case was this, that some of the money might have come from the *Belkissoonnissa Begum*, but he said, in effect, "Assume that it did so come; there is to my mind very strong evidence from the facts of the case, that that was a gift on the part of the *Belkissoonnissa Begum*, and that she intended to do something for the benefit of the man who had been living with her for seven years." Her Husband, *Sha Ali Reza*, had in fact been the cause of her separation from him by his refusal to pay her dower. She had formed relations with *Velayet Hossein* as a second Husband, although it was not a marriage which was warranted by law; still he lived with her as her Husband, and apparently upon very good terms. It was, therefore, very natural, if she found that she was in bad health, that she should have been desirous to make some provision for his benefit. It is also, their Lordships think, extremely probable that he had money of his own, for several of the Witnesses speak to his having had money of his own at various periods after his marriage, though he may not have been a man in good circumstances before. The evidence upon which the conclusion is founded, that she gave him some of the money, and that he bought this estate in his own name with her consent, is found in her acquiescence during her life-time, and their Lordships also think it is found in the acquiescence of *Sha Ali Reza* after her death. *Sha Ali Reza* was certainly not sleeping upon his rights. He was living near these parties. He instituted a suit to set aside a Deed of gift which was set up by *Velayet Hossein*, but he took no steps during his life-time to impeach the purchase; there is the strongest inference to be drawn from his acquiescence in it. What could have been the ground of his acquiescence? The ground of his acquiescence must have been, that he knew that the purchase which was made by *Velayet Hossein* was not made for his Wife, but was made, with her consent, for *Velayet Hossein* himself. One Witness for the Appellant, named *Enayet Hossein*, gives evidence which fortifies the view taken by the Principal *Sudder Ameen*. He says of *Velayet Hossein*, "he had not means formerly, but when he got married at *Karagoluh* he became rich," and then he says, "the possession of *Sha Walayet Hossein* since his purchase continued without opposition, and after the sale the *Bebee* of the *Sha* died at *Bhaugulpore*. I cannot say after how long she died. She used to live with her Husband and she did not claim the *Talook*." There is thus strong evidence of her acquiescence, as well as of all the persons most interested in the transaction. The purchase was made by her own Agent, who was appointed for that purpose by *Velayet Hossein*, and she appears to have been perfectly satisfied afterwards. It seems, also, to their Lordships that the whole history of the parties, and the probabilities of the case strongly confirm the view originally taken by the Principal *Sudder Ameen*.

It was contended that this view of the case was not raised by the issues.

Their Lordships would be disposed to decide the appeal upon the substantial merits, unless they had reason to suppose the parties had been misled by the form of the proceedings; and although it may be true that the above view is not expressly stated, they think it in effect involved in the first two issues, which were founded on the hypothesis of the misappropriation of the property of the *Imambarah* by *Velayet Hossein*, as *Shajada*, and the same view is open upon the general question raised in the third issue.

On these grounds, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court of Judicature, and to dismiss this appeal with costs.

22nd January, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at fort William, in Bengal.

RADHABENODE MISSER,* ... *Appellant*,

versus

KRIPA MOYEE DEBEA, ... *Respondent*.

Mortgagee in possession—Account—Regulation XV. of 1793.

In taking the accounts as between a mortgagor and a mortgagee in possession, the interest may be set-off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the sums which he may have received over and above the interest due to him upon the debt.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:

In this case the question admits of being very shortly stated. It is this, whether the ordinary rules applicable to mortgages expressed in the passages in Mr. *Macpherson's* Book on the Law of Mortgages, referred to by the High Court, do or do not apply to the present case? It was contended, that they did not apply to the present case because their application is expressly excluded by an Agreement between the parties; and if their Lordships had come to this conclusion they would, undoubtedly, have given effect to terms of that Agreement.

The construction of the Agreement which is contended for on the part of the Appellant is this, that the Mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payment of interest which properly would accrue, at all events annually, carry no interest itself, which no doubt is the ordinary rule. On the other hand it is said, that the Mortgagor is entitled to call the Mortgagee to account for the whole of the annual proceeds of the property, less the expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that while on the one hand the Mortgagor can charge the Mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the Mortgagee on the other hand can only charge the Mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that, whereas in this case, it appears very clear, that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest on the principal sum, yet, nevertheless, after a long period of time, the Mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance from the Mortgagee. Of course the parties might have so agreed, if they pleased, but their Lordships would be loth to put such a construction upon the Agreement unless they were compelled to do so by very plain words.

On looking at this Agreement, more especially at the 6th and 10th paragraphs, which have been referred to, and to the precise terms of which it is not necessary to refer again, their Lordships, on the whole, think, that these paragraphs and the Agreement generally, which is drawn by no means in clear terms, are not inconsistent with the supposition, that the parties intended that the interest might be set off, from time to time, against the rents and profits, and that the Mortgagee was only to account to the Mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion, that that interpretation is not inconsistent with

* 14, Moore's I. A., p. 443; 10, B. L. R., p. 386.

the contract, according to the best construction they can give to it, it follows, that the rule stated by *Macpherson* on mortgages is not excluded by the terms of this Agreement.

Their Lordships think it right also to add that, even assuming the construction which has been contended for on the part of the Appellant, certainly an unusual one in Agreements of this kind, their Lordships are not prepared to say, that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the Mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion, that Regulation XV. of 1793, sect. 7, does not apply to transactions of this kind.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

22nd and 23rd January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

KRISTO KINKUR ROY and another,* ... } *Appellants,*

versus

RAJAH BURRODACAUNT ROY and another, ... } *Respondents.*

Limitation—Act XIV. of 1859, *ss.* 19, 20 (1)—*Execution of Decree—Courts established by Royal Charter—Proceeding to enforce decree.*

Where the High Court passes a decree on appeal from a *Mofussil* Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees.

An appeal prosecuted to a decree is a proceeding to enforce a decree within the meaning of s. 20 of Act XIV. of 1859. Also *held* there was such a proceeding where, on the judgment-debtor seeking to obtain leave from the High Court to appeal to the Privy Council, the execution-creditor intervened.

The ruling in *Chowdry Wahid Ali* v. *Mullick Inayet Ali* (2) that whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, not dissented from, except that it was suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree

Quære,—Can the ruling in *Anundmayi Dasi* v. *Purno Chandra Roy* (3) be supported?

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* 14, Moore's I. A., p. 465; 10 B. L. R., p. 101.

(1) See Act IX. of 1871, 2nd Sched., Nos. 166 to 169.

(2) 6 B. L. R., 52.

(3) Case No. 569 of 1865; 24th August 1866.

3rd February, 1872.

JUDGMENT having been reserved, was now delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

This appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The Appellants, on the 25th of March, 1862, obtained a judgment against the Respondents for the sum of Rs. 9,500, with interest, from the date of the plaint, and costs of suit on a claim founded on an Agreement to pay to the Appellant, *Kristo Kinkur Roy*, an allowance of Rs. 900 *per annum* by way of maintenance.

The Respondent, *Rajah Burrodacaunt Roy*, appealed against this Decree to the High Court of *Calcutta*, but by the Decree of that Court made on the 8th of June, 1863, it was ordered and decreed, that the Decree of the Lower Court should be, and the same was thereby affirmed; and that the Defendant Appellant, should pay to the Plaintiffs Respondents the sum of Rs. 350, being the costs of the appeal, with interest thereon at the rate of twelve *per centum per annum* from the date of the Decree to the date of realization.

A petition of appeal to Her Majesty in Council against the Decree was then presented by the *Rajah*. He tendered security for costs, and the usual reference was made to ascertain its sufficiency. But the security was never perfected. On the 8th of April, 1865, he presented a petition to the Court, suggesting that negotiations for a compromise between him and the Appellants were pending, and praying that proceedings in regard to the appeal to *England* might be stayed for two months. On the same day the Appellants filed a petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th of August, 1865, made an Order "postponing the case for two months, as there were hopes of the parties coming to an amicable settlement." The two months expired on the 6th of October, and nothing came of the negotiations: and, on the 9th of May, 1866, the High Court struck the appeal off the file in default of prosecution.

On the 22nd of April, 1867, the Appellants made their first application to the *Zillah* Court for execution against the Respondents. Their application was in the tabular form prescribed by section 212 of the Code of Procedure, which requires the date of the Decree of which execution is sought to be mentioned with other particulars. The only Decree so specified was the Decree of the 25th of March, 1862. But the fact of its affirmance on appeal was stated in the next column, and the amount sought to be levied included the Rs. 350 decreed by the High Court as the costs of the appeal. On the 27th of April, 1867, the *Zillah* Judge rejected the application for execution, on the ground, that it was barred by section 20 of Act, No. XIV. of 1859, no step having been taken since the 8th of June, 1863, to keep the Decree in force within the meaning of that section.

The Appellants appealed from that decision to the High Court, which Court, on the 27th of November, 1867, ruled, that in so far as the Appellants sought to realize the amount decreed to them by the original Decree, their application for execution fell within the three years' limitation of the 20th section; but that, inasmuch as their claim for Rs. 350, the costs of the appeal, rested on the Decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under the 19th section of the Limitation Act, to sue out execution for that amount at any time within twelve years from the date of that Decree; and the case was sent back to the *Zillah* Court with instructions to deal with it accordingly. The Appellants have brought this appeal against so much of this Order as held that their right to execution for any part of their demand was barred, but there has been no cross appeal against that part of the Order which was in their favour.

The argument on this appeal has raised the following questions:—

First, is the execution of Decree of the High Court made on appeal from one of

the Courts in the *Mofussil* to be governed by the 20th or by the 19th section of Act, No. XIV. of 1859? or, in other words, is it subject to the three years or to the twelve years' rule of limitation?

Secondly, what is the effect of a Decree of the High Court affirming a Decree of a *Zillah* Court? Is it to be taken to incorporate the latter in itself, so that for the purposes of execution, the Decree to be executed is to be taken to be a Decree of the High Court?

Thirdly, if, on any ground, the Decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of the 20th section been done within three years of the date of the application for execution?

Upon the two first and general questions there have been conflicting decisions by the High Courts in *India*.

The Order under appeal appears to have been the earliest which decided that Decrees of the High Court were within the 19th section. It has been followed at least in one case in *Bengal* decided as lately as the 6th of September, 1870, *Chowdhry Wahed Ali* v. *Mullick Inayet Ali* (6 *Ben.* L. R., p. 52); and it has been recognized as sound law by the High Court of *Bombay* in the case of *Ba'pura'v Krishna* v. *Madhavra Ra'mu'v* (5 *Bom.* High Court Reps., 214.) But in two cases, *In re Arunachellathudayan* and *In re Veludayan* (5 *Mad.* H. C. Apps., 215), decided by the High Court of *Madras*, on the 4th of March, 1870, it was ruled by Chief Justice *Scotland*, and Mr. Justice *Bittleston* (apparently without any dissent on that point on the part of the other Judges composing the Full Bench of the Court), that a Decree of the High Court made on appeal from a *Mofussil* Court, is not a Decree of a Court established by Royal Charter, within the meaning of the 19th section of the Limitation Act, and is a Decree subject to the provisions of the 20th section of that Act. It may be observed that, neither in these *Madras* cases, nor in that decided at *Bombay*, was the determination of this question essential to the decision of the Court upon the particular appeal before it; since in none of them had the period of three years' limitation, if calculated from the date of the Decree of the appellate Court, expired. This ruling, however, of Chief Justice *Scotland*, appears to have led to a reconsideration of the question by the High Court of *Bengal*.

Their Lordships find that in a case, *Ram Churn Bysack* v. *Luckhee Bornick*, not cited at the Bar during the argument (which is to be found among the Full Bench rulings of the High Court of *Bengal* in the 16th volume of the Weekly Reporter, p. 1; the 12th of June, 1871), a Division Bench of the High Court referred for the determination of the Full Bench two questions, in the following terms:—First, whether a Decree of the District Court affirmed on appeal by the High Court becomes a Decree of the last-mentioned Court; and, secondly, whether execution of that Decree of affirmance passed by the High Court is to be governed by the provisions of section 19 of the Limitation Act, No. XIV. of 1859, or section 20 of that enactment, *i. e.*, whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Justice *Norman* (then acting as Chief Justice), and the Justices *Loch*, *Bayley*, *Macpherson*, and *Dwarkanath Mitter*, unanimously decided the first of these questions in the affirmative; and ruled on the second, that when, under section 361 of the Code of Procedure, a Decree of the High Court on its appellate side is transmitted to the District Court, which passed the first Decree in the suit for execution, it will have the effect of a Decree of such Court, and must be executed within the period limited by the 20th section of Act, No. XIV. of 1859.

The preponderance, therefore, of authority in *India* is now in favour of the proposition, that the execution of Decrees of the High Court, made on appeal from the District Courts, is subject to the three years' rule of limitations.

Their Lordships are of opinion, that this conclusion is correct.

The object of Act, No. XIV. of 1859, was to carry out a recommendation made many years before by the Law Commissioners for *India*, by passing one general

law of limitation applicable to all Courts in *India*. It is hardly necessary to remark that the Legislature, in framing the Act, had then to deal with two distinct judicial systems—the one consisting of what had been the Courts of the East India Company, and may here be called the *Mofussil* Courts; the other, the Courts established in the Presidency Towns and elsewhere by Royal Charter, and administering to all within their jurisdiction, subject to certain statutory exceptions and modifications, the law of *England*. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency Towns; whilst the law of limitation which governed the latter consisted of the Statute of *James* the First, together with such other portions of the Statute Law of *England* applicable to the subject (if any) as had been introduced into *India*, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in *England*. It is not surprising that, in framing a law designed to be common to both systems of judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons which approved themselves to the minds of those who were conversant with the administration of justice in the *Mofussil*, to subject the execution of the Decrees of the *Mofussil* Courts, whether of appellate or of original jurisdiction, to the three years' limitation; whilst, on the other hand, being pressed by the weight and value which the Law of *England* gives to a judgment or Decree of a superior Court, it determined not to reduce the period for enforcing the Decrees of the Supreme Courts to less than twelve years. Hence the distinction made by the 19th and 20th sections of the Act, in which the term "Courts established by Royal Charter" was obviously used not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not it is needless to inquire) certain existing Courts, viz., the Supreme Courts in the three Presidency Towns, and the Recorders' Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions, which might thereafter be established. The same term, it may be observed, is to be found in the preamble of Act, No. VIII. of 1859 (the Code of Procedure,) which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of Judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24th and 25th *Vict.* c. 104, and the 28th *Vict.* c. 15. It will be convenient to speak only of the High Court of *Bengal*. The general scheme of the amalgamation was to constitute one general Court, of which the Judges sitting in various divisional Courts were to exercise the functions both of the Supreme Court and the appellate *Mofussil* Courts (the *Sudder Dewanny Adawlut* and the *Sudder Nizamut Adawlut*,) all of which were abolished.

The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court, to be exercised by it as a Court of original jurisdiction; and the powers and jurisdiction of the appellate *Mofussil* Courts were transferred to it, to be exercised by it as an appellate Court. But the law to be administered by it as a Court of original jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the *Mofussil* Courts was necessarily that of those Courts. The Code of Procedure (Act, No. VIII. of 1859) was indeed made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act, No. XIV. of 1859.

So far, therefore, there can be no ground for inferring that there was any intention on the part either of Parliament or of the Crown to alter the period within which a Decree made on appeal from a *Mofussil* Court could be executed. The Decree,

like the Decree of the former *Sudder Dewanny* Court, was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned Judges who decided the case now under appeal, has admitted that his construction involved consequences "absurd" in themselves, and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, No. VIII. of 1859, that the High Court of *Madras*, and the High Court of *Bengal* in its decision of the 12th of June, 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter," in the broad and general sense of the term, were not when exercising their appellate jurisdiction from the *Mofussil* Courts, such Courts within the meaning of Act, No. XIV. of 1859.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases. But if those words be held to import the Court issuing the process of execution, *i. e.*, the *Zillah* Court, the difficulty would equally have applied to the Decree of the former *Sudder* Court, which, not being the Decree of a Court established by Royal Charter, would have been subject to no rule of limitation. It seems necessary to construe the words "such Court" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, therefore, though it is to be regretted that the Indian Legislature did not, upon the amalgamation of the Courts, provide more precisely for the application of the Limitation Act, and possibly of other Statutes to the new Court, their Lordships are of opinion, that the first question ought to be determined in accordance with the rulings of the High Court of *Madras*, and the Full Bench of the High Court of *Bengal*. The sound and convenient rule is undoubtedly that the Court which has to execute the Decree of the High Court, should be governed by the rules which govern the execution of its own Decrees, and their Lordships do not feel constrained by the words of the Statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal; since it is admitted, that the period of three years, if calculated from the date of the Decree of the High Court, had expired before the application for execution was made.

Nor, indeed, is the general question, upon which there have also been conflicting decisions in *India*, of much practical importance; since it is admitted, that the date from which the three years are to be calculated is the date of the Decree of the appellate Court; whether that Decree is to be treated as the Decree to be executed; or the appeal of which it is the termination is to be deemed "a proceeding taken to keep the original Decree in force." That an appeal prosecuted to a Decree would be such a proceeding is shown both by the judgment of the Full Bench delivered by Chief Justice *Peacock*, in the case of *Bipro Doss Gossain* v. *Chunder Seekur Buttacharjee*, (7th W. R., p. 521); and also by the Judgment of this Board, delivered by Lord *Cairns*, in the case of *Maharajah Dheeraj Mahtab Chand, Bahadoor* v. *Bulram Singh* (13 *Moore's* Ind. App. Cases, pp. 479, 488.)

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle, that a simple decree of affirmance did not so incorporate the mandatory part of the original Decree as to make, for all purposes, the Decree of the appellate Court the sole Decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahed Ali* v. *Mullick Inayet Ali* (6 *Ben.* High Court Reps., p. 52), in which it was ruled that, in order to make the Decree of the appellate Court the final Decree in the suit for all the purposes of execution, it was necessary, that it

should have decreed a material modification of the original Decree. The rule, so expressed, seems open to the objection of vagueness The Full Bench of the High Court of *Bengal*, however, in the decision of the 12th of June, 1871, already referred to, has ruled that, whether the Decree of the Lower Court is reversed, or modified, or affirmed, the Decree passed by the appellate Court, is the final Decree in the suit; and, in the words of Mr. Justice *Mitter*, "as such the only Decree which is capable of being enforced by execution." And that is in accordance with the *Madras* decision already cited. Chief Justice *Scotland's* words are "whether that Decree be in affirmance, or reversal, or modification of the Decree appealed from, it becomes the final Decree in the suit, and therefore the Decree enforceable by execution."

The function of an appellate Court is to determine what Decree the Court below ought to have made. It may affirm, reverse, or vary the Decree under appeal. In the first case, it leaves the original Decree standing, superadding, it may be, an Order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the Decree of the appellate Court may be regarded either as a direction to the Lower Court to make and execute a Decree of its own accordingly, or as an independent Decree, whether it is to be executed by the appellate Court or by the Lower Court. In the latter case a further question arises, viz., whether the original Decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the Decree of the appellate Court as the sole Decree capable of execution, or whether both Decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one and not expressly enjoined by the other.

In this Country the nature and effect of a Decree on appeal would seem to vary according to the nature of the Decree under appeal, the constitution of the appellate Tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that Code, whatever Decree is executed, is to be executed by the Lower Court, in which the record remains, or to which it is to be returned.

But sections 360, 361, and 362 (*a*), which prescribe the form of the Decree of the appellate Court, direct a copy of it to be entered on the Register, and treat that Decree as a Decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain Decree.

If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz.: that the execution ought to proceed on a Decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for the reasons already given, the question is not of much practical im-

(*a*) "Section 360. The Decree of the appellate Court shall bear date the day on which the judgment was passed. It shall contain the number of the suit, the names and descriptions of the parties, Appellant and Respondent, and the memorandum of appeal, and shall specify clearly the relief granted or other determination of the appeal. It shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the original suit are to be paid.

"Section 361. A copy of the Decree or other Order disposing of the appeal, certified by the appellate Court or the proper Officer of such Court, and sealed with the seal of the Court, shall be transmitted to the Court which passed the first Decree in the suit appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the original register of the suit.

"Section 362. Application for execution of the Decree of an appellate Court shall be made to the Court which passed the first Decree in the suit, and shall be executed by that Court, in the manner and according to the rules hereinbefore contained for the execution of original Decrees."

portance, their Lordships will not express dissent from the rulings of the *Madras* Court, and of the Full Bench of the *Bengal* Court, further than by saying, that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a Decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a Decree of affirmance so much of the Decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded Decree.

From a passage in the judgment of Mr. Justice *Mitter*, already referred to, it appears to have been decided in *India*, that what are there termed "the Decrees of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships; and if it ever arises, must be determined on its own merits.

The ground of the decision seems to have been that the Order of Her Majesty in Council being an act done by virtue of Her prerogative, it was not competent to the Indian Legislature to limit the time within which that Order could be enforced. Their Lordships desire to say, that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the question ever be brought here, it will have to be considered, whether the Order in Council, which is not, properly speaking, the Decree of a Court, but an Order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final Decree in the cause, leaving it to be executed by the ordinary process of the Courts in *India*. It may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the prerogative has no concern.

The result of what has been said is, that the determination of this appeal must depend on the third question, viz., whether any proceeding sufficient to keep the Decree in force within the meaning of the 20th section, was had between the 8th of June, 1863, and the 22nd of April, 1867, the date of the application for execution. It has been argued, that the presentation of the petition of appeal to *England*, was "such a proceeding," and that the period of limitation was to be calculated from the 9th of May, 1866, when that petition was finally dismissed.

It was further argued, that the filing by the Appellants of the petition consenting to the Respondent's application for further time to prosecute his appeal was "such a proceeding," and that the time was to be calculated from the date of that petition (the 8th of April, 1864), or from the 4th of October, 1865, when the two months granted expired. Their Lordships are of opinion, that there is no ground for the first contention; that the Respondent's petition of appeal, being a proceeding taken in order to destroy the Decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Mr. Justice *Holloway* in the *Madras* case. It is, however, admitted, that had the appeal to *England* been allowed, the present Appellants, being Respondents to it, and, as such, supporting the Decrees, would have been entitled to sue out execution at any time within three years at least after the final dismissal of that appeal.

The appeal, it is true, never was allowed, but during the period between the date of the presentation of the petition and that of its dismissal, the allowance of the appeal depended on the Respondents' compliance with the rules which regulate the admission and allowance of appeals to *England*; and the Appellants had a right to intervene and see that there was a compliance with these rules, particularly with such of them as relate to security, and, in the event of non-compliance, to insist on the dismissal of the petition. In their Lordships' opinion there is, in this case, sufficient evidence that the Appellants did so intervene. The petition, by which they

consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion, that there was, at that time, such a *contestatio* between the parties touching the allowance of the appeal to *England*, as suffices to bring this case within the principle laid down by Lord *Cairns* in the case of *Maharajah Dheeraj Mahtab Chand, Bahadoor* v. *Bulram Singh* (13 Moore's I. A. Cases, p. 479; 2 P. C. J., p. 597) already referred to, and to relieve their Lordships from the necessity of depriving the Appellants of the fruits of what appear to be just Decrees by the application of the Act of Limitation.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed; that the Orders of the *Zillah* Judge and of the High Court ought to be reversed; and that the Appellants ought to be declared entitled to sue out execution of the Decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

24th January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, at Fort William in Bengal.

MUSSUMAT BUHUNS KOWUR, *(Defendant)** ... } *Appellant,*

versus

LALLA BUHOOREE LALL, AND JOKHEE LALL, *(Plaintiffs)* ... } *Respondents.*

Act VIII. of 1859, s. 260—Execution—Purchaser—Benámi.

A *talook* in possession of a mortgagee was put up for sale under an execution against the mortgagor, and was bought by A in his own name, but *benami* for the mortgagee. A obtained a certificate as purchaser, and was put formally in possession, the mortgagee remaining in actual possession. *Held* reversing the decision of the High Court) that s. 260 of Act VIII. of 1859 is to be construed strictly, and that no suit would lie by A against the mortgagee to redeem.

2nd March, 1872.

THEIR Lordships reserved judgment, which was now delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:

The facts which raise the question for decision in this appeal may be very shortly stated.

Brij Lall Opadhia was Mortgagee in possession of *Talook Doondhur*. Whilst he was so in possession the interest of the Mortgagor was offered for sale under a Decree obtained against him by a Creditor. *Lalla Buhooree Lall* became the osten-

* 14, Moore's I. A., p. 406; 10, B. L. R., p. 159.

sible Purchaser at such sale, and the certificate of sale was granted to him in his own name as the Purchaser.

Brij Lall Opadhia remained in possession until his death, and after it this suit was brought by *Lalla Buhooree Lall* against his heir (the present Appellant) for the redemption of the *Tulook* and possession of it; alleging that the mortgage debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.

The defence was that the purchase was made by *Lalla Buhooree Lall*, in his own name, as a *benamee* Purchaser for *Brij Lall Opadhia*, and with his money; and that the attempt by *Lalla Buhooree Lall* to set up title in himself was a fraud.

It has been decided by the Courts in *India*, that this defence is true in fact, and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain sections of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in *India*. The Principal *Sudder Ameen* decided in favour of the principal Defendant (the Appellant). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the point by a short memorandum to the full Bench, who gave judgment for the Respondents; Mr. Justice *Jackson* dissenting from the decision.

It must be observed at the outset, that the suit to be dealt with is one in which the Plaintiffs (the present Respondents) seek to establish a right against the principal Defendant (the Appellant), and that they invoke the aid of the Court to give effect against equity and good conscience to a claim founded upon fraud.

It must be conceded, that it is only by force of positive statutory law that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent Plaintiffs against the defrauded Defendants. But it is said, that this obligation is found in the Code of Civil Procedure.

It is well known, that *benamee* purchases are common in *India*, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and, therefore, they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the Plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights.

The preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the sections on which the Plaintiffs rely.

The only express enactment on the subject occurs in section 260. That section, after directing that the certificate shall state the name of the person who is declared at the sale to be the actual Purchaser, says this:—"And any suit brought against the certified Purchaser on the ground that the purchase was made on behalf of another person, not the certified Purchaser, though by agreement the name of the Purchaser was used, shall be dismissed with costs."

This enactment is clear and definite; there is nothing from which it can be inferred, that more is meant than is expressed. It is confined to a suit brought against the certified Purchaser, and to a specific direction as to what shall be done with that suit, viz.:—that it shall be dismissed with costs.

The present suit, which is the converse of that pointed at in the section, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end.

It has, however, been contended, in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this section, taken in connection with section 259, and the sections relating to the manner of giving possession, a general intention, having for

its object to prevent any inquiry between the Purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question, whether the purchase was *benamee* or not, and that effect should be given to that general intention.

Their Lordships consider it would not be safe to make such an inference, except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an inquiry into the truth in any suit between the parties; when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships, that effect can reasonably be given to the provisions of the Code without making such implication.

Section 259, requiring the Court to grant a certificate to the person declared to be the Purchaser of land at the Sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the Debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of transfer by Bill of sale. Their Lordships consider, that no inference fairly arises from this clause, that it was intended to interfere with *benamee* transactions; for the language is adapted to meet the case of ordinary Purchasers, and the same language might well have been used if *benamee* transactions had been wholly unknown.

The same observations apply to sections 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit *benamee* transactions.

It is evident from this analysis of the sections of the Code, that the inference sought to be made against *benamee* transactions rests entirely on the 260th clause, and that, if this clause were absent from the Code, there is absolutely nothing in the other sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of the 260th section, a suit brought against a Purchaser on the ground, that the purchase was *benamee* must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a *Benameedar*.

If this really were so, it would result from the attempt to deal with the subject of *benamee* in a partial manner; and even in that case their Lordships would consider it fitting that the Legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing Act. But it will probably be found, that the suggested inconsistencies will not be great, and even if the Respondents' view were adopted, they would not be wholly avoided.

The object which the framers of the Code probably had in view was, to prevent judgment-Debtors becoming secret Purchasers at the judicial sales of their property, and to empower the Court selling under a Decree to give effect to its own sale, without contention on the ground of *benamee* purchase, by placing the ostensible Purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benamee* shall be dismissed.

In the cases where actual possession can be given of the thing sold by the Court, no difficulty can arise; for there the certified Purchaser, having both the certificate and possession, can hold the property by virtue of clause 260, against any suit brought against him; and if that possession should be interfered with, either by force or fraud, on the part of any person, even a *benamee* claimant, it no doubt ought, without inquiry as to the *benamee* claim, to be restored.

It has been suggested, that difficulties may arise in the case of possession given, under sect. 264, of lands in the occupancy of *Ryots* to a certified Purchaser, who had bought *benamee* for the judgment-Debtor, to whom the *Ryots* may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the Purchaser might be preclud-

ed from suing the *Ryots* for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction; for, as regards the *Ryots*, the certified Purchaser, when put into possession, becomes their Landlord, both by title and possession, and it may well be that they should not be allowed to set up the *benamee* right of another against the person to whom they had thus become tenants.

So, in the case where debts due to the judgment-Debtor have been sold and delivered to the certified Purchaser, the Debtors may well be prevented from setting up the *benamee* title of a third person in actions brought by the holder of the certificate of sale, for they are by sect. 265 prohibited from paying to any one except the certified Purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified Purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified Purchaser, who is really a *Benameedar*, having been put into complete possession by the Court of the thing purchased at the judicial sale, attempts to bring a new suit against the real Purchaser, not to complete the title, or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the Purchaser has full possession of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him; but when he seeks, as Mortgagor, in a suit altogether new, to redeem against the Mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up.

But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that where the real Owner has been permitted to have or retain possession by the ostensible Purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of *benamee* judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from the *Benameedar* to the real Owner. The title must depend upon the purchase having been made *benamee*, and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so.

The authorities, therefore, which have held that, in the cases just referred to, the real Owner may set up his *benamee* right against the *Benameedar*, necessarily involve the opinion, that the Code has not made *benamee* purchases unlawful; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports.

The High Court, in their judgment in this case, approve of the above authorities; but they say they may be explained on the ground that the *Benameedar* has, by consenting to the possession of the real Owner, waived his right to the benefit given to him by the Code; but the Code had certainly not for its object the desire to confer a benefit on fraudulent *Benameedars*. Its provisions must have been framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider, that where the Legislature has stopped, the Courts must stop.

It was said that the certified Purchaser in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have, if no positive law intervened. The question is, whether such positive law does intervene in this case.

For the reasons given, their Lordships do not feel justified in adopting a construc-

tion beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so; and they are consequently of opinion, that there is no bar to preclude the inquiry in this suit, into the real title.

Their Lordships find that a cross appeal to Her Majesty in Council against the decision of the Courts below on the question of fact is pending. Without prejudice to such cross appeal, and to any Order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the Decrees appealed from, and in lieu thereof, to order that the appeal to the High Court from the Decree of the Principal *Sudder Ameen* be dismissed with costs. The Appellant will have the costs of this appeal.

25th and 26th January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAM GOPAL ROY, and others,* ... ... } *Appellants*,

versus

GORDON STUART and Co., Secretaries to the Bengal Coal Company, PERSHAN CHUNDER CHATTERJEE, and others, ... } *Respondents*.

Practice—Boundary questions—Evidence—Copies—Reports of Deputy Collectors—Local Investigation.

The Privy Council will never interfere with the finding of an Indian Court upon a question of boundary, unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make it the ground for an order reversing or varying the decree.

Although the admissibility in *India* of copies in evidence must not be dealt with by the strict rules prevailing at a *nisi prius* trial in *England*, yet their Lordships were of opinion that, when a copy has been in any way received and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question, and the weight and value which he will attach to it. There is a considerable difference between cases where documents some in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered and the whole cause of action depends on the proof of the original instrument; strict proof may properly be required in the latter case.

Dealing with the present document, their Lordships were not prepared to say that the High Court had miscarried in concluding it to be genuine; but the High Court did not rest upon that document wholly but proceeded upon the whole of the evidence in the case, which appeared to their Lordships amply sufficient to support the finding of the Court.

Unless there be very good grounds for dissenting and differing from the reports made by Deputy Collectors upon local investigations, the Courts even in *India*, and *a fortiori* the Courts in *England*, in dealing with boundary questions, ought to give great weight to them and to be guided by them.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

The property in question in this suit is a large tract of jungle land lying to the north of the Great Trunk Road in *Zillah Bheerbhoom*. There have been several Claimants to portions of this land, besides the present Appellants and the Respondents, and some of them were originally parties to this suit. Therefore, in order to see how the Appellants and Respondents stand to each other, it may be desirable shortly to consider the proceedings which led to the suit.

There was a dispute as early as the year

* 14, Moore's I. A., p. 453.

1828 between the *Chatterjees* family, whose title is now vested in the principal Respondents, the *Bengal* Coal Company, and one *Ram Narain Mitter*, through whom the Appellants derive their title, concerning the right to this land, but at that time the dispute appears to have been limited to some 1,600 *beegahs* of land. The Government authorities attached this land, and their possession seems afterwards to have extended itself, in some way or another, to the whole of that which was claimed in this suit, 5,600 *beegahs*. When the Trunk Road was made in the year 1841 there was another dispute between the parties as to who were entitled to compensation for the small portion of jungle which was taken on each side of the Road, and, so far as any recognition of title went, the Appellants seem to have been preferred on that occasion. They received some small sum which was awarded for compensation under an *Ikrar*, binding them, in case the opposite party, or any other party, should prove a title to it and come against the Government for it, to repay it.

Then came the proceedings which immediately led to this litigation, proceedings which were connected with the Government survey in 1857. There was then the ordinary dispute between the *Chatterjees*, or the *Bengal* Coal Company as then representing the *Chatterjees*, on the one side, and the *Roys*, the Appellants, on the other, and several other parties who claimed parts of the Forest as annexed to their undisputed *Mouzahs*, and also the Government, claiming to hold, by some title or another, or by virtue of that occupation which had begun in 1828, a large portion of the land. Mr. Deputy Collector *Ross* appears to have gone upon the land, and to have made local inquiries, and on the 18th of June, 1857, he made an Award giving the land, or the greater portion of the land, to the *Bengal* Coal Company as representing the *Chatterjees*. The opposite party appealed to the Collector, who, acting upon his view that the principal document produced by the *Chatterjees*, or the *Bengal* Coal Company, was spurious, and that it did not correspond with an earlier document which was admitted to be the foundation of the *Chatterjees'* title, set aside that decision of Mr. *Ross*. There was an appeal from his decision to the Commissioner, and an appeal from the Commissioner to the *Sudder* Board of Revenue, but the result was, that those authorities upheld the Collector's Order. Another Deputy Collector was directed to make a further apportionment and Award of the land among the parties, and the result was that this last Officer, on the 16th of July, 1858, awarded 625 *beegahs* of the waste land in dispute to the Appellants, and the remaining 4,975 *beegahs* to the Government.

The result of these revenue proceedings was to put the parties to whom those lands were awarded actually, or constructively, in possession, but also to leave to the opposite party the power of impeaching the revenue Award, and of recovering possession of the lands by a regular suit, if instituted within three years of the date of the Award, and accordingly this suit was so brought for that purpose.

The Government appear to have now dropped out of the litigation. The *Zillah* Judge, who was the Judge of first instance, dismissed the Respondents' suit wholly on the ground, that they had failed to prove their title, and he also held, that the suit as against the Government would have been barred by the Act of Limitation, inasmuch as they had been in possession of this land since the time they took possession of it in the year 1828; certainly for more than twelve years. There was an appeal from that decision to the High Court, and on that occasion, it seems to have been almost admitted before the High Court, that the Government had not really any title to the land. The High Court, moreover, held that the decision as to the Act of Limitation was erroneous, inasmuch as the possession of Government had been founded on the attachment of 1828, which was in the nature of taking possession in trust and for the benefit of the party who should succeed in establishing a title to the land. Government appears to have acquiesced in that view, and certainly have not appealed from the Decree which gave the land which had been awarded to them by the Revenue authorities to the *Bengal*

Coal Company, the Plaintiffs in this suit, and the Respondents on this appeal. The other parties, who were also made parties to the suit, and who claimed portions of the land, which were the subject of the Award of the Revenue authorities, seem also now to have abandoned their respective claims, and the litigation is, therefore, reduced to a question between the Appellants and the Respondents, the *Bengal* Coal Company. Nor can the Appellants, if they were to succeed on this appeal, do more than obtain the dismissal of the Respondents' suit, and thus obtain an affirmance of their right to hold the 625 *bigahs* of land. They cannot in this suit assert a title to the larger portion of the land, which the Respondents have recovered from Government.

It is obvious, from what has been already stated, that the question is simply one of boundary. The Appellants claim title under Government, which held *khas* a large portion of Forest land situate in this District and apparently never included in the Decennial Settlement. Out of this land, no doubt, that estate which is admittedly in the possession of and belongs to the Appellants has been carved. On the other hand, the *Chatterjees* derive title under a *Mocurrery* grant from the *Rajah* of *Burdwan*, and it must be held, that the land so granted to them was part of the settled estate of the *Rajah* of *Burdwan*. It has appeared to their Lordships, in the course of this discussion, that a more easy, at least a more satisfactory, mode of deciding this dispute might have been found in the ascertainment (if that were possible) of the real boundaries between the settled *mehals* of the *Rajah* of *Burdwan*, and the Forest lands which remained after the Perpetual Settlement in the hands of the Government, because it is clear that, on the one hand, the *Chatterjees* claim nothing except what they got from the *Rajah* of *Burdwan*, and, on the other hand, that the Appellants claim nothing except what they derived from the Government. That, however, has not been the course which the parties have thought fit to take. They have, however, adduced a good deal of the evidence generally given in boundary cases; the issue being—what are the boundaries of the estate of *Gopeenathpore*, which is the *Mocurrery* of the *Chatterjees*, and has now passed to the *Bengal* Coal Company, and what is the true boundary of the estate of *Gopeenathpore*, which is in the undoubted possession of the Appellants.

It has frequently been said at this Board, that of all the questions which are brought here from *India*, there is no question of fact which is so improper to be brought for final decision by this Tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a Forest or a tract of waste land, must depend so much upon local investigation and local inquiry, and on that sort of knowledge which only Officers in *India*, who are conversant with such disputes, can acquire. Accordingly, their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied, that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an Order reversing or varying the decree. This case, no doubt, has been argued very much on that assumption. The long argument of Mr. *Leith* has turned mainly upon the miscarriage, or rather the alleged miscarriage, of the High Court in dealing with a particular document, viz., the copy of the confirmatory *Sunnud*, which has been so much impeached.

We will at once go to the consideration of that document. With reference to the general question of the admissibility of copies, and the mode in which the Courts in *India* deal with them, their Lordships are desirous to make some observations. It has been repeatedly ruled here, that these questions are not to be dealt with by the strict rules that would prevail at a *Nisi prius* Trial in *England*, where the question is, whether the document ought to be submitted at all to the jury. The way in which evidence is brought in in *India* almost precludes that rule. On the other hand, their Lordships are undoubtedly of opinion, that when a copy has been in any way received, and it becomes the function of the Judge to consider what

weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original; that there should be some account given of the original, and sufficient reason assigned why the original is not produced, and why the parties rely upon the copy. In all cases, the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it. There is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit, as in the case cited by Mr. *Leith* of *Syud Abbas Ali Khan* v. *Yadeem Ramy Reddy* (3 Moore's Ind. App. Cases, 156; 1, P. C. J., p. 259,) is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument. In the latter case strict proof may properly be required.

Dealing with the present document, their Lordships are not prepared to say, that the High Court has miscarried, in so far as it has come to a conclusion that this document is genuine. It is a very ancient document. It cannot for one moment be contended, that it was fabricated for the purposes of this suit. No doubt what we have actually on the record is a copy of a copy, but it is a certified copy of a document which is shown, though a copy, to have been produced in the earlier suits. The degree of credit which it has acquired in those suits, and the effect which has been given to it in those suits, may be more open to question; and there is no doubt great weight in many of the observations of Mr. *Leith*, that those decisions did not positively affirm the genuineness of the document or proceed wholly on the document so as in effect to involve the decision of its genuineness. On the other hand, it is to be observed, that it was produced in one of those suits against the *Rajah* of *Burdwan;* that it was not impeached or treated as other than a genuine document, and it is impossible to say that it did not, by being then produced, acquire some degree of merit.

The effect of the document as against Mr. *Leith's* Clients is of course another question. If the document is treated as a genuine instrument, it does not at all follow, that of itself it would prove the title of the Respondents against the Appellants, because it is a mere statement by the *Rajah* of *Burdwan* that those are the boundaries of what he professes to grant, and it is possible to conceive cases in which, if there had been a conflict between the *Rajah* of *Burdwan* and the Government as to the boundaries of his *zemindary*, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that this *zemindary* extended so far; it is at most a proof of an early assertion on the part of the *Rajah* of *Burdwan* that the land which he purported to grant in *Mocurrery* to the *Chatterjees* did extend so far. Their Lordships conceive that the reason why this has been treated as the turning point of the case is, that the supposed spuriousness of the document and its assumed inconsistency with the earlier documents were the grounds upon which Mr. *Lawford*, the Collector, reversed the finding of Mr. *Ross*, the Deputy Collector, a decision which led to the final adjudication of the Revenue authorities, which is impeached by this suit. In their Lordships' opinion, this decision of Mr. *Lawford* cannot be supported. For the reasons already given, their Lordships think, that the document is not spurious. Nor can it be properly said to be inconsistent with the earlier document. It contains something which the earlier document did not contain, but it contains nothing which is inconsistent with the earlier document. It gives boundaries which the other did not give, but it does not give boundaries which differ in any degree from any which the earlier document gave either expressly or by implication.

It is, however, to be observed, that the decision of the High Court does not rest upon that document wholly, or indeed further than this, that if the document be genuine, it gets rid of that reversal of Mr.

Ross's Order, and throws the parties back into the position in which Mr. *Ross's* Award would have left them. The judgment of the High Court proceeds upon the whole of the evidence in the cause which appears to their Lordships to be amply sufficient to support the finding of the Court. There is, first, Mr. *Ross's* own finding, the result of his local investigation on the spot. It is confirmed to a certain degree by the other local investigation which takes place by the *Ameen*, and their Lordships cannot but remark, that unless there be very good grounds for dissenting and differing from those reports made upon local investigations, the Courts even in *India*, and *à fortiori* the Court in *England*, in dealing with boundary questions, ought to give great weight to them and to be guided by them. Supposing, then, that the *onus* of proof in this case was much heavier on the Plaintiff than it really was, there was ample ground for saying, that he had proved enough to throw the Defendants upon proof of their title; and looking at the petition which limits the amount of their holding to the 1,800 odd *beegahs*, and to the other circumstances remarked upon by the High Court, their Lordships find it impossible to come to the conclusion that the High Court was not amply warranted in the finding to which it came and in reversing the decision of the *Zillah* Judge, which appears to their Lordships to rest upon very unsatisfactory grounds, and to treat the case as if the whole question turned upon the *Sunnud*.

Their Lordships, therefore, must humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

26th and 27th January, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SARODA PROSAUD MULLICK, *(Plaintiff)** } *Appellant*,

versus

LUCHMEEPUT SING DOOGUR, DHUNPUT SING DOOGUR, and JODOONATH SANNYAL, *(Defendants)* ... } *Respondents.*

Execution—Security by Manager—Act VIII. of 1859, ss. 232, 235, & 245, 248—272, 284—287—Attachment without Sale—Concurrent Orders for Attachment in different Districts.

The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and meanwhile the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court,) the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment debtor. The second sale ought not to have been ordered or confirmed.

Under the Code of Civil Procedure, property may be attached without view to immediate sale.

A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power.

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* 14, Moore's I. A., p. 529, 10 B. L. R., p. 214.

3rd February, 1874.

THE consideration of their Lordships' judgment was reserved and now delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:

In this case *Mooktakashee Dabee*, the Manager of the estate of her Husband—a Lunatic—(of which the Appellant is now Manager) obtained a Decree in the *Zillah* Court of *East Burdwan* against *Jodoonath Sannyal*, for upwards of two lacs of rupees.

A small sum only having been realized in that *Zillah*, proceedings were taken to obtain execution of the Decree on properties of the Defendant, *Jodoonath Sannyal*, within the jurisdiction of the *Zillah* Courts of *Moorshedabad*, *Hooghly*, and *Dinagepore*. It is with reference to what was done in *Dinagepore* that the questions arise.

In March, 1864, a certificate and other papers were sent by the Judge of *East Burdwan* to the Judge of *Dinagepore*, the terms of which will be hereafter adverted to. Some time afterwards, but the precise date is not given, the Judge of *Dinagepore* attached the lands of the Defendant in his *Zillah*, which form the subject of the suit. On the 24th of June, 1865, another certificate was sent from the Judge of *Burdwan*, and on the 4th of September the lands of the Defendant were sold under the Decree to *Mooktakashee Dabee*, the Decree-holder, and by an Order of the Judge of *Dinagepore*, of the 4th of December, 1865, the sale was confirmed, and a writ of possession directed.

It appears that the Judge of *Dinagepore* in pursuance of the Order of the Judge of *Burdwan*, required *Mooktakashee Dabee* to give security for the proceeds of the sale before he would allow actual possession to be given to her. Several months elapsed before she found security, and meanwhile the present Defendants, by Orders of the *Zillah* Judge of *Dinagepore*, obtained attachment and sale of the same lands under a judgment obtained by them against the same Debtor, *Jodoonath Sannyal*; and on the 6th January, 1866, the lands were sold in execution of their Decree, and purchased by themselves, and possession afterwards given to them.

Mooktakashee Dabee then brought this suit against the present Defendants (the Respondents), asserting her title under the first judgment sale. It is conceded that her title must prevail, unless the sale under her execution can be invalidated.

The ground on which the *Zillah* Judge directed the giving of possession under the second sale to the Respondents was, that *Mooktakashee Dabee* having failed to give security, the sale to her became null. It is plain that this ground is utterly untenable. The security was ordered for the protection of the Lunatic Plaintiff against misappropriation by his Manager. It was not a proceeding affecting the judgment-Debtor, and was entirely collateral to the course of the suit between the judgment-Creditor and judgment-Debtor. The omission to give this security could not in any way affect the title which had vested in the Plaintiff by the previous sale. This decision of the *Zillah* Judge had the effect of causing the omission by the Lunatic's Manager to do an act intended to secure the fruits of his judgment to him, to operate so as to deprive him altogether of them, and hand them over to the second judgment-Creditor. It is much to be lamented that such a misconception should have taken place.

Their Lordships also consider, that the *Zillah* Judge was in error in granting the Order for the second sale under the Respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under *Mooktakashee Dabee's* attachment, and the purchase by her under that sale had been confirmed and had not been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure. The title had vested in *Mooktakashee Dabee* by the sale under her attachment, and until it was set aside there was nothing upon which the second sale could operate. This course inevitably created a conflict between the two Decree-holders who became Purchasers at the judicial sales, under their respective attachments, and led to the erroneous Order of

the 19th of June, 1866, which ordered the possession to be given to the Respondent. Such a course also is in any case clearly contrary to the interests of Debtors as well as Creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price.

In the present appeal, however, it was contended at their Lordships' Bar, by Sir *Roundell Palmer*, that the proceedings in the Court of *Dinagepore*, which resulted in the sale to the Plaintiff, were without jurisdiction, and that the sale under them was invalid on the ground of "a radical vice" in the proceedings when the matter was first transmitted by the *East Burdwan* Judge to *Dinagepore* in this:—that the lands of the judgment-Debtor were ordered to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and, therefore, that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code.

It is plain, however, on reference to the Code, that property may be attached without view to immediate sale. The group of clauses, sections 232 to 245, under the heading "Of the execution of Decrees for money by attachment of property," prescribe the manner of attaching the various kinds of property and dealing with them when attached. Section 243 shows how debts and immovable property are dealt with, and provides modes of satisfying the Decree by them, without sale. Another group of sections, 248 to 272, headed "Of sales in execution of Decrees" provide the procedure in case is becomes necessary to sell.

It is obvious from these sections that, in the case of lands, the process of attachment, and the order for sale may be distinct and separate, and that there may be a complete execution of a Decree under an attachment without any order for sale.

Then procedure is provided for the execution of Decrees out of the jurisdiction of the Court in which they are made. Section 284 and following clauses empower the Judge on application unless there be any sufficient reason to the contrary, to transmit a copy of the Decree with a certificate that satisfaction of it has not been obtained in his jurisdiction, and a copy of any Order for execution of such Decree that may have been passed, "to any Court to which the applicant may wish the Decree to be executed." The Court to which they are sent is to file them, and section 287 enacts, that the copy of any Decree, or of any Order of execution, when filed in the Court to which it has been transmitted for execution, shall for such purpose have the same effect as a Decree or order for execution made by such Court.

The certificate or Order of the Judge of *Burdwan* of the 19th of March, 1864, sent to the Judge of *Dinagepore*, contains, in substance, a recital or statement of the Decree of the *East Burdwan* Court, the amount recovered by execution, the balance due, and that the Decree-holder had given a list of properties in *Zillahs*, *Moorshedabad*, *Hooghly*, and *Dinagepore*, and then declares that "a certificate, &c., are sent" to *Moorshedabad*, under sections 284 and 285, requesting that properties in that District may be attached and brought to sale, and that certificates, &c., be sent, under section 235, for attachment, with a view to prevent alienations of properties, in *Zillahs*, *Hooghly* and *Dinagepore*. It ends thus, "afterwards, when proceedings for attachment and sale of the properties in *Zillah Moorshedabad* shall have been completed, the proper order will be passed on the Decree-holder's application."

The objection was, in effect, that this Order treated the attachment directed to be made in *Dinagepore* as an injunction or sequestration only. Their Lordships, however, think that this was not so, but that it was meant that the attachment should be a proceeding in execution of the Decree. The proceeding was, on the face of it, declared to be a direction to attach under section 235; and that section only authorizes the attachment as a step in execution. No doubt, every attachment involves an injunction, which is indeed one of its necessary effects. But when an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification

which would altogether destroy its effect. Their Lordships, therefore, consider that what the Court intended to do was to transmit the proceedings to the three *Zillahs* for execution, with a direction that the first process of execution, viz., by attachment, should take place in all, but that further proceedings under the attachment should not be taken in *Hooghly* and *Dinagepore* until the result of the completed execution in *Moorshedabad* was known.

It has been already pointed out that the procedure of the Code contemplates, in the case of lands, the issuing of separate Orders, subsequent to the attachment, for the sale or other disposition of them.

A more important point involved in the case is whether the transmission could be made to the three *Zillah* Courts concurrenlty, for the purpose of execution. On consideration of the Code their Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow of it, and of its being done most beneficially for the Creditor, and without injustice to the Debtor. If it were not so, the Debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the Debtor, for the issuing of the execution in more *Zillahs* than one is made subject to the control of the Judge, who may refuse to do so, where "he saw there was any sufficient reason to the contrary" (section 286.) Again, after the attachments have been granted, if there should be any ground of complaint, the Debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them.

It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a Decree for concurrent execution into several places; and when it did act on it, it would be, in many cases, proper to impose terms on Decree-holders, that they should not proceed to sale under all the attachments at once.

This is really what was meant to be done here, although it was not done in a very good and satisfactory form.

The case is thus reduced to the objection, that a copy of the Decree was not transmitted to *Dinagepore*.

The High Court rest their first judgment on the ground that no copy of the Decree or of the certificate, that satisfaction had not been obtained, was sent. The latter document clearly was sent. In the judgment on review, Mr. Justice *Jackson* came to the conclusion that both were transmitted. Mr. Justice *Kemp* alone retained his former view.

Assuming that if no copy of the Decree was sent, the attachment made at *Dinagepore* would be without valid authority, which their Lordships do not find it necessary to determine, it lies on the Defendant to prove that it was not transmitted. The Judge at *Dinagepore* acted on the certificate by attaching the lands, and afterwards sold under that attachment. The maxim, therefore, *omnia præsumuntur rite esse acta*, must prevail until the contrary is shown. It certainly is not shown by the document of the 19th of March, 1864, for it is there stated that "Certificates, &c.," were sent; nor by the Memorandum of the attachment which refers to the *rookabaree* "and other papers" having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said, that it must be inferred from the Order which preceded the document of the 19th of March, that it was not intended to send the copy of the Decree to *Dinagepore*. This, perhaps, may be inferred from that document taken alone, but it would not be safe to act on such an inference to annul the attachment and sale, especially when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th of March; or, at all events, before the attachment was made.

On the whole, their Lordships consider, that the appeal should be allowed; and will humbly advise Her Majesty that the Decree of the High Court should be reversed, that the Decree of the Principal *Sudder Ameen* should be executed, and that the Appellant should have the costs of the litigation in *India* and of this appeal.

31st January, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor.—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, Bengal.

ANUND LOLL DOSS, (Plaintiff)* ... } *Appellant,*

versus

JULLODHUR SHAW and another, (Defendants) } *Respondents.*

Act VIII. of 1859, ss. 235 & 240—Execution—Private Alienation.

The prohibition against private alienation of attached property contained in s. 240, Act VIII. of 1859, relates only to alienation which would affect the creditor who obtained the attachment.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:

The facts under which this question arises may be thus shortly stated. *A.* obtains an execution against his Debtor, in the form of an attachment against the Debtor's real property. The Debtor, with the consent of *A.*, makes a private sale of the property, and out of the proceeds satisfies the debt, but no application is made to the Court for the confirmation of the sale or for the removal of the attachment, and the attachment still remains, at all events, formally, in force. Subsequently *B.*, another Creditor, obtains an attachment upon another judgment. He proceeds to a judicial sale, treating the former sale as void; and the question is, whether the Purchaser under the second sale has a good title, and is entitled to say, that the prior sale was to all intents and purposes void as against him?

Their Lordships adopt the view taken by the late Mr. Justice *Norman* in the first instance, and by the majority of the High Court, including the Chief Justice, upon appeal. The question turns mainly upon the interpretation of two sections of Act, No. VIII. of 1859, under the head "Execution of decress for money by attachment of property," and in construing these sections it should be borne in mind that we are not dealing with provisions prescribing the mode of administering property amongst Creditors generally, but with provisions prescribing the rights of particular Creditors who have obtained judgments and executions.

Now, the sections alluded to, are in these terms: Section 235, "Where the property shall consist of lands, houses, or other immovable property, the attachment shall be made by a written Order, prohibiting the Defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise."

Section 240 enacts, "After any attachment shall have been made by actual seizure, or by written Order as aforesaid, and in case of an attachment by written Order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts or dividends or shares to the Defendant during the continuance of the attachment shall be null and void."

The question is, whether those words, "any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void," are to be taken in the widest possible sense as null and void against all the world, including even the Vendor, or to be taken in the comparatively limited sense attached to them by the Courts in *India*? Their Lordships adopt the language of the Chief Justice, who, in the judgment of the Court, expresses his opinion, that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree, relates only to alien-

* 14, Moore's I. A., p. 543; 10 B. L. R., p. 134.

ation which would affect the Creditor who obtained the attachment. That appears to their Lordships to be the true meaning of the section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bonâ fide* Purchaser by the Vendor could be set aside by the Vendor himself; the words must, therefore, necessarily be read with some limitation. It appears to their Lordships, that their construction must be limited in the manner indicated by the Chief Justice, on the ground, that they were intended for the protection of the Creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions.

Reference has been made to section 271, which is to this effect: "If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of Decrees against the same Defendant and not obtained satisfaction thereof." This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not under the circumstances a private sale was valid.

Their Lordships understand that the Courts in *India* have generally proceeded upon the view taken by the Chief Justice and the majority of the Court, and they would be unwilling to interfere with an established course of practice unless they came to a very clear opinion that it was wrong.

Under these circumstances, their Lordships will humbly advise Her Majesty that the Decree of the High Court should be affirmed, and this appeal dismissed, with costs.

20th, 22nd and 23rd February, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Lord Justice James, the Right Hon. Lord Justice Mellish, the Right Hon. Sir James Shaw Willes, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir R. P. Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, at Fort William in Bengal.

JATINDRA MOHAN TAGORE, and another, (Defendants)* ... } *Appellants*,

versus

GANENDRA MOHAN TAGORE, (Plaintiff) ... } *Respondent*.

AND

GANENDRA MOHAN TAGORE, (Plaintiff) ... } *Appellant*,

versus

JATINDRA MOHAN TAGORE, and another, (Defendants) ... } *Respondents*.

Hindu Will—Deeds of Gift—Construction, Rules for—Maintenance of Son—Trusts—Life-estates—Estates tail.

In construing transfers by gift among Hindus, a benignant construction is to be used, and the donor's intention carried out, if ascertainable, to the extent and in the form which the law allows. Thus, if an estate be given by a Hindu to *A* without words of inheritance, it will, in the absence of a conflicting context, give an estate inheritable as the law directs; if to it be added an imperfect description of it as a gift of inheritance not excluding the inheritance imposed by law, an estate of inheritance would pass; if a gift be in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction is to be rejected; if a gift be to *A* and his heirs to be selected from a line other than that specified by law, and expressly excluding the legal course of inheritance, the gift is only good so far as consistent with the law—*A* would take a life-estate, and the other limitations would fail. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance,

* 9 Ben. L. R., p. 377.

are void as such, and by Hindu law no person can succeed as heir to estates described in terms which in English law would designate estates tail.

In order to make a gift under a will good by Hindu law, the donee, except in the case of an adopted child, or a child *en ventre sa mère*, must be a person in existence capable of taking at the time when the gift takes effect. A child adopted after a man's death, in pursuance of a power given by him, is in contemplation of law begotten by that man.

The law of wills among Hindus is analogous to the law of gifts; and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred. A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator. *Sreemutty Soorjeemoney Dassee* v. *Denobondoo Mullick* (1) distinguished.

Trusts are not unknown to Hindu law; they can be created for carrying out such intentions as the law recognizes.

There is no reason why a Hindu should not, by will, create an estate for life.

Where the testator left his property to *A* for life with remainders, showing that *A* should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail, *held*, that *A* could not be declared entitled to more than a life-estate.

Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid; and that as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property.

The will directed that, as to the personalty, the trustees were, after all annuities and legacies had fallen in and been satisfied, to stand possessed of, and interested in, the *corpus* in trust absolutely for the person or persons entitled under the limitations in the will to the beneficial or absolute enjoyment of the real property. The High Court gave the tenant for life the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, but excluded him from any right to the subsequently accruing interest: *held*, that he was entitled to the interest of the personalty after such falling in and satisfaction.

Where a son had received as a gift from his father property producing at the time Rs. 7,000 a year, their Lordships, without deciding whether a son could be deprived of maintenance, considered that he had received an adequate maintenance.

All the existing parties interested in a will being before the Court, a decree can be made as to the rights of all parties. *Lady Langdale* v. *Briggs* (2) distinguished.

THEIR Lordships reserved judgment in order to allow *Suttendro Mohan Tagore* to be heard in the event of his electing to appear by Counsel at the bar. Of this, however, he did not avail himself.

5th July, 1872.

Judgment of their Lordships delivered by

THE RIGHT HON. SIR JAMES SHAW WILLES:

These were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Hon'ble *Prasanna Kumar Tagore*, a Hindu inhabitant of *Calcutta*, who died on the 30th of August 1868, leaving his only son, the Plaintiff, and two widow daughters, with six grandchildren, the children of daughters, him surviving.

The Defendants are three of the trustees and executors under the will of *Prasanna Kumar*, dated the 10th of October 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed.) The trustees and executors are *Upendra Mohan Tagore*, *Jatindra Mohan Tagore*, and *Durga Prasad Mookerjee*. *Jatindra Mohan Tagore* is named as the first tenant for life, and he had, and has, no son. The Defendant *Surendra Mohan Tagore* (named in the will *Susendra Mohan Tagore*) is also named as tenant for life. The Defendant *Promoth Kumar Tagore* (a minor) is the son of *Surendra Mohan Tagore*, and was born in the life-time of the testator. He is described as tenant for life. The remaining Defendant *Suttendra Mohan Tagore* (a minor), is the grandson of *Lalit Mohan Tagore*, who was dead at the date of the will. He was born in the life-time of the testator. His father and grandfather died before the testator. If the will be valid, he is entitled to an estate in tail male. It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised, except as to the alleged want of any description of the capacity in which *Jatindra Mohan Tagore* has been sued. This latter

(1) 9 Moore's I. A., p. 123; 1 P. C. J., p 837.
(2) 8 De G. M. & G., p 301.

point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the Plaintiff, stating that he had been already provided for in the testator's life-time. That provision was made by nuptial gift on the occasion of the Plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, *zemindary*, which then fetched Rs. 7,000 per annum, and the present value of which the Plaintiff does not state. Upon the death of the Plaintiff's first wife, his father also paid him the value of her jewels, to which he laid claim. The explanation of the exclusion of the Plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in *Abraham* v. *Abraham* (1) as to the law applicable to the convert's own property, or as to the personal relations of him and his family. The Act XXI. of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the Plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son *Ganendra Mohan Tagore* (the Plaintiff) as he considered sufficient, and that *Ganendra Mohan Tagore* would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom *Jatindra Mohan Tagore* was one, "their heirs, executors, administrators, representatives, and assigns," upon trust.

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities:

To pay annuities afterwards given (except Rs. 1,000 a month afterwards given for worship) and legacies payable after the investment: and

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust moneys, and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely, for the person or persons entitled, under the limitations and directions hereinafter contained and expressed to the beneficial or absolute enjoyment of my said real property."

And as to "realty or immoveable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities:"

To pay Rs. 1,000 a month for the worship of idols:

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desire that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or per-

(1) 9 Moore's I. A., p. 195; 2 P. C. J., p. 10.

sons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive Rs. 2,500 a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The will then directs as follows:—

"And so soon as all the legacies, annuitics (save and except the said sum of Rs. 1,000 for the worship of the said idols, given by this my will, shall have fallen in or been paid and fully satisfied, then on the trust forthwith to convey the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed, of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at *Mollajohur*, and had given a *talook* to supply the means for their worship, and that such provision was insufficient, gives the Rs. 1,000, before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the Plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the *Tagore* Law Professorship.

The will then disposes of the real property as follows:—

"And whereas I am, amongst other property, possessed of and entitled to a *zemindari* or *talook* called *Pergunnah Patleadah*, and *Kismat Patleadah*, in *Zillah Rungpore*, subject to an annual consolidated *jumma* payable to Government of Rs. 40,555-13-3, and I am also possessed of and entitled to other estates and property in *Zillah Rungpore* and other districts, and also to a *ghaut*, which I have erected and built on the river bank side of the Strand Road in *Calcutta*, and also to land and building opposite thereto, abutting on and near to the said road and also to the *baithak-khana* house, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and sub-division of estates in *Bengal* is injurious alike to the families of *Zemindars* and to the *ryots*, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the *ryots* and tenants thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same: Now, therefore, I give and devise (subject always to the devise to the said *Ramanath Tagore*, *Opendra Mohan Tagore*, *Jatindra Mohan Tagore*, and *Durga Prasad Mookerjee* hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farm-yard, furniture of the *baithak-khana*, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said *Jatindra Mohan Tagore* for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said *Jatindra Mohan Tagore*, who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of the said *Jatindra Mohan Tagore*, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said *Jatindra Mohan Tagore*, who shall be born during my life successively, according to their respective seniorities, for the life of each of such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said *Jatindra Mohan Tagore* and the heirs male of their respective bodies issuing, so that the elder of the sons of the said *Jatindra Mohan Tagore*

born in my life-time, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said *Jatindra Mohan Tagore* born in my life-time, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said *Jatindra Mohan Tagore*, who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of their and his respective bodies issuing: and after the failure or determination of the uses and estates hereinbefore limited, then to the use of *Susendra Mohan Tagore*, the second son of my brother, *Haro Kumar Tagore*, for the term of his natural life; and after the failure or determination of that estate,—"

Then to the sons of *Surendra Mohan Tagore* and their sons and the heirs male of their body respectively, in like manner as for *Jatindra's*; and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their bodies, of *Lalit Mohan Tagore* successively, and respectively in like manner as in the case of the sons of *Jatindra* and *Surendra*. Like limitations as to other persons as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create as follows:—

"And I declare that, in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and, failing descent, by adoption, and his issue or heir male by descent, and, failing descent, by adoption, shall be preferred to every younger son and his issue or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate."

It next provides that such estates of inheritance shall not be alienable as follows:—

"And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindu born and resident in *Bengal* may give or control the inheritance of his estate, or a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of *England* whereby an entail may be barred, affected, or destroyed."

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder "to be sold for arrears of Government revenue," or in case of failure "to keep up in a due state of repair, and to use as his residence in *Calcutta*," the testator's house and furniture, &c., in which case the person next in succession is to take as in case of death.

There follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management, and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor."

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The plaint, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the *corpus* of the personal estate, consisting of Company's Paper, and that there is danger of future waste.

The plaint prays in substance that it be declared

(1) that the Plaintiff, as only son and heir-at-law, is entitled to represent the estate;

(2) that the testator had no absolute power of disposition, especially of ancestral estate;

(3) that the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void, save so far as they give *Jatindra Mohan Tagore* a life-interest, and that the Plaintiff is entitled after *Jatindra Mohan Tagore's* death;

(4) that the Plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest; and

(5) for further relief.

The answer of the trustees and executors, and that of *Surendra Mohan Tagore*, admit the main facts, with some qualifications not at present material; and that of the trustees and executors denies that they have improperly disposed of the estate.

They submit that the will is valid, and ask for proper declarations and directions.

The infant Defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court:—

"*First.*—Does the plaint disclose any cause of action?

"*Second.*—Did the testator die intestate with respect to any and what portion of his estate?

"*Third.*—Was any and what part of the immoveable property of the testator ancestral estate, and, if so, had the testator power to dispose thereof by will?

"*Fourth.*—Are any and which of the gifts or limitations contained in the will and codicils of the testator void in law?

"*Fifth.*—What are the rights of the parties respectively under the will and codicils?

"*Sixth.*—Whether the Plaintiff is entitled to any and what maintenance out of the estate of the said testator?

"*Seventh.*—Whether the executors, Defendants, have misapplied any and what portion of the testator's estate?"

At this stage, the cause was heard before the High Court (ordinary original civil jurisdiction), and the learned Judge Mr. Justice *Phear*, dismissed the plaint.

Upon appeal before the High Court (appellate jurisdiction), presented Sir *Barnes Peacock*, C. J., and Mr. Justice *Norman*, it was decreed—

(*a*) that the decree of the lower Court be reversed;

(*b*) that the plaint in this suit does disclose a cause of action;

(*c*) that *Prasanna Kumar Tagore*, the testator in the pleadings, did die intestate as to certain portions of his property;

(*d*) that part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will;

(*e*) that the Plaintiff is not entitled to any maintenance;

(*f*) that the devises and gifts to *Jatindra Mohan Tagore* for life are valid, and that (subject to debts, legacies, and annuities) he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the legacies and annuities shall fall in, and be satisfied, to receive the sum of Rs. 2,500 a month out of the net rents of the immoveable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interest, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended;

(*g*) that the said *Jatindra Mohan Tagore* is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate;

(*h*) that it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property, or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied;

(*i*) that the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid,

and that the beneficial interest in such personal estate is vested in the Plaintiff, as the heir and representative of the said testator;

(*k*) that the executors and trustees are bound to render to the Plaintiff an account;

(*l*) and after disposing of the costs, it was ordered and decreed;

(*m*) that the case be remanded to the lower Court, with a request that it will try the sixth (1) issue, and return its finding thereon, with the evidence, to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the Plaintiff, by *Jatindra Mohan Tagore*, and by *Surendra Mohan Tagore* respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the Defendant, *Suttendra Mohan Tagore*, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and decided according to the Hindu law prevailing in *Bengal*, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property, or the right of inheritance or succession thereto. Various complicated rules, which have been established in *England*, are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of *England*, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty,—a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in *England* is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property—*Dyke* v. *Walford* (2). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in *England* are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority. The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner: transfer does. Inheritance is a rule laid down (or, in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy—Domat, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice *Turner* in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1:)—"A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy." Another general principle applicable to transfers by gift (more liberally applied in the law of *England* to wills than to gifts *inter vivos*) is that a benignant construction is to be used; and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly des-

(1) Intended for the seventh.

(2) 5 Moore's P. C., 431.

(1) 6 Moore's I. A., 555; 1 P. C. J., p. 586.

cribing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in *England*) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize. If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his life-time,—here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favor of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his life-time, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in the terms which in English law would designate estates tail.

It remains, however, to be considered whether the persons described as heirs in tail, or heirs of inheritance not recognized by law, are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail; or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindu law of gifts during life and of wills, and the extent of the testator's power, whether in respect of the property he deals with, or the person upon whom he confers it. The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be aliened by the holder without the concurrence of those who are interested in the succession; but by the law as prevailing in *Bengal* at least (1,) the impropriety of the alienation does not affect the legal character of the act (*factum valet,*) and it has long been recognized as law in *Bengal* that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence, and capable of taking from the donor, at the time when the gift is to take effect, so as to fall within the principle expressed in the *Dayabhaga*, ch. I., v. 21, by the phrase "relinquishment in favor of the donee who is a sentient person." By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence. As to the case of adopted chil-

(1) As to *Madras*, see to the same effect *Valinayagam Pillay v. Pachche*, 1 *Mad.* H. C. R., 326; S. C., 1 Norton, L. C., 334, *per* Willes, J.

dren (so much relied upon during the argument,) it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his life-time, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in *India*, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in *India*, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law, as pointed out by Mr. E. C. *Clark* in his interesting treatise upon "Early Roman Law," p. 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his life-time, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his life-time. There is no law expressly and in terms applicable to persons who can so take. The law of wills has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord *Wensleydale*, in the opinion delivered by him as a Judge in the House of Lords in the case of *Mirehouse* v. *Rennell* (1,) in accordance with principles generally recognized (2.) "The case," said Lord *Wensleydale*, "is in some sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our judgment of what is just and expedient. Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case

(1) 1 Cl. & Fin., 546.

(2) See this well stated in the introductory disposition of the Civil Code of Italy, Article 3, "Qualora una controversia non si possa decidere con una precisa disposizione di legge, si avrà riguardo alle disposizioni che regolano casi simili o materie analoghe; ove il caso rimanga tutt avia dubbio, si deciderà secondo i principii generali di diritto"—*per* Willes, J.

is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice *Knight Bruce*, in the case of *S. M. Soorjeemoney Dossee* v. *Denobundoo Mullick* (1,) was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindu succession, and Mr. Justice *Phear*, upon the authority of that case, held that "there is nothing in Hindu law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council), if at all immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of *England*), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied, will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Massamut Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdry*, (1), in which the testamentary power of disposition by Hindus in *Bengal* was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of *England*, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindus in *India*. It is obvious, therefore, that the conclusion arrived at in the lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principle of Hindu law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next to those which affect the will in question.

It was argued on behalf of the Plaintiff, in the first place, that the will is void by reason of its being founded upon the creation of an estate in trustees, absorbing the whole interest in the property, and out of

(1) 9, Moore's I. A., p. 134; 1 P. C. J., p. 837.

(1) 10, Moore's I. A., p. 279; 2 P. C. J., p. 111.

which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindu law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The Plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the Plaintiff also gives the go-by to the consideration that, if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the will, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay *A* an annuity, and subject thereto in trust for *B*; if the trust be void, it should simply be struck out, and *B* would have the property subject to the annuity. Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law, which has grown up in *England* of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in, and ought not to be introduced into, Hindu law. But it is obvious that property, whether moveable or immoveable, must, for many purposes, be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in *India* in many cases. Implied trusts were recognized and established here in the case of a *benami* purchase in *Goopeekrist Gosain* v. *Gungapersaud Gosain* *; and in cases of a provision for charity or for other beneficient objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property (to which no objection has been raised,) the creation of a trust is practically necessary. If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that, under the guise of an unnecessary trust of inheritance, the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, after the determination of those interests, the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails. As for the argument that the trust failed, because one of the trustees had renounced, or, more correctly speaking, had not acted, their Lordships think this criticism unfounded in law, and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

Having disposed of the question, whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one, for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the Plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to

* 6 Moore's I. A, p. 53; 1 P. C. J, p. 423.

the real estates and the personalty settled therewith, is as follows:—

Rs. 2,500 per month to the "*person or persons* for the time being entitled," under the will, "to the beneficial enjoyment of the said real property:"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible:"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustees or trustee are to convey to he person entitled to the beneficial interest, subject to the subsequent limitations, "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be;"

The limitation referred to was as follows in the present tense, and therefore to operate at the moment the will took effect, though "subject always to the devise to" the trustees:—

1. To the Defendant *Jatindra Mohan Tagore* for life;

2. To his eldest son, born during the testator's life-time, for life;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male;

4. Similar limitations for life and in tail male upon the other sons of *Jatindra Mohan Tagore*, born in the testator's life-time, and their sons successively;

5. Limitations in tail male upon the sons of *Jatindra Mohan Tagore*, born after the testator's death;

6. "After the failure or determination of the uses and estates hereinbefore limited" to (the Defendant) *Surendra Mohan Tagore* for life;

7. Like limitations for the sons of *Surendra Mohan Tagore* and their sons as for the sons of *Jatindra Mohan Tagore*. Under these limitations the Defendant, *Promoth Kumar Tagore*, * who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life-estates of *Jatindra Mohan Tagore* and of his father;

8. Like limitations in favor of the sons of *Lalit Mohan Tagore*, who was deceased at the date of the will, and their sons in tail male, as for the sons of *Jatindra Mohan Tagore*. Under these limitations (if the will be valid), the Defendant *Sutendra Mohan Tagore*, as the son of a son (his father having died during the testator's life-time) would take an estate in tail male. He is the only Defendant in that situation.

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of *England* whereby an entail may be barred." This clause shows an intention that each tenant, though of inheritance, should be prohibited from alienation, a restriction which in *England* could only be imposed by Act of Parliament, as in the case of the settled Abergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence, or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that, upon the face of it, the will contains a variety of limitations which are void in law, as, for instance, the limitations in favor of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male, which is a novel mode of inheritance inconsistent with the Hindu law.

The first life-interest in *Jatindra Mohan Tagore* next requires attention. It

* A son of *Surendra Mohan*.

was objected to on two grounds: first, because it was said that Hindu law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, and so forth; secondly, it was said that the life-interest was void, because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of Rs. 2,500 per month, so that it is said this life-estate may never come into existence, because the legacies and annuities, and interest on arrears, may never be completely satisfied.

As for the first objection, it amounts to this, that, because there is, as was contended, only one estate technically known to Hindu law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because, in the law we are dealing with, the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the Plaintiff that annuities given and charged upon land are valid: but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits, and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will.

As to the second objection to the life-interest,—namely, the uncertainty of the period at which it was to commence,—that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life-interest was to begin at once. It was subject to the devise to trustees, who were to receive the rents, allow the life-holder Rs. 2,500 per month out of the net proceeds, to apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession, to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will, alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that, upon the ground of public policy, such law ought to extend to *India*, which the character of the law of gifts there seems to render unnecessary.

Whether *Jatindra Mohan Tagore* took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favor of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law, whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindu law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in *England*. These would be re-

jected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents, would be disregarded as an attempt to legislate. Accordingly, it has been argued in support of the will that, as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created ought to be rejected, and such an estate of inheritance, as the law would uphold and sanction, ought to be read out of the will, and conferred either upon *Jatindra Mohan Tagore*, whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life-estate as converted or extended into an estate of inheritance, according to Hindu law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male; whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance, not merely in details, but in substance and effect with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nicholl* v. *Nicholl* (1). The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. Testing this alone by English precedents, it might plausibly be maintained by *Pitt* v. *Jackson* (1). The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance, which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which show, in common with the rest of the will, that the intention of the testator was to give, and to give only, such an inheritance as would keep together the property inalienable, so long as a male descended in a male line from any of the indicated sources of inheritance, should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at, by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guess-work as to what the testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed. These observations dispose of the case of *Humberston* v. *Humberston* (2.) so much relied upon by Sir *Roundell Palmer* in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the testator, estates of inheritance will be inferred against the particular expression, in order to benefit, as nearly as may be, in a lawful way all whom the testator intended to benefit.

(1) 2 W. Bl., 1159.

(1) 2 Br. Ch. Ca., 51.

(2) 1 P. Wms., 332

To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of *Monypenny* v. *Dering* (1.) Their Lordships are of opinion that no estate of inheritance, other than the void estate in tail male, can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded,—namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life-estate to the first is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death, except *Suttendra Mohan Tagore* and the validity of his claim to a life-interest in succession stands upon the same ground as that of *Surendra Mohan Tagore* and his son, whose position must next be discussed.

Upon this the question arises whether *Surendra Mohan Tagore*, *Promoth Kumar Tagore*, and *Suttendra Mohan Tagore* take life-interests successively after that of *Jatindra Mohan Tagore*, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to *Surendra Mohan Tagore*, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations, except *Jatindra Mohan Tagore*, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life after the death of *Jatindra Mohan Tagore* then became vested in *Surendra Mohan Tagore*. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law; as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.

If *Jatindra Mohan Tagore* should beget or adopt a son and die, leaving the son and *Surendra Mohan Tagore* both surviving, either *Surendra Mohan Tagore* (and after him his son) must take at once and enjoy, to the exclusion of the son of *Jatindra Mohan Tagore*, in spite of the will, or the heir-at-law (who, though in terms excluded from benefit "under the will," cannot be excluded from his general right of inheritance without a valid devise to some other person) must enter and enjoy during the life of *Jatindra's* son, and of his issue male, actual, or adopted; and *Surendra Mohan Tagore* (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law, whose intervention was not contemplated by the testator.

If *Jatindra Mohan Tagore* were to die, leaving power to adopt a son, who was afterwards, in fact, adopted, *Surendra Mohan Tagore* would either enjoy absolutely, to the exclusion of the son, in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed, in which the rights of *Surendra Mohan* and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's in-

(1) 2 De G. M. & G., 145.

tenation by keeping up the estate, and handing it on from one to another, whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean failure or determination in fact, of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance, and must fall therewith.

Their Lordships are thus of opinion that a life-interest has been created in *Jatindra Mohan Tagore*, and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the question how far the personalty not settled with the realty, but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with. Whether the bequest of the *corpus* is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (appellate jurisdiction.) The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the *corpus* to an uncertain person who might be one of those who, for failure of the estate in tail male, cannot take the realty. Mr. Justice *Norman* declined to reject the words "or persons," and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction; but he leant to the alternative, that it was uncertain whether the testator meant to make an absolute gift, or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives *Jatindra Mohan Tagore* the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows,—*viz.*, that the surplus in the hands of the trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty, in the same manner as the rents of the realty. The words "or persons," instead of being rejected as inconsistent with a gift of the *corpus*, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the trustees, not to convey, but to stand "possessed of, and interested in, the trust moneys, and securities, and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoy-

ment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is that, after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of *Jatindra Mohan Tagore*, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the Plaintiff's claim to maintenance, their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The Plaintiff admits a marriage gift by his father of real property, producing at the time Rs. 7,000 per year, which, *primâ facie*, is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said *Prasanna Kumar Tagore's* property." The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally, and not of the particular claimant) may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is, whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *primâ facie* adequate income; and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the Plaintiff has laid no foundation for further inquiry, either in law or fact.

The Plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact, until he comes into its enjoyment. He has averred upon information and belief that the trustees, "against the directions contained in the will," sold securities for money consisting of Government Paper, "out of the *corpus* of the estate of the said testator, and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (original ordinary civil jurisdiction), Mr. Justice *Phear* considered this statement of the Plaintiff insufficient, because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty and the selling of the Government Paper, of which the Plaintiff complains may, as far as anything goes which is stated by the Plaintiff, have been effected

for that purpose." The High Court (appellate jurisdiction) however directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the Defendants' knowledge, and not within the Plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was consistent with a due performance of the trust. In this latter view their Lordships concur and hold that the Plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life-interest of *Jatindra Mohan Tagore*, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdal* v. *Briggs* (1), where it was laid down that, generally speaking, it is not according to the course of the Courts in *England* to declare future rights, and it falls within the exceptions there contemplated as possible, in the judgment of the Lord Justice *Turner*, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose, of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between attorney and client of all parties in the lower Court, upon appeal to the High Court (appellate jurisdiction), and of the appeals to Her Majesty in Council, ought to be paid out of the estate, taking first the *corpus* of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (appellate jurisdiction) be in part affirmed, and in part varied, and that additional declarations of the rights of the parties should be made as follows, that is to say:—that the said decree be affirmed, so far as it orders that the decree of the lower Court in its ordinary civil jurisdiction be reversed: and that the plaint in this suit does show a cause of action: and that the testator died intestate as to certain portions of his property: and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will: and that the Plaintiff is not entitled to any maintenance from the estate of the testator; and that the Plaintiff is entitled to an account as directed by the decree of the High Court (appellate jurisdiction): and that, as to the residue of the said decree that the same be varied, and the following order and decree substituted for the same, that is to say:—that the Defendant *Jatindra Mohan Tagore* is beneficially entitled to a life-interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made, and to the provisions of the will not hereby declared to be void; and also, until the legacies and annuities fall in and are satisfied, to receive Rs. 2,500 per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout; and also that, subject to the trusts for payment of the legacies and annuities, the said *Jatindra Mohan Tagore* is beneficially entitled for his life to use and enjoy the library, carriages, horses, farm-yard, furniture, jewels, gold and silver plates, and other articles be-

(1) 8 De. G. M. & G., 391.

longing to the said testator, except the jewels, household furniture, and other articles which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not, to be collected, or got in, or sold by the said trustees and executors: and that the limitations in tail male and subsequent limitations in the said will respectively have failed and are void: and that, upon the failure or determination of the life-interest of the said *Jatindra Mohan Tagore*, the Plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life-interest is declared; and that upon the expiration of the said life-interests, and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the Plaintiff as such heir-at-law: and that the case be remitted to the Lower Court, with a direction that it shall try the seventh (1) issue, and return its finding thereon, with the evidence, to the High Court (appellate jurisdiction): and that the costs of the parties respectively in the lower Court, of the appeal to the High Court (appellate jurisdiction), and the costs of the several appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the *corpus* of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (appellate jurisdiction) upon the taking of the account by that Court directed.

(1) In the decree, as printed, erroneously called the sixth issue.

24th February, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces, Agra.

MUSSUMAT AZEEZOONNISSA and another, (Defendants)* ... } *Appellants*,

versus

BAQUR KHAN, (Plaintiff)... *Respondent*.

Evidence—Execution of Document by Purdah Ladies—Agency—Burthen of Proof.

The Plaintiff sought to make two *purdah* ladies liable on a document which he alleged had been executed by a third person as their agent. *Held* (reversing the decision of the High Court), strict proof of the agency must be given.

THEIR LORDSHIPS delivered the following judgment:—

This appeal arises out of a suit brought by the present Respondent against the Appellants for the recovery of the possession of a village named *Burehta*, under a title which was originally a mortgage title, but which may be taken to have been made absolute by foreclosure. The suit was resisted by the Appellants, the then Defendants, on the ground that they never executed the mortgage-deed in question. That is the substantial issue in the case; that it was executed neither by them, nor by any person duly authorised to execute it on their behalf. The *Zillah* Judge, who tried the case in the first instance, found that the Plaintiff had wholly failed to make out his case, and dismissed the suit. The Plaintiff then appealed to the High Court in

* 10 Ben. L. R., p. 205.

Agra, and the learned Judges, who heard that appeal, reversed the decision of the *Zillah* Judge, and found in favor of the Plaintiff; and it is against that decree that the present appeal is brought.

What was the foundation of the judgment of the High Court? The learned Judges begin by saying:—"We do not mean to find that the Plaintiff's case is free from doubt; but the admitted facts, and some reasonable presumptions, lead us to conclude that the Plaintiff had at least proved a sufficient *primâ facie* case, and that the Defendants not having adduced such evidence in answer to it as they might fairly be expected to do, there should be a decree against them." Therefore, the judgment assumes that the Plaintiff had made out a *primâ facie* case, and that the Defendants had failed to make a sufficient answer to that case.

It is, then, desirable in the first instance to consider what was the *primâ facie* case, which, in the opinion of the learned Judges, had been proved. The case of the Plaintiff was that, on the 22nd of January 1857, in consideration of an advance made by him to the Defendants, they had executed to him a bond, hypothecating another village named *Nundsenes*; that finding he had not got the security which he intended to have, namely, a mortgage by conditional sale, he applied to them for further security, and that after some dispute it was agreed that the instrument upon which he sued should be given to him in substitution of the other, which was in fact, though not actually cancelled, treated as being superseded and made of no effect by the second transaction.

It appeared by the evidence, and it was not contested at the bar, that both these instruments were executed by *Mahomed Alee*, the husband of the Appellant *Ehsan Bibee*, and each document appears to have been registered on the day on which it was executed, not at *Cawnpore*, the place where the Defendants resided, and where the transaction of advance, if any advance was made, is alleged to have taken place, but in *Futtehpore*, the district in which the village of *Burehta* is situated. So far, no doubt, the Plaintiff proved his case. But he failed to show that either at the time of the registration, or at any subsequent time any *mooktearnamah* authorising the execution of those deeds by *Mahomed Alee*, as agent of the Appellants, was produced or verified, or proved in any way. No mention of such an instrument is made in the endorsement of registration upon either mortgage, all that therein appears being that *Mahomed Alee* was identified, and that upon such identification the deeds were registered.

Again, what is the account which the Plaintiff gives of the advance and of the transaction? He alleges that this *Mahomed Alee* was not only the manager on behalf of his wife and her sister—of their property—but that he had some employment under a person described as the *Rajah* of *Rusdharree*; that, in that capacity, he wanted to obtain a loan of Rs. 16,000, to be applied in paying off a mortgage upon *Mouzah Rusdharree* belonging to the *Rajah*; that he, the Plaintiff, agreed to advance Rs. 8,000, part of this money, on the security of the Appellants' villages, and that the remaining Rs. 8,000 were to be advanced by one *Rae Chund*, a banker in *Cawnpore*; and that in some way or other the Appellants were to have a counter-security upon *Mouzah Rusdharree*. There is no evidence whatever that any such transaction ever really took place, except the deposition of the Plaintiff himself. None of the subscribing witnesses to the execution of the first bond, which was the only occasion on which money is alleged to have passed, were called. Two persons were called by the Plaintiff, who alleged that they were creditors of the ladies. They gave a wholly different account of the transaction, representing that the ladies were about to change their residence, and to leave *Cawnpore*, that they owed to one of these persons Rs. 1,000, and to the other Rs. 451, and that these debts were paid out of the Rs. 8,000 advanced. Neither of them professed to have seen the ladies; and neither of them spoke to the execution of the first bond in his presence. They left it uncertain where the first bond was executed; their testimony pointing to its execution at *Futtehpore*, and not at *Cawnpore*, where the ladies were living. Then only one of the subscribing witnesses to

the second instrument was called, and he, too, did not profess to have been present at its execution, or to have seen any power-of-attorney under which it was executed; nor does his evidence fix the place of its execution; or show under what authority it was executed.

Their Lordships, therefore, considering that these ladies are *purdah* women, are of opinion that the High Court was in error in considering that a *primâ facie* case had been made out at all. The witnesses differ from the Plaintiff as to the nature of the transaction, they are not consistent as to the execution of the instruments, and not one of them pretends to prove the authority under which they purported to be executed. That authority was either a written authority, or if such a thing would suffice it was a verbal authority. No written authority is produced or proved. If there was a verbal authority, it lay upon the Plaintiff to prove that verbal authority; and not upon the Defendants to show that *Mahomed Alee* acted without their authority.

If, then, there has been any error in not calling *Mahomed Alee*, that is a fault of which the Plaintiff, and not the Defendants, should suffer the consequences, because it was clearly the Plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the *purdah* women, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that *Mahomed Alee* is dead. He, therefore, cannot be heard to say that the Defendants are in fault for not calling *Mahomed Alee*, even supposing that it lay upon them, and not upon him, to call that person.

Their Lordships have not omitted to consider some documentary evidence relied upon by the Plaintiff, *viz.*, the petitions put in by *Mahomed Alee* in 1858, and afterwards in 1860. In 1858 *Mahomed Alee* seems to have either truly or untruly alleged that these instruments, though executed by him, never were really delivered to the Plaintiff; that they remained with him until the advance should be actually made; and that during the disturbances consequent upon the mutiny at *Cawnpore*, his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the Plaintiff. He put in a counter-petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action, and dismissed the criminal charge. That statement of *Mahomed Alee* was either true or false. If it were true, there is an end of the Plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding with the Defendants, except the mere statement of *Mahomed Alee*. The High Court seems to have assumed that because *Mahomed Alee* said he presented that petition on behalf of the Defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with *Mahomed Alee* in an attempt, upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the Plaintiff. But there is really no more proof of *Mahomed Alee's* having acted as their agent in that case than there is of his agency in the original transaction; and therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted. The same observation applies, perhaps even more strongly, to the petition put in by *Mahomed Alee* in 1860, as an intervenor in the foreclosure proceedings.

Therefore, taking the whole evidence produced by the Plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *primâ facie* case had been made out; and they consider that the suit, being one brought against *purdah* women, upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the

whole course of cases that have been decided in *India* and at this Board in respect of transactions to which *purdah* women are parties.

It has perhaps by anticipation been stated that even had a *primâ facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the Defendants because they had failed to call *Mahomed Alee*, (if *Mahomed Alee* is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given by the mouth of *Amjaud Alee* evidence far more satisfactory than any statement of so untrustworthy a person as *Mahomed Alee*, that that person was not their general manager or their manager at all, and that there is no reason to suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the Plaintiff, or of the fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the *Zillah* Judge was correct, and they will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and in lieu thereof to direct that the appeal to that Court be dismissed, and the judgment of the *Zillah* Judge affirmed with costs, and that the Respondent should also pay the costs of this appeal.

12th, 13th and 14th March, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

THE GOVERNMENT OF BOMBAY,* ... } *Appellant,*

versus

DESAI KULLIANRAI HAKOOMUTRAI, ... } *Respondent.*

Palki Huq.

Suit to establish a claim, as of hereditary right, to an annual payment for *Palki Huq*, or palanquin allowance, the only issue settled being, whether the right claimed was perpetual, or whether the Government was competent to make it cease whenever they pleased to do so. *Held*, upon the special ground that under the native rulers this allowance was treated as permanently annexed to the office of *Desai* of the *Pergunna Broach*, and was confirmed in 1808, by the British Government as appurtenant to the office, that the claimant was entitled to the *Palki* allowance claimed.

The Court was unable to concur with the High Court of *Bombay* that upon the facts the claimant had under the provisions of *Bombay* Regulation No. V of 1827, Clause 1, Section 1, acquired a title by prescription to maintain his suit, whatever might have been the original title of his ancestors to the *Palki* allowance claimed.

The Court was by no means satisfied, that, the allowance, though payable out of the Government Revenue of a particular *Pergunna*, could properly be said to be *immoveable property* within the meaning of Clause 1, Section 1 of *Bombay* Regulation No V. of 1872. It did not constitute a charge which could be enforced against the land, or since 1808, against the revenues of the land prior to the claim of Government.

The utmost right, was, to receive, after the perception of the revenues by Government, a certain annual sum of money, out of the Collector's treasury; and the regulation afforded no bar to the trial of the question between the Government and the claimant upon its merits.

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* 14, Moore's I. A., p. 551.

20th April, 1874.

Judgment having been reserved, was now delivered by

The Right Hon. Sir James William Colvile:

The question raised by this appeal was, whether the Respondent has an hereditary right to receive out of the public revenues of the Presidency of *Bombay*, an annual allowance of Rs. 1,274 : 4 : 2, notwithstanding an Order of the Government, dated the 28th of November, 1861, which declared it to be a mere personal allowance, and as such resumable; and that it was to cease on the death of the then recipient—the Respondent's Father.

The Respondent is *Desai* of the *Pergunnah* of *Broach*. His office, once important, is now a mere sinecure, its functions being exercised by other Officers. But such as it is, it is admitted to be held by him, together with an *Enam* village enjoyed with it, by hereditary right. The allowance in question is, however, not a necessary incident to the office of *Desai*, nor is it held by the same title as the village. His case as to it is, that upwards of a century ago the then native ruler of *Guzerat* conferred upon one of his ancestors, and predecessors in the office of *Desai*, as a reward for distinguished service, the grant of a *Palkhi* or Palanquin, together with the allowance in question, the latter being the sum fixed for the *Palkhi* expenses, and charged on the land revenues of the *Pergunnah* of *Broach*. He alleges, that this Grant was confirmed by the different dynasties who have since ruled in *Guzerat*, and finally by the British Government in 1808; and he insists, that the allowance thus enjoyed is hereditary in his family, and now irrevocable by the Government.

The case made by the Government in answer to this claim, is that the *Palkhi* right was not granted for *Desaiship* service; that it is not of the nature of an ordinary *Enam*; that it was granted to the original holder personally, and was liable to cease on his death; and that to allow, or not to allow, such a right depends on the pleasure of Government. The only issue settled in the cause was, whether the right claimed was perpetual, or whether the Government was competent to make it cease whenever they pleased to do so.

The *Zillah* Judge, who tried the cause in the first instance, determined this issue in favour of Government, and dismissed the suit; his decision was reversed, and a Decree made in favour of the Respondent by a Division Bench of the High Court of *Bombay*; and the present appeal is against that Decree.

The grounds of the judgment of the High Court are thus summed up by Mr. Justice *Tucker*: "I consider, then, that the Plaintiff is entitled to succeed in this suit (1) because, in the absence of the original Deed of conveyance, or Grant, the long enjoyment of the Plaintiff's ancestors, during four generations successively, and for a period of more than a century, creates a legitimate presumption that the allowance was conferred on the original Grantee and his heirs; and (2) because the uninterrupted enjoyment of the Plaintiff's Grandfather and Father, under the Order made by the Government of *Bombay* on the 7th of February, 1808, which extended from that date to 1856, gave to the Plaintiff a statutory and indefeasible title."

Their Lordships propose to deal, in the first instance, with the second of these propositions; but, before doing so, they will shortly review the proceedings of the British Government with reference to the allowance claimed, because the effect of those proceedings has an important bearing upon both propositions.

The territory of which *Broach* forms part was annexed, with the rest of *Guzerat*, to the *Mogul* Empire, by *Akbar* in 1572, and, from that time to 1685, was governed by a *Nawab*, or *Soubahdar*. The sovereignty over it then passed to the *Mahrattas*, and seems to have been exercised by the *Guicowar* until 1772. In that year *Broach* was taken by the British, and was held by the East India Company until 1783, when it was ceded to *Scindia*. That *Mahratta* power held it until 1803, when it finally became British territory, under one of the Treaties concluded with *Dowlut*

Rao Scindia. The office of *Desai* appears to have been held by the Respondent's ancestors during all these changes of dynasty. His grandfather, *Dowlutrai*, was found in possession of it by the British in 1803; and it would appear from the evidence, continued to receive the emoluments of office which he had previously received (including for some time the *Palkhi* allowance,) but subject to the condition of submitting to the orders which the Government of *Bombay* might pass respecting any increase or reduction of them. On the 31st of May, 1807, the Revenue Commissioners at *Broach* made their Report to Governor *Jonathan Duncan*, upon several matters previously referred to them, which included the claims of the *Desais* in the territories in question. That document was not produced in the Court below, and the High Court has drawn various inferences, unfavourable to Government, from its non-production. It has, however, been brought before their Lordships in the supplemental record; and has been treated as part of the evidence in the cause.

One of the papers forming the Appendix to this report, No. 51, is entitled "Statement of the Income assigned to the *Desais* of the *Broach Pergunnah*, as taken from separate statements given in by each under their respective signatures." From this it appears, that what *Dowlutrai* claimed was an *Enam* village, under a Grant to his ancestor, *Khooshalrai*, from the *Guicowar*, in A. H. 1140, corresponding with 1727-8; the *Palkhi* allowance in question; rights in certain *Passaita* land; and some other customary allowances or perquisites in money or in kind. The recommendations of the Commissioners in the body of the report were (par. 34), that the last-mentioned allowances and perquisites should be abolished or reduced; that the right of *Desai Dowlutrai's* family to the *Enam* village should be acknowledged; and that they should, for the present, be allowed to hold their *Passaita* land, subject to such arrangements as Government might think fit to adopt for restoring to the State all illegally alienated land.

Nothing was there expressly said about the *Palkhi* allowance; but it may be included in the general recommendation contained in these words:—"The amount of such of these (*i. e.*, those fees and emoluments) as Government may be of opinion they (the *Desais*) have a tolerably fair right to, from the length of time they may have enjoyed them, may be calculated from the accompanying statement, Nos. 51 and 52, and a *per centage* in proportion allowed to them on the Government Land Revenue, which should be made payable to them from the Collector's Office only, in lieu of all secret or avowed perquisites and emoluments whatever."

The action which the Government of *Bombay* took on this report, is shown by the 16th paragraph of a Letter, dated 7th of February, 1808, in these words:—

"Proceeding next to the *Desai's* allowances, the village of *Kallum*, or (as written in the *Sunnud*) *Kullub*, is confirmed by Government, as you recommend, as on the same grounds the *Palanquin* establishment with *Sepoys*, and *Peon's* allowance to *Dowlutrai*, from the beginning of the current *Mergsaul*, but without arrears, for the time the same has been suspended.

"The article *Sootchumra* is to be resumed from him and the other *Desais*, on the like principle, as ordered in respect to *Jee Baboo*, and the article of *Sadur*, as applicable to all those *Desai* offices, is left to you to confirm or revoke, according to your sense of its justice and expediency."

We accordingly find that *Dowlutrai*, in his subsequent *Kaboolyat*, or acknowledgment of the 20th March, 1809, whilst he admits the receipt of an order for the payment of the money appertaining to the customary allowance (*dustoor*) and *Passaita* land, and agrees to treat those allowances as subject to the future orders of Government, ceases to make mention of the *Palkhi* allowance, obviously treating that as unconditionally confirmed to him.

That it was regularly paid to him up to the time of his death is shown by the revenue accounts of the Collector of *Broach*, which have been produced, in which, at least after April, 1809, it is treated as one of the general charges on the revenue.

Dowlutrai died in 1828. He was

succeeded in the office of *Desai* by his Son, *Hakoomutrai*, who thereupon applied for the *Palkhi* allowance to the Collector of *Broach*. It was paid to him by that Officer without any fresh or distinct Grant or order of the Government, the payment continuing as before to be entered in the Collectorate accounts as a general or permanent charge on the revenues of the District. This state of things went on without question until the year 1856. In that year the right of *Hakoomutrai* to this allowance was first questioned. He was required to explain how he was in receipt of it, and made, on the 28th of December, 1856, the statement respecting his right. No final Order, however, seems to have been passed by Government on this matter until the 28th of November, 1861, when, on the Report of the Revenue Commissioners, dated the 3rd of October in that year, it was resolved, as follows:—"The allowance is clearly a personal allowance, and should, as recommended by Mr. *Peile*, be transferred to the head of 'Life pensions.' It should cease on the death of the present incumbent, *Hakoomutrai*."

Hakoomutrai died some time in the year 1863. The payment of the allowance then ceased, and in December, 1864, the Respondent commenced this suit to establish his hereditary right to it.

Their Lordships are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the Respondent had, under the provisions of the *Bombay* Regulation V. of 1827, cl. I., sect. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this *Palkhi* allowance. They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular *Pergunnah*, can properly be said to be "immoveable property," within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of *Dowlutrai* after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury.

Nor, again, are their Lordships satisfied that there has in this case been such a possession or enjoyment of the allowance under a claim of hereditary right for thirty years without interruption, as would bring the right, if in the nature of immoveable property, within the operation of that Regulation. The question between the Government and the Respondent is, whether the allowance was enjoyed by hereditary right, or by virtue of a grant for life, express or implied, to each successive taker. So long as *Dowlutrai* lived, his enjoyment of the allowance would be as consistent with the one contention as with the other.

Jaghiredar for life cannot convert his life tenure into a perpetual tenure by living for more than thirty years. The period of thirty years, therefore, would only begin to run from 1828, when *Hakoomutrai* began to receive the allowance without a fresh grant; and, as it may be assumed, under a claim of hereditary right. But it seems to their Lordships that the interruption to this enjoyment may fairly be taken to have begun in 1856.

The right of *Hakoomutrai* was then called in question; and there was the commencement of an investigation of his title which appears to have lasted, until the final Order of Government in November, 1861. There was, on the part of Government, no admission, express or implied, of his hereditary right after 1856. And for these reasons they have come to the conclusion, that the Regulation affords no bar to the trial of the question between the Government of *Bombay* and the Respondent upon its merits.

Again, both the learned Judges of the High Court appear to have acted on a presumption, that the title of the Respondent to an hereditary grant was founded, not on the documents produced, but on some lost or missing *Sunnud* which contained words of inheritance. In making this presumption they drew certain inferences against the Government, and in favour of the Plaintiff, from the non-production of the Report of the Revenue Commissioners at *Broach* of the 31st of May, 1807. That document is, however,

now before their Lordships; the appeal has been argued as if it were part of the evidence in the cause, and the inferences to be drawn from it must be drawn from its actual, and not from its supposed, contents.

Their Lordships will now consider what is the effect of the evidence in support of the Plaintiff's title.

The first trace of the allowance in question is to be found in a *Perwannah* which, if not a Grant, recites a Grant by the *Nawab Hyder Joolee Khan* to *Khooshalrai Desai*, in recompense of his extraordinary services as *Desai*, fixes the allowance for the sustentation of that dignity at Rs. 1,972 (being Rs. 1,200 for the *Palkhi*, and Rs. 772 for the servants), and directs that sum to be paid to him annually. The only date on this document is "the 13th *Shaban*, in the 9th year of the reign," a date which it would be difficult to fix. But as the Grant purports to have been made by the *Nawab*, and there is no mention of the *Guicowar*, it may be presumed that this *Perwannah* was issued before the year 1685, when the actual sovereignty over the territories in which *Pergunnah Broach* is situated, passed into the hands of the *Mahrattas*.

This Grant, however, whatever its nature, appears to have been afterwards superseded; for the earliest *Mahratta* document produced by the Respondent in support of his title, and said to bear a date corresponding with the year 1753–54, is in favour of *Bhikaridas*, the son of *Kooshalrai*, and imports the grant to him by the *Guicowar* of a *Palkhi*, with an allowance of only Rs. 1,100 for keeping it up. This document seems to have been intended to operate both as a *Sunnud* or Grant, and as a *Perwannah* or Order addressed to the Officers who were to pay the allowance; for it is stated that, across the *Hindee Perwannah*, to the Officers, there is written a memorandum in Persian to the effect, "a *Sunnud* for a *Palkhi* in the name of *Bhikaridas Desai*." *Bhikaridas* was succeeded by *Jamiyatrai*. Several *Perwannahs* issued by the *Guicowar* during the life of this *Desai* are produced, but none of them show how his receipt of the allowance began. Those of 1760-61 and 1762-63 refer to interruptions of his existing right, not to the commencement of it. That of 1772-73, contains proof of an augmentation of the previously existing allowance by the wages of seven *Sepaie* thereby assigned to him. *Jamiyatrai* died in 1774-75, and thereupon the *Guicowar* of the day issued what is termed "a consolatory Letter," in the shape of a *Perwannah*, to the revenue Officer at *Broach*, which contains this passage:—

"*Jamiyatrai Desai* is dead. Giving consolation to his Son, *Dowlutrai Desai*, in many ways, you are, from time to time, to get the business and affairs of the *mehal* transacted by his hands, as has been done; and you are to pay, from time to time, his *Palkhi* and *Sebandi* allowances as they now exist." The whole of this document, including the expression that "they" (*Dowlutrai* and his ancestors) "had from ancient times belonged to the *Sirkar*," implies the existence of at least a customary right of succession to the allowance with the office of *Desai* from Father to Son, though perhaps a right capable of being interrupted or destroyed, like other rights under a despotic Government, by the will of the Sovereign.

This is the latest document issued by the *Guicowar*; and indeed the date as given in the record is later than the taking of the City of *Broach* by the British. The authority however of the *Guicowar*, may at that time have continued to exist in the surrounding District.

The next document is the *Perwannah* of *Scindia*, issued on the application of *Dowlutrai* in April, 1786. It recites the application of *Dowlutrai*, which appears to have been in the nature of a claim by hereditary right, since it refers to the Grant to his Grandfather, *Bhikaridas*, as the foundation of his title, making no mention of any intermediate Grant to his Father, *Jamiyatrai*. The allowance was then fixed by *Scindia* at Rs. 1,352, and directed to be continued to *Dowlutrai* as *Desai*. And a further direction was given to take a copy of the document and to return the original (called a *Sunnud*) to the *Desai* for his use. This is the last of the native documents, *Dowlutrai* being still alive and in the enjoyment of the al-

lowance when the Territory of *Broach* was ceded to the British Government in 1803.

Reviewing these native documents, their Lordships are unable to find any which import, by express words of inheritance, that the *Palkhi* privilege with its allowance was to be enjoyed from generation to generation by the original Grantee and his heirs. And it is now clear, that the Report of 1807 does not, as the Judges thought it might, disclose any evidence from which the existence of a *Sunnud* in those terms may be inferred. Their Lordships are disposed to infer from the terms of *Scindia's Perwannah*, and the earliest of the *Guicowar's Perwannahs*, that there was no *Sunnud* other than those documents importing the grant of the allowance to *Bhikaridas*; and the confirmation of the allowance to *Dowlutrai*. On the other hand, the documents do not appear to support the Appellant's contention that the allowance was merely personal to each taker; and the subject of a separate grant to each in succession.

There is no trace of such a Grant in favour of *Jamiyatrai*; when *Dowlutrai* succeeded to *Jamiyatrai* he was treated as succeeding to the allowance by the same title to which he succeeded to the *Desaiship*; the confirmation of *Scindia* is founded on an original Grant to *Bhikaridas*; and the whole tenor of the documents is in favor of the conclusion that, after the allowance was granted, it was treated and considered as part of the emoluments of the hereditary office of *Desai*.

Their Lordships are not disposed to treat the proceedings of the British Government in 1808 as amounting to a new and enlarged Grant. Nor do they consider that the accounts, or the acts of the Government Officers on the death of *Dowlutrai*, though they afford evidence that Government up to 1856, considered the allowance to be a permanent alienation of revenue in favour of this family, are conclusive against the Government's present claim of a right of resumption.

They think that the reasonable construction of the proceedings in 1807 and 1808 was, that the Government of that day intended to confirm, and did confirm, the title of *Dowlutrai*, whatever it might be, without enlargement, but also without diminution. But the inference which their Lordships draw from the Report and the Letter of Government thereon is, that the Government of that day was dealing, and intended to deal, not with the mere rights and allowances of the individual *Dowlutrai*, but with the emoluments of the hereditary *Desaiship* held by his family. And it is on the special ground that, under the native Rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808 by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the Decree under appeal, and to dismiss this appeal with costs.

14th and 15th March, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

RAMALAKSHMI AMMAL, (Defendant)* ... } *Appellant,*

versus

SIVANANTHA PERUMAL SETHURAYAR, (Plaintiff) } *Respondent.*

Hindu Law—Impartible Zemindari—Inheritance—Custom—Evidence.

By the general Hindu law where a subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons, the succes-

* 14, Moore's I. A., p. 570; 12 B. L. R., p. 396.

sion as between sons by different wives (other than the first wife) of equal caste, is to be determined by the priority of birth of the sons, and not by the priority of marriage of their respective mothers; and therefore with respect to the succession to an impartible *zemindari* in the district of *Tinnevelly* in the presidency of *Madras*, the son of the third wife is, in the absence of proof of any special custom or family usage to the contrary, to be preferred as heir to a subsequently born son of the second wife.

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence.

20th April, 1872.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:

This is an appeal from the High Court of *Madras* in a suit raising the question of the right of succession to an impartible *zemindary* called *Urkodu* in *Tinnevelly*. The litigants are two Sons by different Wives of *Kolalinga Sethurayar*, the late *Zemindar*.

Kolalinga Sethurayar, who was a Hindoo, married three Wives. The first, *Kanthunathi Ammal*, had no child. His other Wives were *Ramalakshmi Ammal*, the Mother of *Muttee Ramalinga Sethurayar* (the Appellant) and *Vellaithai Perumal Ammal*, the Mother of *Sivananatha Perumal Sethurayar* (the Respondent.)

Although the Mother, *Ramalakshmi Ammal*, is Appellant as Guardian of her Son, it will be convenient to speak of him as the Appellant, and of the other Claimant as the Respondent.

The marriages of the two Mothers took place on the same day June in 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit

The Courts in *India* have held, that the marriage of the Appellant's Mother was first solemnized, and that she, therefore, in order of time, was the second Wife, and the Respondent's Mother the third Wife of the *Zemindar*.

In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they, therefore, adopt it in dealing with the present appeal.

It appears that at the date of the marriages the Appellant's Mother was a child only ten years old, whilst the Mother of the Respondent was a girl of sixteen. The Respondent, as might naturally be expected from the relative ages of the Mothers, was born many years before the Appellant, and he seeks to recover the *zemindary* in this suit as the first-born Son of the *Zemindar*. The Appellant resists his claim on the ground that he, as the Son by the earlier marriage, is the rightful heir. The question is thus raised, whether the Son of the second Wife, although born after the Son of the third Wife, is entitled to inherit; in other words, whether the priority in birth of the Sons, or the priority in the marriages of their Mothers, both being of the same caste, is to prevail in determining the succession to an impartible *zemindary* in this District of *Madras*.

It appears from the pleadings and issues, that the Respondent, the first-born Son, relies on the general Hindoo law of succession, and on the custom of the family, which he affirms to be in accordance with it.

The Appellant alleges, that by the custom of the District he is entitled to the succession, and he also denies that the general Hindoo law is in favour of the Respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in *India*, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court, that the

Appellant has failed to prove the special custom which he undertook to establish.

It appears from the record that, in 1861, during the life of their Father, the late *Zemindar*, the Appellant brought a suit in the Civil Court of *Tinnevelly* against the present Respondent, to have his right to the succession declared. He founded his claim on the usage in his Father's *zemindary* and "other *zemindaries*." The present Respondent then relied, as he still does, on the general Hindoo law, and the usage of the family. The Civil Judge was of opinion, that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the *Zemindars* of the District that the Son of the senior Wife was to succeed. The decision of this Judge in favour of the present Appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the Father; but it has been necessary to advert to the suit because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late *Zemindar* himself, who was a party to the declaratory suit, and, evidently, he is not a trustworthy Witness, for whilst in that suit he espoused the cause of the present Appellant, and gave evidence of the family usage in his favour, he had some years before, and after both Sons were born, given equally strong evidence of a custom the other way in support of the claim of the present Respondent. It is obvious that the *Zemindar's* testimony was influenced by his partiality for one Son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed in the present suit both the Courts in *India* have so regarded it.

Then with respect to the usage of the District set up by the Appellant, the only evidence, apart from the conflicting testimony just referred to, which appears on the Record, is a statement of certain declarations alleged to have been made by some *Zemindars* under the following circumstances. In the year 1849 the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor Sons of the *Zemindar* of *Parayur* was to succeed him, requested the Collector of *Tinnevelly* and *Madura* to ascertain the rule of succession "as regards Sons by different Wives," and it appears from the Collector's Letter to the Secretary of the Board, that the opinions of twenty *Zemindars* and *Poligars* were collected, copies of which he sent, giving also at the same time, an abstract of them in his Letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above Letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in *India*, the substantial principles on which the authenticity and value of all evidence rest, should be observed. One of these principles is, that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the *Zemindars* or some of them might not have been called as Witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships consider, agreeing with the High Court, that the only evidence offered, viz., the Collector's Letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the Collector (if it may be looked at) discloses that the *Zemindars* were not unanimous in their view

of the custom; and it further appears, that their opinions were given with reference to the succession to a *zemindary* in a family of a different caste. The late *Zemindar*, who was one of those vouched, differed from the majority, and declared that the eldest Son, although by the junior Wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom, at all events as one prevailing in his own caste and *zemindary*.

It was insisted by the learned Counsel for the Appellant that the fact that the priority of the marriages of the second and third Wives was made a question in the declaratory suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the Appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the declaratory suit brought in the *Zemindar's* life-time, and to which he was a party, the *Zemindar* himself, contrary to his former view, set up the custom which would give the succession to the Appellant, whom he was then supporting, in opposition to the Respondent, his eldest Son. When the Father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindoo law applicable to this disputed succession.

The case stands in this respect in the same category as that in the appeal relating to the *zemindary* of *Shivagunga*, which was decided by this Board in 1863(*a*). Their Lordships, in giving judgment in that appeal, say: "The *zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of a family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject" (*a*). Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact, that succession by primogeniture is the rare exception to the ordinary rule in Hindoo families, taking place only upon the descent of some impartible subject, as a *Raj* or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in Books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned Counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindoo, is the duty of having a Son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born Son is, throughout the Books of authority, treated as pre-eminent

(*a*) Katama Natchiar *v.* The *Rajah* of *Shivagunga*, 9 Moore's Ind. App. Cases, 539; 2 P. C. J., p. 25.

(*a*) Katama Natchiar *v.* The *Rajah* of *Shivagunga*, 9 Moore's Ind. App. Cases, 588; 2 P. C. J., p. 26.

amongst his Brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the Father's property, by the general rule, descends upon all his Sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, *Menu*, after laying down the cardinal rule of succession that Brothers divide the paternal property among them, adds "The eldest Brother may take entire possession of the patrimony; and the others may live under him, as they lived under their Father, unless they choose to be separated" (ch. IX., sect. 105).

"By the eldest, at the moment of his birth, the Father having begotten a Son, discharges his debt to his own progenitors; the eldest Son, therefore, ought, before partition, to manage the whole patrimony" (ch. IX., sect. 106).

"That Son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (ch. IX., sect. 107). See also sects. 137, 138.

Many of the precepts of *Menu* have been undoubtedly altered and modified by the modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the foundation of the Hindoo law of succession by modern Writers and compilers. (*See* 1 *Strange's* "Hindu Law," p. 192. *Colb.* Dig., B. V.)

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can, therefore, go to one only of several Sons, the first-born by reason of his general preeminence, should be preferred to his younger Brother.

It was not disputed that this would be so in the case of several Sons by the same Mother; but it was contended that, where there were Sons by different Wives, the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the Sons by any Wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the Sons of Wives of the same caste and class.

Thus *Menu* says, "a younger Son being born of a first married Wife after an elder Son had been born of a Wife last married, but of a lower class, it may be a doubt in that case, how the division shall be made." (Ch. IX., sect. 122.)

The doubt thus suggested whether, even in the case of a Wife of a lower class, there would be inequality of division amongst the Sons, raises a strong presumption that there would be none where the Mothers were of the same class. But the matter does not rest on presumption, for the 125th section runs thus:—

"As between Sons, born of Wives equal in their class, and without any other distinction, there can be no seniority in right of the Mother; but the seniority ordained by law, is according to birth."

It is true the Writer is, in this section, treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest Son is entitled, and one of them he had just declared in a preceding section (119) thus:—

"Let them never divide the value of a single Goat or Sheep;—a single Goat or Sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said, that the single Goat or Sheep is to belong to one Son, it is apparently for the same reason that a *zemindary* so descends, viz., that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born" appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several Sons is to be deemed the first-born is declared by section 125 above cited, "there can be no seniority in right of the Mother, but the seniority ordained by law, is according to birth."

It appears to their Lordships, that the rules just cited approach very nearly to a dis-

tinct declaration of the general Hindoo law upon the question, when regarded apart from any special custom prevailing in a particular District or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the Son of the first Wife would succeed before an elder Brother by a subsequent Wife, and it was contended that, by analogy, the Son of the second Wife must be entitled to the like precedence over the Son of the third. There are, undoubtedly, authorities which show, that the first Wife occupies a position of honour, and precedence above all others, but it is not necessary for their Lordships to decide, whether the admission made in this case is in accordance with general Hindoo law; for supposing the law to be so, no just analogy can be established between the *status* of the first Wife and that of any subsequent Wife. Her title to special rank and privileges rests upon grounds peculiar to the first Wife, and which can have no application to others. (See *Strange's* "Hindu Law," Vol. I., pp. 55, 56 [2nd Ed.]). The reasons upon which she alone of all Wives is entitled to peculiar honour and privileges, rather point to the conclusion, that the Wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first-born Son. The inheritances of Hindoos which descend on a single heir, are almost entirely confined to *zemindaries* in the nature of a *Raj*, and to offices (see "*Norton's* Leading Cases," Part I., p. 278), and it is obviously in accordance with reason and convenience, that such successions should devolve upon the Son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion, that upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of *Bombay*, *Bhujangra'v bin D. Ghorpade* v. *Malojira bin D. Ghorpade* (5 *Bom.* High Court Reports, 161.)

Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of *Madras* and to dismiss this appeal with costs.

16th, 23rd and 26th March, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

SHAM CHAND BYSACK,* ... *Appellant,*

versus

KISHEN PROSAUD SURMA alias RAJA BABOO, ... } *Respondent.*

Alluvial Lands.

In a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian river, concerning certain *chars* formed in the course of that river, each landed proprietor maintaining that he was entitled to those *chars* as appertaining to his estate. *Held*, that no sufficient explanation had been given of a very long delay on the part of the Plaintiff in instituting the suit. That if some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. That the hardship might be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away, or wit

14, Moore's I. A., p. 595.

nesses may have died. That in this case there had also been a delay of nearly ten years wholly unexplained in the prosecution of the appeal. That Plaintiff had failed to prove his case. That he had not proved the lands which had reformed, if lands had reformed in the bed of the river, to have been the same as those which belonged to his predecessors, and had been diluviated, and that he had failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he was in possession.

Whether the 2nd Clause of the 4th Section of *Bengal* Regulation XI. of 1825, applied, or, whether the 5th Clause of the same section applied, it was equally essential to the maintenance of the Plaintiff's case that he should establish the identity of the land which he had lost.

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:

This is a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian River, concerning certain *churs* formed in the course of that River, each landed proprietor maintaining that he was entitled to those *churs*, as appertaining to his estate.

The case of the Plaintiff was, in substance, that he was the Owner of a *Talook* called *Meer Syud Mahomed*, together with certain other persons of the surname of *Chowdhry*; that his ancestors, by reason of their possession of this *Talook*, were entitled to two *churs* in the channel formed by the junction of the two Rivers, the *Booreegunga* and the *Dhuneesurree*; that those *churs*, one named *Goag*, otherwise *Kodalia*, and the other *Bhedur*, were, what is called diluviated, that is, covered by water, some fifty or more years ago. *Chur Goag* was said to be diluviated in a great measure, though not wholly (indeed, it has never been quite diluviated), as long ago as the year 1814. The other *chur*, *Bhedur*, was diluviated sometime about the year 1817 or 1818. The case of the Plaintiff was, that those *churs* had gradually reappeared, chiefly owing to a change in the course of the River; in fact, that they had re-formed upon their original sites not many years after they were diluviated; and he gave evidence of measuring, from time to time, those *churs* as they reappeared and of exercising acts of ownership upon them. Among other acts of ownership, he gave evidence of a Lease granted by the *Chowdhrys*, who were co-shareholders with him in the *Talook*, *Meer Syud Mahomed*, to a person of the name of *Dowcett*, in 1829, for a term of five years, and that *Dowcett* cultivated Indigo upon a portion of the *locus in quo*. It is to be observed, however, that there is evidence on the other side, of *Dowcett* having taken the precaution of also obtaining a Lease from the proprietor on the opposite bank.

According to the Plaintiff's evidence, he was in as complete possession as the subject-matter admitted of, at all events up to the year 1832, when this litigation with the riparian proprietor on the other side of the River, who owned *Talook Bucktbully*, commenced.

It is not necessary to refer to the proceedings which took place before the Magistrates from the year 1832 to 1835, further than to state their result, which appears to have been this:—The Plaintiff, or rather those under whom he now claims, were put into possession of *chur Goag*, or, at all events, a portion of *chur Goag*, and they have remained in possession of that portion from that time to this. But, in the year 1835, an Order was made by the Magistrate for putting the Defendant's Father, *Gopal Pershad*, in possession of *chur Bhedur*. Actual possession would appear to have been delivered in 1836, and *Gopal Pershad* and his Son, the present Respondent, have remained in possession of *chur Bhedur* from that day to this.

The Plaintiff having been dispossessed, as he alleges, in the year 1836, of *chur Bhedur*, did not institute this suit for the purpose of recovering that possession until the year 1847. He does indeed make some attempt to explain this delay by stating, that in the interim, a resumption suit was instituted in respect to these lands. As to the proceedings in that suit, it is not necessary for the present case to refer to, more than this, that the proprietor of *Talook Bucktbully*, on the opposite side of the River, appears to have instituted a proceeding against the Government, with a view of obtaining possession of the lands in dispute, and some more, upon payment of the Government revenue. As to a portion he succeeded; that he now

occupies, and in respect of that portion there is no dispute. As to the lands now in question, he failed; and undoubtedly the Collector did find, that the Plaintiff was entitled to those lands. That decision, however, was subsequently set aside on the ground, that the Collector had no jurisdiction to make it, his jurisdiction being confined to determining the questions which arose between the Owner of *Bucktbully* and the Government, and not extending to deciding on the conflicting claims of other Landowners.

It appears also, that in the interim between 1836 and the institution of this suit, there was some family suit with respect to this property. Their Lordships, however, are of opinion, that no sufficient explanation had been given for the very long delay on the part of the Plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. The hardship may be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away or Witnesses may have died; indeed in this case it would appear that *Gopal Pershad*, the then Owner, died before the institution of this suit, and possibly *Gopal Pershad's* evidence might have been of an important character, which his Son could not supply.

But the delay in the institution of this suit is not the only delay with which the Appellant is chargeable, for the Decree in this suit was pronounced so long ago as the year 1861; the appeal was brought in 1862; and in 1863 the record was lodged. Some years afterwards, in the year 1868, the Appellant filed a supplemental record, but he did not lodge a case until the year 1871, so that there has been a delay of nearly ten years wholly unexplained in the prosecution of this appeal.

The case stands thus: the Appellant seeks to oust from possession persons who have enjoyed this property from the year 1835 to the present time, and for nearly twenty years of that delay he is responsible. Under these circumstances, their Lordships certainly require to be satisfied by clear proof of the grounds which he alleges for disturbing a possession of such long continuance.

This suit began in the year 1847, and it lasted to the year 1861. It is not necessary to refer at length to its history. It may be enough to say, that at an early stage, in the year 1848, a local investigation was held by an *Ameen* of the name of *Monier*, which appears to have resulted in favour of the Plaintiff. Subsequently to that there was a hearing in 1850, before the Principal *Sudder Ameen*, who decided against the Plaintiff, upon the ground of the Act of Limitations. The case on appeal was sent back to be re-heard, in order that the grounds of that judgment might be more clearly stated. It was again heard in 1852, and again decided against the Plaintiff, on the plea of the Act of Limitations; the Principal *Sudder Ameen* at the same time expressing a somewhat strong opinion against the Plaintiff's case generally. Subsequently the case was again sent back to be re-heard upon the merits; and previous to its re-hearing upon the merits, another local investigation was ordered before the *Moonsiff* of *Narainganje*, which took place on the 30th of January, 1858, whereupon the report of the *Moonsiff* was against the Plaintiff. The Principal *Sudder Ameen*, on the hearing of the cause, set aside the *Moonsiff's* report, which he considered unsatisfactory, and decided substantially all the issues in favour of the Plaintiff. The case then came on for appeal before the High Court, and it is against this judgment that the present appeal is lodged.

It has been contended, that the *Sudder* Court mistook the law as applicable to this case, and that their decision is in contravention of two cases, *Mussumat Imam Bandi* v. *Hurgobind Ghose* (4 Moore's Ind. App. Cases, 403; 1 P. C. J., p. 371), and *Sree Eckowrie Sing* v. *Heeraloll Seal* (12 Moore's Ind. App. Cases, 136; 2 P. C. J., p. 399), in which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly, that the High

Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision appealed from; but it appears to their Lordships impossible to suppose that the High Court could not have been acquainted with the first of those cases, reported so long ago, in 4th of Moore's Indian Appeals; and on looking at the judgment, although there are some expressions in it which may give some colour to the contention of the Appellant, it does not appear to their Lordships that the High Court have, in the reasons of their decision, acted in contravention of either of the above decisions. It appears to their Lordships, that the judgment must be taken to have proceeded mainly upon the ground, that the Plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the *chur* which he alleged to have been diluviated.

Whether the second clause of the fourth section of *Ben.* Reg., XI. of 1825, applies, or whether the fifth clause of the same section applies, which is in general terms and to this effect, that in all cases not previously provided for, and in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a River or the Sea, which are not specifically provided for by the rules of that Regulation, the Courts of justice, in deciding upon such claims and disputes, is to be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case; or if not, by general principles of equity or justice; in either case, it is equally essential for the maintenance of the Plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think, that on the face of the judgment it appears, that this consideration must have been present to the High Court, and they read their finding, "that there were not any marks by which the lands can be identified as having at any time formed part of the estate of the Plaintiff," not as intimating (as it has been contended) that proof was necessary of the existence of some specific landmarks; but as a general finding on the part of the Court that the lands had not been identified; and if so, undoubtedly there was an end of the Plaintiff's main case. But, further, it would appear from the judgment, that the Plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as re-formed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession; for, in the judgment of the Court it is said: "But he [the Plaintiff] urges, that being in possession of part of the *chur* as the *Goaj* under a decree of a competent Court, which has become final, the rest of the *chur* lands must be considered an increment to that village." The Court disposed of that argument by stating their opinion that, if the lands in question had formed to the south of the portion which was in possession of the Plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north. They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the Plaintiff.

Under these circumstances, their Lordships, whatever might have been their view, if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High Court, which was to the effect, that the Plaintiff has failed to prove his case, that he has not proved the lands which have re-formed, if lands have re-formed in the bed of the River, to have been the same as those which belonged to his predecessors and had been diluviated; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

On these grounds their Lordships will humbly advise Her Majesty that this appeal be dismissed.

20th and 21st March, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THE GENERAL MANAGER OF THE RAJ DURBHUNGA, under the Court of Wards, (Defendant)* — *Appellant*,

versus

MAHARAJAH COOMAR RAMAPUT SING, (Plaintiff) — *Respondent*.

Acts X. and XI. of 1859—Sale in Execution of Estate of Deceased—Decree Inter Partes.

A sued, under Act X. of 1859, the widow of Z, as widow of Z and guardian of Z's son, for arrears of rent due by Z. He obtained a decree in 1862 against the widow as Z's representative, but it was declared that Z's son was not liable, on the ground that he had been adopted into another family. In a regular suit, A obtained a decree declaring Z's son to be the heir of his natural father Z. Certain estates of the deceased were then, in 1867, put up for sale under Act XI. of 1859, in execution of A's decree for rent, and A became the purchaser. The certificate stated that the sale was of the right and interest of the widow, and that it took place under the decree in the regular suit. B, the holder of a prior decree for rent against Z, having failed to obtain execution against the same property, then sued A and Z's son for a declaration that he was entitled to sell the property on the ground that it had come to Z's son as Z's heir, and that only the interest of the widow (who had no interest) had been purchased by A. *Held* (reversing the decision of the High Court) A was entitled to the property.

The case of *Issan Chunder Mitter* v. *Buksh Ali Soudagar* (1) approved of.

WITHOUT calling for a reply,

Their Lordships delivered judgment by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

These proceedings certainly illustrate what was said by Mr. *Doyne*, and what has been often stated before, that the difficulties of a litigant in *India* begin when he has obtained a Decree. When, however, the actual question which is at issue between the Appellant and the Respondent on this appeal is eliminated from the rest of the record, it does not appear to their Lordships to present any very great difficulty.

The Appellant and the Respondent had each, it must be assumed, a good claim against the estate of the deceased, *Gourpershad*. The Respondent had obtained a decree according to the practice then existing in the Civil Court in the life-time of *Gourpershad*. The Appellant, pursuing his remedy for rent under Act, No. X. of 1859, in the Collector's Court, had obtained a Decree for the arrears of rent in respect of which he sued against *Chooharoo Kooer*, as the Widow of *Gourpershad* and the Guardian of her infant Son *Hurpersad*. It was a suit brought against those who were supposed to be the representatives of the Debtor, *Gourpershad*. In that suit the case set up by the Defendants was, that the infant was not the heir of his Father; that he had been adopted into another family, and that consequently the Widow was the sole heiress and representative. The Decree was against the Widow in that capacity. It declared that the Son was not liable, and ended with a declaration, which clearly pointed to the realization of the demand out of the estates of the deceased, *Gourpershad*, and showed that the decree was made against the person supposed to be the heir and representative of *Gourpershad*. Other difficulties being interposed in the way of executing that Decree, the Respondent thought it necessary to go to the *Zillah* Court in order to get rid of certain Deeds as well as of the alleged *kritima* adoption of *Hurpersad*, the Son, and he succeeded in obtaining a Decree, which was afterwards affirmed by the High Court, the result of which may be taken to be to affirm that *Hurpersad* was the heir of his natural Father. The execution of the Collector's Decree had in the meantime been suspended. When the Decree of the Civil Court became final, an intimation was

* 14, Moore's I. A., p. 605; 10 B. L. R., p. 294.

(1) Marsh. Rep., 614.

sent to the Collector that the stop Order which had been put upon the execution should be removed, and that the execution might go on. Execution of that Decree was accordingly had under the conjoint provisions of Act, No. X. and Act, No. XI. of 1859, and perhaps, it is owing to the operation of those Acts, and in particular to the fact, that the execution took place under Act, No. XI. of 1859, by putting up the property for sale in the same way that an estate would be sold for arrears of revenue, and not proceeding under the Civil Code Act, No. VIII. of 1859, that some of the confusion and difficulties which have taken place in this case have arisen. However that may be, the estates in question were sold under the Collector's Order, and purchased by the judgment Creditor. That took place in November, 1867. In the meantime certain proceedings had taken place in the suit of the Respondent. The Respondent had originally applied for execution of his Decree obtained in the life-time of *Gourpershad* against the Widow and the infant Son. He was met by the same allegation that had been made in the Appellant's suit, that *Hurpersad* had no interest in his Father's estate, and a miscellaneous Order was made, which held that *Hurpersad* was not liable for his Father's debt, and treated the Widow as the sole representative. Afterwards the Respondent attempted to get the benefit of the Decree which had been obtained by the Appellant, and to proceed against *Hurpersad*, and on that occasion the Appellant intervened as an Objector. The Judge disallowed the objection, but, at the same time, held that the former execution proceedings were invalid, and directed them to be struck off the file. The Respondent then commenced other proceedings against *Hurpersad*, and although there was no formal discharge of the miscellaneous Order, the Judge appears to have considered that as swept away with the former execution proceedings and no longer operative, and directed a sale in execution, which, if there were nothing else in the way of it, would probably have been regular against *Hurpersad* as the heir of his Father. However, when the Respondent was proceeding to carry out that Order, the Appellant came in and objected that the estates had already been sold under his Decree, and had been purchased by him, and that in fact they could not be any longer sold as the estates of *Hurpersad*. That objection prevailed, and the result was that the Respondent's only remedy was to bring the regular suit out of which this appeal has arisen.

From the above statement it is clear, that unless there be some fatal irregularity in the mode in which the Decree of the Appellant was obtained or drawn up, or some fatal irregularity in the mode in which that Decree has been prosecuted, the estates have been regularly sold, and that the suit of the Respondent, seeking to set aside the Order for sale and to get the benefit of his own execution as against *Hurpersad* as the heir of his Father, must fail.

Their Lordships are of opinion, that no case has been made upon which they can say, that there has been that irregularity in the proceedings before the Collector and the sale which took place which would justify them in setting aside the sale, and upon that point they must differ from the Judges of the High Court. The proceedings took place under Act, No. XI. of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this case, so far as the proceedings show, it appears that the Widow was the registered Proprietor. But the case does not rest there, because in the certificate of sale there is a distinct reference to the Decree obtained by the Appellant from the *Zillah* Court, and, therefore, the whole proceeding, if fairly looked at, amounts to this,—that the estate of *Gourpershad* was sold under that Decree in execution for his debt, and that the interest of his Widow, the registered proprietor and ostensible Owner of the estate, and also the interest of his Son, if he had any interest, was bound by that Decree. If that be so, the question arises, whether the Respondent, the Plaintiff in the suit below, has any ground upon which he can come in and impeach the sale? It

appears to their Lordships that he can claim only what interest remained in *Hurpersad*, and that substantially the proceedings would be a bar to any claim on the part of *Hurpersad*. It is unnecessary to consider, whether in any question between the Respondent and *Hurpersad*, who in this suit came in and continued to dispute his heirship, the Decree in the suit which had been obtained by the Appellant would be any binding adjudication between the Respondent and *Hurpersad*. It appears to their Lordships clearly to be a mere Decree *inter partes*, and that there is no ground for giving it the effect of a Decree *in rem*, which is the effect which a passage in the judgment of the High Court appears to attribute to it. But without going into that, it seems sufficient to their Lordships for the determination of this appeal to say, that there was in their judgment no substantial irregularity in the sale before the Collector, and that, therefore, that as between the Appellant and Respondent, the Appellant is entitled to and cannot be deprived of the benefit which has resulted to him from his greater diligence in enforcing his demand.

Their Lordships also desire to add, that they are unable to see any substantial distinction between this case and that of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (*a*.) They entirely agree in the principles expressed by Chief Justice *Peacock* in that case, and think that they govern the present case.

The result, therefore, must be that their Lordships will humbly recommend to Her Majesty that this appeal be allowed, the judgment of the High Court reversed, and the judgment of the Lower Court affirmed. The costs of the appeal will, of course, follow the result, and the Appellant will be entitled to the costs of the appeal in the Court below.

(*a*) Marshall's Ben. App. Cases, 614.

27th April, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH CHUNDERNATH ROY, (Defendant)* ... } *Appellant,*

versus

KOOAR GOBINDNATH ROY and others, (Plaintiffs) } *Respondents,*

AND

THE COLLECTOR OF MOORSHEDABAD, (Defendant) ...* ... } *Appellant,*

versus

RANEE SHIBESSUREE DABEA, (Plaintiff) ... } *Respondent.*

Hindu Law—Adoption—Nattore Raj—Stridhun—Endowed Lands—Sheba—Presumption—Mode of Dealing with Evidence—Weight of Evidence.

In a suit as to the validity of the adoption of a claimant to the *Nattore raj*, held, notwithstanding a finding of the Judge of first instance that the adoption was not proved, that the evidence fully supported the adoption.

The presumption is that the object of an endowment by a Hindu for the worship of idols is to preserve the *sheba* in the family, rather than to confer a benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise.

THEIR LORDSHIPS of the Judicial Committee, having heard the arguments of the learned Counsel on the issue as to the adoption, gave the following judgment:—

* 11 Ben. L. R., p. 86; Cowell's I. A. Sup. vol., 86.

In these appeals the title to the succession to the large and ancient *raj* of *Nattore*, on the death of the *Rajah Gobindchunder*, is involved, and it has been thought convenient to determine it before proceeding to deal with the other questions in the suits.

The issue raised on the title is whether *Gobindnath*, the Respondent, is entitled to the succession as a son by adoption of the late *Rajah Gobindchunder*. The adoption was made by his widow *Shibessuree*, and the power to make it is alleged to have been given by a deed (*anumatipatra*) executed by the late *Rajah* on the eve of his death. He is alleged to have made at the same time another deed (*katrityapatra*,) giving his mother *Kishtomonee*, or rather his adoptive mother, the management during the infancy; and the whole question on this issue turns upon the validity or invalidity of these two deeds.

Their Lordships do not think it necessary to go into the history of the long and complicated litigation which has arisen out of this succession, though parts of it may be incidentally referred to; and the general facts which introduce the period when these deeds were executed are few.

It appears that *Gobindchunder* died in 1836, having the *raj* in full right and possession.

He died, leaving his mother *Kishtomonee*, his wife, who was then about the age of 20, and an infant daughter about two years old; and it is material to bear in mind this state of his family in weighing the presumptions which arise from the subsequent conduct of the parties.

The *Rajah Gobindchunder* had himself been adopted into this family by *Kishtomonee* in the year 1814, and he came of age in 1829. During his minority, *Kishtomonee* managed the property, and there were disputes between the *Rajah* and his adoptive mother, which, when he came of age, led to what has been called by the learned Counsel for the Appellant exasperated litigation. There can be no doubt that there was fierce litigation between the mother and the adopted son. In that litigation insults were heaped by one upon the other; and the fair result of the evidence seems to be that they continued for a considerable time in a state of hostility. From conversation held with the *Rajah* himself, it appeared that, only a short time before his death, he was not on visiting terms with his mother. She had left the palace at *Nattore*, and had gone to live at *Sydabad*, on the other side of the Ganges. But, although that state of hostility between mother and son is proved beyond all dispute by the evidence, it is also proved, and with equal certainty to the minds of their Lordships, that on the eve of his death the *Rajah* became sincerely desirous of seeing his mother, and becoming reconciled with her. He was taken ill some few days before the 9th of December. On the 9th of December, or as one witness says, on the day before the 9th, he was told that his illness was serious; and on the morning of the 9th, when several family physicians were present, when one of his relatives, *Hurishpursad*, the father of his young wife, was also present, the evidence is that the deeds which are now in dispute were executed, attested, one by nine, and the other by eleven witnesses, and the deed of adoption (*anumatipatra*) given by the *Rajah* to *Hurishpursad*, who at once delivered it to his daughter, the *Rajah's* wife, who was behind the screen in the same room. The other deed the *Rajah* put in his seal-box, intending himself to take it to his mother.

The direct evidence of the execution of the deeds is that to which attention should first be called; and, of course, if that evidence fails to establish that those deeds were executed, the case of the Respondent must fail.

Their Lordships, having given very careful consideration to the evidence in this case, have come to the conclusion that the judgment of the High Court is perfectly right; that there is direct evidence of the execution of the instruments, which is, if not so clear as to remove all doubt, at least so satisfactory that, in the absence of contrary evidence, or very strong presumptions to the contrary, it ought to prevail. Their Lordships also think that, whilst the direct evidence is satisfactory, the presumptions which exist on the one side and on the other, when they come to be weighed, very strongly preponderate in

favor of the execution of these deeds. Several witnesses have been called who were present when these deeds were executed; and in considering the witnesses who were called, and the absence of witnesses, the length of time which had elapsed from the period when the deeds were executed to the time of the inquiry must be borne in mind. The deeds were executed in December 1836, and these witnesses were examined before Mr. *Jackson* in 1860, 25 years after the event. It is unnecessary to say which of the parties is responsible for the delay. Undoubtedly, when the conduct of *Anundnath* comes to be considered, there will appear considerable delay on his part; but without casting the responsibility of that delay on the one side or the other, the fact of the delay is certainly important when we come to consider the evidence which was given, and that which, if the case had been heard at an earlier period, might have been expected to be given. Of the witnesses who have been called, without adverting to the others, three appear to be in a respectable position in life, and one of them is a witness, whose interest is apparently opposed to the deeds supposed to have been forged, and which he must, if he is saying that which is untrue, be assumed to have assisted in fabricating. This witness, *Hurishpursad Roy*, was an old man when he was examined, and the father of *Shibessuree*, the widow of the *Rajah*. He says he was present when these deeds were executed. He gives a long account of the way in which it was done, and he gives the names of the writers. He says:—"*Bhoyrub Sircar* wrote the *anumatipatra*, and *Kistodhone Mozoomdar* wrote the *katrityapatra*." Both these persons are dead. He also gives us the name of the officer of the *Rajah* who drew the will, *Hurishchunder Khan*, who appears to have been the chief *dewan* in the *Rajah's* house, and therefore a person very likely to have been consulted. *Hurishchunder Khan* prepared the deeds and read them over. If this witness is to be believed, *Hurishchunder Khan* read them over to the *Rajah*, then they were executed, and one delivered to *Hurishpursad* himself to be given to his daughter in the way which has been already described. In addition to that witness, there is *Needanchunder Roy*, a cousin of the *Rajah* living with him, and therefore a person who would naturally be present upon an occasion of this kind, and *Monmohun*, the court physician, one of the numerous doctors who were in attendance upon the *Rajah*. Those witnesses were not subscribing witnesses; and undoubtedly that which is least satisfactory in this part of the case is that these respectable persons were not subscribing witnesses, and that only one subscribing witness was called upon the inquiry in 1860. But it appears that, upon a trial which took place before the Principal *Sudder Ameen*, in the year 1852, two attesting witnesses were called. The deposition of one of them has been read, and the other (to adopt the phrase used at the bar) has in some way dropped out of the record. It appears to have been the deposition of one of the physicians. Other witnesses had died before the inquiry in 1860. Therefore, their Lordships find a considerable number of witnesses called to prove the execution of these documents. They do prove them in the most direct way, and if any credit is to be given to their evidence, these deeds were executed by the *Rajah*, and one of them was delivered by his own hand to *Hurishpursad*.

On the other side there is no direct evidence, but it is sought to impeach the testimony in favor of the deeds by admissions which were supposed to have been made by the *Rajah* himself and by his mother the *Ranee Kishtomonee* about the time when it is supposed that these transactions took place. The *Rajah* himself expressed his desire to be carried to the Ganges to die. His mother lived near the Ganges. In the course of his journey, which apparently was a journey of about 60 miles, he stopped at *Rampore*, and there he was seen by a witness, *Harradhun Sanyal*, *mooktear*, who from his own statement had been employed by several members of this family in transacting their legal business. His evidence appears in the second record, and he is the only witness called by the Appellants whose evidence goes very seriously to impeach the testimony as to the execution of

the deeds. It is no doubt very important, and is entitled to be very carefully considered, because, undoubtedly, if what he says is taken literally and is true, it is difficult to suppose that the *Rajah* had executed these two deeds before he had started on his journey. He says he saw the *Rajah* at *Rampore* and had a conversation with him; and he says:—"I told the *Rajah* that you are unwell, you give a permission for holding of the house; upon which he told [me], 'I have an intention of giving permission. It is not written. I cannot do so until I see my mother. I will go to the banks of the Ganges. Get a boat for me.' Upon which I told him, 'You present a petition intimating the said permission.' He said, 'Let me go to my mother and I write it. There is no need of giving any information. Get me a boat and cross me over.'" Undoubtedly, if that evidence is entitled to credit and to be entirely relied on, it is inconsistent with the execution of the deeds having then taken place. But there are various circumstances which tend to impeach this evidence. *Harradhun Sanyal*, it appears from his own statement, had quarrelled with *Kishtomonee;* she had in some way withdrawn her confidence from him, and he admits that he then took part with *Rajah Anundnath*. But what appears still more to throw doubt upon his evidence is this: he says that, although he had had this all-important conversation with the *Rajah* upon the question which must have agitated the family for many years, although he was acting for *Anundnath* and in constant communication with him, he never told him of this conversation until after the commencement of this suit. That does appear to be utterly incredible, and to throw not only doubt but discredit upon his testimony. It is also to be observed that, even if that testimony be true, and although, if the *Rajah* is assumed himself to have been sincere, his expressions indicate that the deeds had not been executed, yet it is possible that, as he had not employed this man in preparing them, he might not for that reason or for others have chosen to tell him of what he had done. Again, supposing the evidence to be entitled to any credit, two circumstances appear from it extremely favorable to the case of the Respondent; one is that the *Rajah* had the intention to give the power of adoption to his widow; and the other is that he was going to see his mother; and from his expressions, as given by this witness, it is plain that he was going not only to see but to consult her, and act according to her advice and wishes. Those two circumstances are strongly in favor of the presumptions of intention on which the Respondent relies.

A great deal of evidence appears to have been given in the suit before Mr. *Jackson*, to show that *Kishtomonee* and *Shibessures* had fabricated these deeds, in order to compromise a quarrel between themselves. The learned Counsel, Mr. *Field*, who very fully and strenuously argued this case, has not ventured to rely upon that evidence. His main support was the judgment of Mr. *Jackson*, and as Mr. *Jackson* himself did not believe that story, Mr. *Field* probably exercised a wise discretion in not relying upon it. But it is perfectly plain that the Appellants had set up a case of fabrication of documents, which entirely broke down and failed to obtain credit. The endeavour to do so, and in a very systematic way, throws great discredit upon the whole of their case.

Anundnath himself was examined, and it appears to their Lordships, as it did to the High Court, that his evidence is very strongly in favor of the validity of these deeds, because it appears that he recognised, by the giving of presents, both the adopted children. He recognised the two sons who were in succession adopted; and the only way in which he gets rid of that damaging fact is by saying that he was not aware that they were adopted under a valid power given to the widow. He says he thought they were merely children about the house brought up by *Shibessures:* but their Lordships think that such an explanation is entirely incredible. He was living in the palace at the time the *Rajah* died. These deeds had been publicly notified to the Collector, and had been filed. He must have known of the deeds and of the attesting witnesses to them; and to suppose that this gentlman believed that these children had not been adopted is really impossible. A letter was put in evi-

dence when he was examined, which, if it be genuine, is decisive to show that he treated the first child as the legally adopted son of *Gobindchunder*. The letter is this:—"Having received the letter conferring blessings, I cannot express the mental agony I feel on hearing the news of the death of my brother's son." Nothing can be more precise than that expression. In the mind of a Hindu, when it was used, it must have been perfectly clear that the child who was just dead could only be his "brother's son" by a legal adoption. There could have been no adoption in this case by the widow, unless by virtue of deeds executed by the *Rajah* before his death. A question was made whether that letter was really *Anundnath's* writing or not. The evidence seems to be in favor of its authenticity. Mr. *Jackson* says he only faintly denies it. He was examined before that Judge, who had an opportunity of seeing him. The other circumstances referred to in the examination go a long way to show that it was a genuine letter. A man would not "faintly deny" such a letter if he could have denied it honestly; and the faintness probably arose from the feeling that he could not with a safe conscience say that it was not his own letter.

Upon the whole of the evidence, therefore, which their Lordships have considered, but to which it is not necessary to advert in all its parts, their Lordships have come to the conclusion already intimated. But this case has arrived at its present stage, and the litigation has been prolonged, not so much by the result which ought to be drawn from the evidence given on both sides directly applicable to the facts, as from this, that the learned Judge, Mr. *Jackson*, drew from circumstances not given in evidence in the case, and from general knowledge, inferences and presumptions hostile to the direct evidence. It appears to their Lordships that some of those inferences are of a strained character, and some of the presumptions unsound; but the Judges of the High Court, who went very carefully through the evidence, have disposed of those inferences and presumptions to a considerable extent, and have made presumptions from the evidence with which their Lordships are very much disposed to agree.

The main presumption which has been relied on in favor of the Appellants against the deeds arises from the state of feeling which existed between his mother *Kishtomonee* and the *Rajah*. Undoubtedly that state of feeling is entitled to be considered. It has already been stated that it existed. But there is surely nothing contrary to the ordinary workings of human nature in the supposition that, on the eve of his death, he was desirous of reconciliation, and that an entire revulsion of feeling had come over him. It is said, Why should he entrust the management of this important *raj* to his mother, who had managed it so much to his own dissatisfaction? It appears that the dissatisfaction was that she preferred to manage it herself, and would not let him have the control of it; and he may have thought that, when he left a young wife and an infant child, the mother, who was so perfectly capable of managing, was the best manager whom he could select. But that he did desire reconciliation and was anxious to consult her is perfectly clear; and that he went out of his way when the hand of death was upon him for the very purpose of seeing and consulting his mother is equally clear.

The next inference suggested as hostile to the deeds arose from their non-publication by the *Rajah* before his death, or by *Kishtomonee* immediately afterwards. Unquestionably it is most satisfactory when documents of this kind are registered, and it would be very much for the interest of proprietors in *India* if, when they execute deeds giving their widows after their death power to adopt, they would take the precaution to register the deeds (1.) It might save great litigation, which very frequently wastes the property they desire to preserve. However, it was not done in this case; it was not compulsory on the *Rajah* to do it; and the time when these deeds were executed, the circumstances under which they were executed, the fact that the transaction was not fully completed until he had taken the deed of management to his mother, and she had accepted

(1) See Act IX. of 1871, s. 17.

the trust, may all account for his not having published them before his death.

Then it is said, Why did not *Kishtomonee*, who, when passing through *Rampore*, saw some of the old retainers of the family, tell them, and proclaim that she had the management? It would have been better perhaps that she should have done so; but still the delay in publishing the deeds was not very great. About six weeks after the death of the *Rajah*, she presented a petition to the Collector, in which the two deeds are referred to, and the evidence appears to be that they were then produced to the Collector. At all events, whether produced or not, they were specifically referred to, and in the following June, six months after, were regularly filed.

Again it is said, and an inference is attempted to be drawn hostile to the Respondent from the circumstance that the adoption of a son did not take place until six or seven years after the *Rajah's* death. That appears to be explained and accounted for by the circumstance that the *Rajah* had left a daughter. If she had lived and had married and given birth to a son, that son would have become the representative of the family; he would have been able to have performed the religious rites of the family and of the *Rajah*, although not to the same full degree that an adopted son might have done; still those circumstances would reasonably account for the adoption not having taken place. Mr. *Doyne* forcibly pointed out the obligation upon the widow to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. The widow may have neglected her duty, but the presumption against the deeds does not seem very strong from that circumstance; whereas the presumption that the *Rajah* would leave the power to adopt is very great. The stronger the duty to adopt a son, the stronger is the presumption that the *Rajah* would not like to die without leaving power to his widow to make the adoption. That he should have postponed it to the eve of his death is a circumstance that does not weigh against the probability of the deeds, for he was only of the age of 24 or 25, having a wife younger than himself.

These seem to be the presumptions which have been most relied on against the deeds, but the presumptions in favor of them are not only strong but almost irresistible.

The theory of the Appellants must be that those deeds are forgeries, and if they are forgeries, *Shibessuree* and her father *Hurishpurçad* must have been engaged in them. It was clearly against the interest of the widow that there should be an adoption, for she would have been entitled to the *raj* and all the property for life, and her daughter, if she had married and had had a son, would have continued the succession. And her father certainly could have had no interest in fabricating a deed which would give *Kishtomonee* the management, because if such a deed had not existed, and his daughter had had her life-estate in the property, he would have been the natural person, as her protector, to have had the management of it. Therefore the presumption against forgery, arising from the interest of these two persons who are supposed to be implicated in the fabrication of the deeds, is very strong.

Then there is the presumption to which allusion has been already made, arising from the duty to have a son by birth or adoption, strengthened by the presumption arising from the usage in this family, in which for 150 years, with only one exception, there has been a series of adopted children. It is very unlikely that the late *Rajah* should have wished to drop that usage. At all events there is a strong probability that he should have desired to act in accordance not only with the general law, but with the custom of his own family.

The last presumption to which their Lordships think it necessary to refer is that arising from the conduct of *Anundnath* himself. It has been already incidentally adverted to, but is so strong that their Lordships desire again to direct attention to it at the close of their observations. *Anundnath* was a man apparently of wealth and position. He recognised the two children who were adopted in succession, and it is not until the year 1849 that he first comes forward, not directly to put forward his claim, but to intervene in another suit which had been brought by

Kishtomonee, on behalf of the adopted son, to recover some property from third persons. It would appear from the proceedings which took place before the Principal *Sudder Ameen*, in which it is now said that the validity of those deeds was in question, that, if that was so, *Anundnath* brought forward then no witnesses to impeach them, and certainly did not put forward *Harradhun Sanyal*, the *mooktear*, now his strongest witness. It seems that that proceeding, which was a suit to recover property belonging to the *raj*, took this course; evidence having been given of the execution of these deeds by one or two witnesses, and no evidence having been called on the other side, it was supposed that enough had been done to establish the title. That may have been a misapprehension. It may have been that the *Sudder Dewanny Adawlut* were right in their first judgment in thinking that the matter was fully in issue, and that if that were so, sufficient evidence had not been given to establish the validity of the deeds. It certainly looks as if the case had proceeded very much in the way in which an ejectment proceeds in this country, where an heir brings an ejectment to recover possession from a stranger of property belonging to his estate, he introduces a *primâ facie* case, and unless there is evidence given on the other side, it is considered to be sufficient. However that may be, the *Sudder Dewanny Adawlut* upon review considered that there had been a misapprehension; that there was an issue which had not been properly tried, and so they sent the case down again. It is important to observe that, upon that first inquiry, the trial was either treated as one where *primâ facie* evidence was sufficient, or if it was treated as one where both parties were to bring forward all their evidence, *Anundnath* did not bring forward any; and certainly did not bring forward the *mooktear* on whom he now so strongly relies.

Their Lordships having come to the conclusion that the judgment of the High Court on the question of succession is right, that decision will dispose of the two appeals of *Rajah Chundernath Roy*. They will therefore advise Her Majesty to dismiss those appeals with costs. They will also advise Her Majesty wholly to affirm the decree of the High Court made on appeal in the suit originally brought by *Anundnath Roy*, No. 28 of 1861, and also to affirm the decree of the High Court made on appeal in the suit originally instituted by *Kishtomonee Dabea* against the Collector of *Moorshedabad* and others in 1849, in which *Anundnath Roy* intervened, so far as the question of succession is concerned.

Their Lordships then proceeded to hear the arguments as to the validity of the deeds of gift which were the principal questions raised by the appeal of the Government.

The deeds in question were five in number, and were executed by *Maharanee Babanee* in favor of *Ranee Joymonee Dabea*. It was admitted that *Ranee Joymonee* had given the properties to *Doorgachunder* and his wife.

The deeds were as follows:—

Deed No. 1.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"This *hibanamah* (deed of gift) is executed in the year 1205 (1798). I have certain property for the service of the gods worshipped by me at *Mamoodpore*, *Kallie Baree*, and *Gopaulpore*, appertaining to *Chuckla Bhoosnah*, within the jurisdiction of the district of Jessore. I have now arrived at my old age, and am desirous of visiting holy places. My oldest grandson is *Rajah Bissonath Roy*. His understanding is unsettled. He is incapable of managing the property, and the *zemindary* in his name is gradually diminishing. My second grandson, *Kooar Sheebnath Roy*, is a minor and disobedient to my commands. Therefore, by neither of these two can the service of the *gods* be performed. Knowing this, you are the wife of my grandson and mother of a son; moreover, you are always employed in taking care of me, you will be able to conduct in a very good way the service of the gods, and my property will remain intact. For these reasons, the worship of the aforesaid gods and their *debutter pergunnahs* (naming them) and all and every land with the *thacurbari* in the said places, the tanks, ponds, gardens, the ornaments of the gods, and the utensils and furniture, and all the property appropriated to the worship of the gods, I make over to

you by a gift, in my sound senses. Having caused your name to be enrolled in the *shebaitti* (management of the *sheba* or worship,) you will take possession of the *debutter*, &c., and continue to perform the prescribed worship of the gods from generation to generation. You have the power to appoint a *shebait* for the worship of the gods. I and my heirs have no concern with it. For this reason I have given this deed of gift, dated 25th *Kartick* 1205 B. S." (8th November 1798.)

Deed No. 2.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"This is the deed of *hibanamah*, year 1209 (1802.) Deed of gift to the effect that my auction-purchased *zemindary Hoodda Burranagore* and others, I in sound mind, of my own free-will, having abandoned my own interest, make a gift of it to you. By paying the *malguzari* into the *Sudder*, you will do virtuous actions, &c., from the profits. As long as I shall live, the said *Hoodda* should remain in my name. After my death, you, by entering your name in the *Sudder*, and striking out my name, and by recording your name in *Zillah Moorshedabad* Collectorate, you should enjoy it with your son and grandsons, *i. e.*, in succession. If at any time any heir of mine should make any claim, that will be null and void. To this effect I execute the deed of *hiba*, dated 5th *Srabun* 1209 B. S." (19th July 1802.)

Deed No. 3.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"I have in my *Burranagore* house the worship of the idol *Sree Sree Ishwur*. My daughter was the *shebait*. On her death I worship at present. I am incapacitated now. For the purposes of worship, there is *Turrup Beenudnugger*, &c., and *Beel Ekumba Talook*, as also *Debutter Goopeenathpore*, &c., and in *Pergunnah Sherpoor* the *chuck* and gardens in *Turrup Burranagore*, and all the ornaments of the gods, as also the furniture which is theirs: I give it to you as a gift. You will take possession in accordance to the *hiba*. You will always perform the worship of the gods: if you fail, the virtue or the sin be on you. With me there is no connection. You will cause your name to be written in the *talooks* as *shebait* (worshipper) in the Government records, and will always pay the revenue. Therefore I give this deed of gift, the 29th *Srabun* 1209 B. S." (12th August 1802.)

Deed No. 4.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"Deed of gift written in the year 1209 (1802:) may it come of use. In *Burranagore* the *rujdhani* house, and the *mohul* tank and mangoe garden and jack and other fruit trees, &c., and the buildings of masonry, &c., the whole I give, of my own free-will, as a gift to you. You will repair the house and garden, and bring it into your possession, and hold possession and have enjoyment in peace. You have the power to make gift, or to sell it; it has no connection with me. If hereafter any of my heirs lay any claim, it is void. Therefore I give the deed of gift, the 12th *Bhadro* of the above year" (27th August 1802.)

Deed No. 5.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"This *hibanamah*, or deed of gift, executed in the year 1209 (1802), is to the following effect:—The *sheba* (worship) of *Sree Sree Dooryg* is mine: of that *sheba*, I had a desire to make a gift to my daughter-in-law, *Ranee Sunkary*. In the year 1206 (1799); for arrears due from *Rajah Bissonath Roy*, *bokras*, &c., were sold by auction. At that time I purchased it, paying the value through *Rooddra Chowdhry* in the name of the goddess. I got it once registered in the name of *Ranee Sunkary*. She is dead. For this reason I make a gift of the same *sheba* to you, who are my grand-daughter-in-law, of the entire *talook Turrup Kajeepore*, *Bhabanypoor*, *Dooryapoor*, *Anundopore*, *Bokra*, *Sahary*, *Habuepore*, *Soboral*, and *Turapore*, and the *Debutter Fazilnagore Koomary*, *Pergunnah Korarprotass*, *Goyaabad*, *Noyangur*, *Dhawa Bonehaut*, *Goucur*, *Kalfeena*, and *Rajshahye*: the *debutter* gardens at *Burranagore*, consisting of betel-nut, cocoa-nut, mangoe, jack, and other trees; cows and buffaloes; and the ornaments, &c., of the goddess and all the *sheba*. You will have your name registered as a *shebait* (manager of the worship,) and take possession of the mehals through your men, and continue to perform the worship of the gods from son to grandson, and so on. For this reason I give this deed of gift, dated 22nd *Bhadro*, in the year aforesaid" (6th September 1802.)

Mr. *Forsyth*, Q. C., and Mr. *Merivale* for the Government.

Sir *R. Palmer*, Q. C., Mr. *Leith*, and Mr. *Peterson* for the *Ranees*.

Mr. *Field*, Q. C., and Mr. *Doyne* for *Rajah Chundernath Roy*.

The following cases were cited:—*Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1), *Ram Sundar Roy* v. *Heirs of Rajah Udwant Singh* (2), *Elder Widow of Rajah Chutter Sein* v. *Younger Widow* (3), *Bhowanee Purshad Chowdree* v. *Ranee Jugudumbha* (4), *Ranee Shibeshuree Debia* v. *Mothooranath Acharjee* (5), and *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (6).

8th June, 1872.

Their Lordships having taken time to consider, delivered the following judgment:—

The remaining question in the appeal in the above suit relates to the effect to be given to four out of five *hibanamahs* executed by the *Maharanee Babanee* in favor of *Joymonee*, one of the wives of her grandson *Bissonath Roy*. The Appellants contend that, although *Gobindnath* has established his title as heir by adoption to *Bissonath* and to the *raj* of *Nattore*, the properties comprised in these deeds did not descend upon him, because, as they allege, *Joymonee* acquired under them an alienable estate. It is admitted that in point of fact *Joymonee* in her life-time gave the properties comprised in four of the above deeds to *Doorgachunder*, who has since died, and is represented by *Koylaschunder Roy*, the minor Appellant, and the property comprised in one deed to his wife *Kaseesoondree*, the other Appellant. The question is whether *Joymonee* had power to make these alienations.

A decision hostile to the validity of an adoption of *Doorgachunder* by *Joymonee*, under an alleged authority from her deceased husband *Bissonath Roy*, was given in the course of the protracted litigation referred to in the record: so that he must be regarded as a stranger to the family of her husband *Bissonath*.

Maharanee Babanee, in consequence of minorities, managed for many years the *raj* of *Nattore*, but the property comprised in the deeds in question was acquired by her in her own right. Some part of it, once forming part of the estates of the *raj*, was purchased by her at auction-sales, when it was sold for the debts of *Bissonath Roy*. The Respondents indeed do not dispute that the property was held by the *Maharanee Babanee* as her *stridhan*, nor her power of dealing with it as she chose; but their contention is that she dedicated it to religious worship in such a manner that it became inalienable by *Joymonee*, and descendible only to her heirs. There is no sufficient evidence that the idols mentioned in the deeds were ancestral or family idols, or that the property, before the *Maharanee* acquired it, was devoted to religious purposes. The dedication to such uses, whatever may be the nature and extent of it, appears to have been made for the first time by herself, and she must be considered as the founder of the endowments.

With regard to one of the deeds (No 4,) dated 27th August 1802, no question arises. It contains no reference to worship, and has an express power of alienation. The Courts in *India* have concurred, and as their Lordships think rightly, in treating it as an absolute gift of the property to *Joymonee* with all the rights of unrestricted ownership.

Their Lordships consider also that little difficulty arises with respect to another of the deeds (No. 2,) dated 19th July 1802, relating to the "auction purchased *zemindary, Hoodda Burranagore*." That *hibanamah* contains an absolute gift of the estate to *Joymonee;* and the words "you will do virtuous actions, &c., from the profits," do not appear to their Lordships to contain any specific direction or trust capable of being enforced. They appear to be simply recommendatory of a moral duty, and do not qualify the absolute

(1) 8 Moore's I. A., p. 66; 1 P. C. J., p. 721.
(2) 5 Sel. Rep., 210.
(3) 1 Sel. Rep., 180.
(4) 4 Sel. Rep., 343.
(5) 8 W. R., 202.
(6) 7 W. R., 266.

character of the gift. The clause "you shall enjoy it with your sons and grandsons; if at any time any heir of mine should make any claim, that will be null and void," ought not in their Lordships' view to be construed as a limitation to the sons, and consequently as a restraint on alienation. It may have been added to express the absolute and irrevocable nature of the gift. The High Court considered that the absence of an express power of alienation led to the presumption that the gift was limited; and, apparently disregarding their own rule that each deed should be interpreted by itself, they infer from the insertion of such a power in the subsequent deed (No. 4,) and the omission of it in this an intention to restrain alienation. Their Lordships think that the subsequent deed cannot properly be referred to for this purpose. If it had appeared expressly, or by reasonable implication from the contents of the deeds that they all formed part of one entire design, then the construction of any one could properly be aided by the dispositions made, and the language found in the others, but it cannot be inferred from these deeds that they are parts of one design, or that they form a connected series to be construed as a whole. Their Lordships consider that this *hibanamah* No. 2, construed by itself, contains an absolute and unrestricted gift of the property comprised in it to *Joymonee*, and consequently that the judgments given by the Courts in *India* in favor of the Respondents, on the ground that she had no power to alienate, cannot be sustained.

The three other deeds, No. 1, No. 3, and No. 5, are different in their character from the two hitherto discussed. They contain provisions for the endowment and support of idols and their worship, which are in the nature of trusts impressed on the property to be performed by the donee. In the case of a bare trust, leaving no beneficial enjoyment to the donee, there would be strong ground for the implication that the property was not alienable, and was to descend to the donee's heirs as trustees in succession. But it was contended that in these grants the trust is coupled with an interest, giving the donee a right to the enjoyment of the surplus usufruct of the property, after making due provision for the sustentation of the idols and their worship, and therefore that there is a beneficial ownership capable of alienation. The case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1) was cited to show that such a beneficial interest may exist as a secular right in property dedicated primarily to the worship of idols. In that case, it is true, a disposition of the surplus was expressly made by the will of the donor; but their Lordships do not doubt that cases may occur where, from the nature and terms of the gift, the intention of the donor to confer a beneficial and alienable interest in property so dedicated may be inferred. The question arising for decision on these several deeds is whether it can be collected from their language that the donor *Maharanee Babanee* intended to make such a gift, or whether she meant that the worship and the endowments should remain in the family of *Joymonee*.

It would unquestionably be more consonant with the genius and spirit of Hindu law and usages that endowments of this kind should be made to a family, by whose members in succession the worship might be performed, than to an individual who might sell or give them to a stranger.

The following cases were referred to on this subject during the argument:—*Elder Widow of Rajah Chutter Sein* v. *Younger Widow* (2,) *Bhowanee Purshad Chowdree* v. *Ranee Jugudumbha* (3,) *Ram Sundar Roy* v. *Heirs of Rajah Udwant Singh* (4,) *Ranee Shibeshuree Debia* v. *Mothoornath Acharjee* (5,) and *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (6.)

There is considerable difficulty in arriving at the intention of the donor in the present case, in consequence of the peculiar position of this family, and the vague and varying language of the several grants. The *raj* of *Nattore* was from its nature an impartible estate, descending on a single heir; and the *Maharanee* certainly does

(1) 8, Moore's I. A., p 66; 1 P. C. J., p. 721.
(2) 1 Sel. Rep., 189.
(3) 4 Sel. Rep., 343.
(4) 5 Sel. Rep., 210.
(5) 5 W. R., 262.
(6) 7 W. R., 266.

not seem to have intended to annex this property and worship to the *raj*. She clearly also did not desire that they should go to her grandsons, *Bissonath Roy* and *Sheebnath Roy*. It may be inferred from the *hibanamahs* that she intended one of two things: either to make an absolute gift to *Joymonee*, giving her full dominion over the property and worship; or to vest them in her and her heirs, as family property and *sheba* in such manner that the succession should be to her heirs, passing over her husband *Bissonath* and his brother. It is important to observe that *Joymonee* at the time of these deeds was the mother of two sons.

Bearing in mind, whilst construing these *hibanamahs*, the presumption already adverted to that endowments of this nature are usually made by Hindus with the object of preserving the *sheba* in families, rather than of conferring a benefit on individuals, their Lordships have been led to the conclusion, with regard to the *hibanamah* No. 1 that, upon the right construction of that deed, *Joymonee* had no power to alienate the property contained in it. In that *hibanamah* dated 8th November 1798, the *Maharanee Babanee* says:—"I have certain property for the service of the gods worshipped by me at *Mamoodpore*, &c. ** My eldest grandson is *Rajah Bissonath Roy*; his understanding is unsettled, he is incapable of managing the property, and the *zemindary* in his hands is gradually diminishing. My second grandson, *Koopar Sheebnath Roy*, is a minor, and disobedient to my commands; by neither of these two can the service of the gods be performed." She thus declares her motive for desiring to exclude her immediate heirs, but that motive does not afford a reason for a desire to allow the *sheba* to go entirely out of her family. The deed goes on:—"Knowing you are the wife of my grandson and the mother of a son; moreover, you are always employed in taking care of me, you will be able to take care in a very good way of the service of the gods, and my property will remain intact." The above passages which refer to *Joymonee* being the mother of a son, and to her ability to take care of the service of the gods, and the conclusion the *Maharanee* draws from these facts, seem strongly to indicate an intention "that the property should remain intact" in the family. The deed goes on:—"For these reasons the worship of the aforesaid gods, and their *debutter pergunnahs* (naming them,) the ornaments of the gods, and all the property appropriated to the worship of the gods, I make over to you, by a gift. Having caused your name to be enrolled in the *shebaitti*, you will take possession of the *debutter*, &c., and continue to perform the prescribed worship of the gods from generation to generation. You have the power to appoint a *shebait* for the worship of the gods." The power to appoint a *shebait* is perhaps consistent with either construction. The words "from generation to generation" may, in some cases, mean no more than to express the absolute character of the gift; but, considering the subject-matter, it seems more probable that in this deed they were used in their natural sense to denote an intention to perpetuate the worship in the family. The words "I and my heirs have no concern with it" were strongly relied on by the learned Counsel for the Appellant, and they undoubtedly favor his construction; but their Lordships consider, although not without some doubt that those words may be satisfied by referring them to the intention of the *Maharanee* to exclude her grandsons, who were her immediate heirs, and that they are not sufficient to rebut the construction derivable from the other parts of the document. The judgment on this deed will therefore be in accordance with the decision of both the Courts in *India*.

Their Lordships have come to an opposite conclusion with respect to the *hibanamah* (No. 3,) dated the 12th August 1802. It contains no words of succession, nor any reference to family or descendants. In it the *Maharanee* says she has in her *Burranagore* house the worship of the idol *Sree Sree Ishwur*, that her daughter was *shebait*. "I worship now." She goes on:—"For the purpose of worship there is *turrup*, &c., and the ornaments, &c., I give it to you as a gift; you will take possession in accordance with the *hiba*; you will always perform the worship of the gods; you will cause your name to be

written as *shebait* in the Government records, and will always pay the revenue. Therefore I give this deed of gift." No words occur to limit the completeness of the gift to *Joymonee*, subject to her making due provision for the worship of the idol. It may be that the *Maharanee Bubanee* intended that *Joymonee* should enjoy this property and worship as fully and in the same manner as she herself had held them; and their Lordships do not consider the presumption already referred to arising from general Hindu usages is sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it. Their Lordships, therefore, with regard to this deed (No. 3), disagree with the judgment of the High Court, which reversed the decision of the first Judge (Mr. *L. Jackson*).

The construction of the last deed (No. 5), dated 5th September 1802, depends very much on the same considerations and reasons as those which determine, in their Lordships' view, that of the *hibanamah* No. 1. These deeds are substantially to the same effect. The *Maharanee* in the last says:—"The *sheba* of *Sree Sree Doorga* is mine; of that *sheba* I had a desire to to make a gift to a daughter-in-law, *Rinee Sunkary*." She then refers to having purchased property sold for arrears due from *Bissonath*, and paid the value in the name of the goddess, and to the death of *Sunkary*, and then goes on:—"For this reason I make a gift of the same *sheba* to you (*Joymonee*), who are my granddaughter-in-law, of the entire *talook*, *turrup*, &c., and the ornaments of the goddess, and all the *sheba*. You will have your name registered as *shebait*, and take possession of the *mehals* through your men, and continue to perform the worship of the gods from son to grandson, and so on. For this reason I give this deed of gift." Their Lordships do not think it necessary to repeat the reasons already given in commenting upon the first deed, which led them to the conclusion that the *Maharanee* intended that the endowments and worship should remain in the family of *Joymonee*. They think the declaration of the donor that the worship should continue "from son to grandson, and so on," and that for that reason she made the gift, construed with the aid of the presumption arising from the nature of it, sufficiently indicates this intention. Their Lordships must therefore hold, in accordance with the judgments of both the Courts below, that the alienation made by *Joymonee* of the property comprised in this last deed cannot be supported.

It was not disputed, in the end, that the Respondent *Gobindnath Roy*, having established his title as heir by adoption to *Bissonath Roy*, became also heir to *Joymonee*, and entitled to recover such of the properties comprised in the *hibanamah* as should be held to be inalienable by her.

In the result their Lordships will humbly advise Her Majesty in the appeal of the Collector of *Moorshedabad* in the suit originally brought by *Kishtomonee Dabea* in 1849 as follows, that is to say, that, with respect to the properties comprised in the *hibanamahs* Nos. 1 and 5, the appeal be dismissed, and the judgments of the Courts below affirmed; that with respect to the property in the *hibanamah* No. 2, the appeal be allowed, and the judgments of both the Courts below reversed, and the suit so far as it relates to this property dismissed; and that, with respect to the property in the *hibanamah* No. 3, the appeal be allowed, and the judgment of the High Court reversed, and that of the Judge of *Rajshahye* affirmed.

The parties to the last-mentioned appeal will bear their own costs of that appeal; and their costs in the Courts in *India* should be apportioned according to the course of those Courts in cases where the Plaintiff is only partially successful.

2nd May, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ROY DHUNPUT SINGH ROY BAHADOOR, (Decree-holder)* ... } *Appellant,*

versus

MUDHOMOTEE DABIA, (Judgment-debtor) ... } *Respondent.*

Execution of Decree—Limitation—Act XIV. of 1859, section 20 (1).

An execution sale was stayed by consent for two months, and the execution suit was struck off the file During such period the execution creditor applied to the Court to restore his execution suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment debtor in another suit, alleging that he (the execution creditor) had attached them; but it turned out that he had attached them in another suit. *Held*, the application being *bonâ fide*, the period of limitation began to run from the date of the disposal of the application by the Court.

THIS was an appeal from a decision of the High Court of the 11th February 1870, reversing a decision of the Subordinate Judge of *Dinagepore* dated the 11th August 1869.

The question was whether an application made by the Appellant on the 24th April 1869 for execution of a decree obtained by him was barred by the 20th section, Act XIV. of 1859.

The Appellant obtained his decree on the 12th June 1865 for Rs. 8,311-8-6. On the 12th December 1865, he applied for execution, and prayed that certain property held by the Respondent as a *patni* tenure might be sold. On the 24th February 1866, the Appellant filed a petition stating that, at the earnest solicitation of the judgment-debtor, and on her promise to pay the amount due within two months, he had agreed to allow two months, and prayed that that time might be allowed, and the sale be stayed. The judgment-debtor also, on the same date, filed her petition to the like effect, and added that the amount would be paid by her with intimation to the Court within the aforesaid two months. On this it was ordered, on the 26th February, by the Principal *Sudder Ameen*, that the sale should be postponed, and the case struck off the file.

On the 20th March 1866, the Appellant presented a further petition stating the suing out of execution (execution suit, No. 162 of 1865,) and the allowance of two months' time, and further stating that the judgment-debtor had sued out execution against one *Mooktocasee Dabia*, and had caused her property to be sold, and the amount paid into Court. The petition then alleged that the Appellant, while his execution was pending, caused the amount so paid into the Court to be attached, and he now prayed that his execution-suit might be restored to the file, and the attached amount paid out to him. On the same day an order was passed on this petition that it should be entered and numbered, and the record sent for. The report, in obedience to this order, was dated the 3rd May 1866, and was to the effect that no moneys had been attached in execution of this decree, but that in execution suit, No. 164 of 1865, between the same parties, Rs. 55l had been attached. Thereupon it was ordered as follows:—

"Whereas no money has been attached in this suit, no orders can be passed for the payment of such money, nor can any other steps be taken. It is accordingly ordered that the case be struck off the file, and the *mooktearnama* be returned."

This order was dated the 12th of May 1866. No proceedings to enforce the decree appeared to have been taken from that date until the 24th of April 1869, on which day the Appellant petitioned that the execution of the decree, which was struck off the file on the 12th May 1866, should be restored,

* 11 B. L. R., p. 33.

(1) See Act IX. of 1871, sch. 2, cl. 167.

and that the amount due to him might be recovered by attachment and sale of the judgment-debtor's property; and an order was made that the petition should be entered under a new number, and the record called for,

In July 1869, the judgment-debtor filed a petition of objection, alleging that the execution of the decree was barred by the law of limitation, on the ground that the last proceeding to enforce it was made on the 26th of February 1866, and that, from thence to the 24th April 1869, a period of more than three years had elapsed It was also asserted that the proceedings before referred to, and going on from 20th of March 1866 till the 12th May 1866, did not avail to save the time, since they did not execute the decree. The Appellant filed his answer pointing out, among other things, that the judgment-debtor was allowed two months' time from the 26th February 1866, and that the present application for execution of decree was made within three years of the date on which those two months expired.

The case was heard before the Subordinate Judge, who decided in favor of the Appellant on the latter ground, and the objections of the judgment-debtor were overruled.

The Subordinate Judge gave the following reasons for his decree:—

"I do not think the execution of this decree is barred by the statute of limitations; first, in execution of the decree, sale proclamations were issued against the property of the judgment-debtor; and on the date fixed for the sale, *viz.*, on the 26th February 1866, the judgment-debtor took two months' extension of time from the judgment-holder, within which time she promised to pay off the entire amount due to him, and on this both parties applied for stay of the sale, which the Court sanctioned, and ordered that the case be struck off the file; and it was accordingly struck off. When the execution proceedings were stayed for two months at the instance of the judgment debtor, she having applied for two months' time, the decree-holder was under legal disability to use any measure during that period of two months for recovering his money through the Court by execution of decree. The pleader for the judgment debtor argues that s 20, Act XIV. of 1859, applies to execution of decrees alone; and it lays down that, unless some proceeding shall have been taken to enforce the decree within three years, such decree shall not be executed. So that before this application for the execution of the decree had been filed, no proceeding for the enforcement of the decree had been taken within three years, and consequently that decree has been barred by lapse of time. On this point I would remark that the judgment-debtor having applied for and obtained two months' time, and thus stayed all proceedings in Court for that period, and the decree holder having consented thereto, the Court stayed execution-proceedings; so that such stay of proceedings can by no means be taken to be neglect or laches on the part of the decree-holder. On the contrary, it may be maintained that the decree-holder was engaged in execution proceedings during those two months in the manner prayed for by the judgment-debtor. Under such circumstances, how can it be said that the decree-holder took no measures during three years to enforce his decree? This decree can, therefore, undoubtedly be executed.

"The second plea taken by the judgment-debtor is that the decree holder, after consenting to give time for those two months, broke the covenant by applying for execution within that period, *viz.*, on the 20th March, and praying that the money under attachment be paid over to him Consequently he is not entitled to any benefit arising out of that contract. That this argument is useless, is perfectly clear The decree-holder has in no way committed a breach of that former agreement; he only applied that the money under attachment belonging to the judgment debtor may be paid over to him. This is not an act against the terms of the agreement Secondly, should we take it for granted that there has been a breach of that agreement on the date in question, then this application for execution has been made within three years. For all these reasons, the objections raised by the judgment-debtor appear to be groundless."

On the 17th September 1869, the Respondent appealed to the High Court against that order of the Subordinate Judge.

On the 11th February 1870, that appeal having come on for hearing, the High Court (*Glover* and *Hobhouse*, JJ.) reversed the decision with costs; and held that the Appellant was barred from proceeding with the execution of his decree; and that the costs

of the present application, and of the Court below, should be paid to the judgment-debtor.

The following was the judgment:—

The question before us is simply this, whether the decree-holder, Respondent, was, with reference to the provisions of s. 20, Act XIV. of 1859, in time, when, on the 24th April 1869, he applied for execution of his decree?

Mr *Paul*, for the Appellant, contends that the last application for execution was on the 26th February 1866. But without saying it being unnecessary in our view of the case to say, whether it was so or not, we will take it upon the contention of Mr *Allan*, for the Respondent, that the last application for execution was made on the 20th March 1866. Starting from the 25th April 1869, and going back as the law requires, a period of three years from this date, it is manifest that this application of the 20th March 1866, standing alone, was not an application in the words of the law within three years next preceding the application now before us. But Mr. *Allan* points out that, acting upon this application, the Court entered into certain proceedings which did not terminate until the 3rd May 1866; and he contends that the act of the Court in these proceedings must be taken as an act on his part, and that therefore he may take the date of these proceedings, namely, the 3rd May 1866, as the date which represents the last proceeding taken by his client. He relies for this contention on the ruling case of *Ram Sahaye Sing* v. *Degun Sing* (1). He also relies on the case to be found at page 211 of Mr *Thomson's* edition of the Limitation Law of the edition of 1866. These two precedents taken together, and even it may be said separately, seem to say that the time from which a decree-holder may date his last application is the last date of any proceeding, either of himself or of the Court put in motion by him in furtherance of the application, provided only such proceeding be taken in good faith, that is, as we understand it, with the intention on the part of the decree holder to arrive at the fulfilment of the decree. It is therefore necessary to consider what was the application made on the part of the decree-holder on the 20th March 1866, and what was in the words of the decision at page 211 of *Thomson's* Limitation Act, "that substantial act done in furtherance of such application by the Court on which the decree holder is entitled to rely."

(1) B. L. R., Sup. Vol., 492.

The application of the 20th March was to this effect:—The decree-holder said that in another Court there was a certain sum of money standing to the credit of the judgment-debtor, and he prayed that a proceeding might issue from the execution Court to that other Court, directing that the said money should be paid over to his *mookhtar*. Upon this application, and upon the date of this application, the Court directed that the record should be sent for, and the application, *i. e.*, the execution application, be restored to the file. After that, we may presume, the records arrived, and on their arrival the usual report was submitted upon them by an officer of the Court, and the Court then, on the 3rd May 1866, passed judgment somewhat in these terms:—It said that, inasmuch as the money in question was under attachment by this very decree holder in another Court, so the Court could not make an order directing payment of that money to the *mookhtar* of the decree-holder; and that inasmuch as the decree-holder had taken no further steps in the matter, that is, no steps apparently since the date of the application of the 20th March, to prosecute his decree, so the Court rejected the prayer, and ordered that the execution-proceedings should be struck off the file.

Now it seems to me upon these proceedings that the utmost that could be said as to any act done by the Court in furtherance of the Plaintiff's application to execute his decree, was that act by which the Court sent for the record of the case, in order to pass some order upon the application of the decree-holder. If, therefore, the date of any act done by the Court is to be taken as the date from which the decree holder is to reckon his last application to execute, that application must date from the order of the Court calling for the record; an order which appears to bear exactly the same date as the application, *i. e.*, the 20th March 1866, and so the decree holder is still out of time. But even if this were not so, I should be quite prepared to hold that the act of making the application was not in itself a *bonâ fide* act in furtherance of the decree. I say this for two reasons first of all, because I think that when, upon the facts disclosed in the order, the decree holder was himself the person who was preventing the property, that is, the money in question, from being paid out of the Judge's Court, he must have known that he could not, in another execution case, have got that money paid over to him by the order of another Court. Again, if there had been any real intention, as evidenced by this act of the

decree holder, to execute the decree, we should undoubtedly have seen him following out this act in some practical manner, or we should at least have had some explanation from him as to what he did in the matter of the decree between the 20th March 1866, or putting it at the best, between the 3rd May 1866 and 24th April 1869. Sitting here as a Court of Regular Appeal, we have to determine whether the act of the decree holder, of March 1866, was done with the real intention of realizing his decree When, therefore, we find that the act itself was one in which he could not in reason have expected success, and was one with reference to which no explanation has since been offered, and was one not followed up by any other proceeding on his own part for more than three years after the first application, it is impossible, in my judgment, to say that the act was one done in good faith for the purpose of obtaining satisfaction of his decree. This being so, I think that the decree-holder was barred by the application of the statute of limitation when the present application was made to execute it

I am reminded by Mr *Paul* for the Appellant that the ground on which the lower Court has passed its judgment has not been touched upon by this Court, and no doubt that is so. I was, however, under the impression that Mr. *Allan*, for the Respondent, was not prepared to support this decision on that ground, because, as I understood and understand him to admit, the Full Bench Ruling in the case of *Krishna Kamal Sing* v. *Hiru Sirdar* (1), is conclusive upon the point The point arose on these facts:—The decree-holder on the 26th February 1866 applied for execution, then on that very day both he and the judgment-debtor filed applications to the effect that proceedings might be stayed for a period of two months This, therefore, took the case down to the 26th April 1866, and the Court below held that this agreement between the parties to postpone execution of the decree was a proceeding on the part of the decree-holder which brought his last application for execution down to 26th April 1866, and so brought it in time from the next application on the 24th April 1869 If the words of the law were not in themselves, as I think they are, quite conclusive against any such contention, the Full Bench Ruling, which I have quoted, is obviously so conclusive.

The order is that the decree of the lower Court be reversed, and that the decree holder be barred from proceeding with execution, and that he do pay costs in the Court below and in this Court"

The execution-creditor then appealed to Her Majesty in Council.

Sir *R. Palmer*, Q. C., and *Mr. Mortimer*, for the Appellant.—The decision of the Subordinate Judge was right. The second petition was not intended to affect the arrangement as to the *Patni talook*, and there was in fact only a prorogation of the sale for two months. The case of *Krishna Kamal Sing* v. *Hiru Sirdar* (1) was very different; there the execution was in fact given up. The effect of holding the present case barred by limitation would prevent a *bonâ fide* postponement for a debtor's benefit being made.

Mr. *J. D. Bell* for the Respondent.—The case comes clearly within the principle of the Full Bench decision: the petition agrees to two months' time being allowed and the staying of the sale, and the case is then struck off the file. The time must run from that date, or from the 20th March 1866, when he applied to have the execution-case "restored to the file." The last *bonâ fide* proceeding was on the 20th March 1866—*Maharajah of Burdwan* v. *Bulram Sing Baboo* (2) and *Ram Sahaye Sing* v. *Degun Sing* (3).

Sir *R. Palmer*, Q. C., in reply.

THEIR LORDSHIPS gave the following judgment:—

In this appeal the only question which arises is whether, within three years preceding the application for execution made in the Court below, any proceeding had been taken to keep the original decree in force; the question depending on the 20th section of Act XIV. of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is, whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869; and undoubtedly it must be shown that, within three years of that date, some proceeding

(1) 4 B. L. R., F. B., 101.

(1) 4 B. L. R., F. B., 10.
(2) 5 B. L. R., 611, 2 P. C. J., 597.
(3) B. L. R., Sup. Vol., 402.

was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1855, under which there was an order for the sale of a *patni talook*, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months; and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the Appellant that this execution-suit must be considered to have continued in living force, although by the suspensory order, no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question; they desire to give no opinion judicially upon it; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866 are sufficient to take the case out of the operation of the Limitation Act.

The petition of the 20th March 1866, which was filed before the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment-debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase-money, an amount of Rs. 551, was received on deposit, and then the petitioner proceeds:—"While my execution was pending, I caused that amount belonging to the judgment-debtor to be attached, and file this petition, and pray that my execution-suit may be restored to the file, and that the aforesaid attached amount, Rs. 551, be paid to my *mookhtar*." This petition, if *bonâ fide*, would clearly be a proceeding to enforce the judgment, its object being to obtain execution of the money attached. It was referred to the officer of the Court, and the officer upon that reference found that no moneys were attached in execution of the decree in which the petition was filed, that is, the decree in the present suit, but that certain moneys had been attached in another suit between the Appellant and the Respondent. The report is dated on the 3rd of May. On the 12th of May, an order of the Court is made upon it, which has the following preamble:—"Whereas no money has been attached, no orders can be passed for the payment of such money, nor can other steps be taken. It is accordingly ordered that the case be struck off the file, and the *mookhtarnama* be returned." It seems to result from the report of the officer of the Court, and the order made upon that report, that no execution could issue upon the petition in consequence of the money not having been attached in this suit, and that there was another suit between the same parties, in which that sum of money had been attached.

It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bonâ fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion. It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution.

Then, assuming it to be a *bonâ fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it; that it was a continuing proceeding duly prosecuted by the Appellant, up to the time of the report, and further

up to the time when the judgment was finally given, and that during the whole of such pendency, the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was in the end abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1833, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this Committee in the case of *Maharajah of Burdwan* v. *Balram Singh Baboo* (1), and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this appeal, and to order that the judgment under appeal be reversed, and that in lieu thereof the appeal to the High Court be dismissed, and the judgment of the first Judge be affirmed with costs. The Appellant will have the costs of this appeal.

3rd May, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RANEE BHOBOSOONDREE DASSEAH, (Plaintiff)* } *Appellant,*

versus

ISSURCHUNDER DUTT and another, (Defendants) } *Respondents.*

Agreement to transfer—Deed of Sale—Ejectment—Specific Performance—Breach of Contract—Allegations.

Where it was agreed between *A* and *B* that, in consideration of certain proceedings to be instituted jointly by *A* and *B*, and payments to be made by *B*, for the recovery of certain property claimed by *A*, against *C*, *A* would make over the half of the property recovered to *B*; but *A*, contrary to the terms of the agreement, without the consent of *B*, compromised his claim with *C*, and obtained possession,—*Held*, the agreement did not operate as a transfer of the property to *B*; she could not sue to eject *A*.

Semble.—*B's* proper remedy was a suit for specific performance or for damages for breach of the contract, to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by *A*.

THIS was an appeal from a decision of the High Court (*Loch* and *Mitter*, JJ.) dated 10th June 1869, dismissing the Appellant's action of ejectment.

One *Ramnarain Dutt* died, leaving a *talook*. The Respondent *Jogessur Ghose* claimed it as his heir. The other Respondent claimed under a deed of gift from *Ramnarain*, which *Jogessur* impeached as a forgery.

While these disputes were going on, the Respondent *Jogessur* applied to the Appellant, and asked her to assist him in litigating with the other Respondent for the purpose of getting possession of all the property which had belonged to his maternal grandfather, and it was arranged between them that, in the event of such litigation arising, she should advance the expenses to the extent of Rs. 3,000, and should protect *Jogessur* from a then impending execution, the consideration being a moiety of the property claimed.

An agreement in writing was accordingly executed by *Jogessur* in favor of the Appellant on the 14th *Bhadro* 1273 (29th August 1866,) which, after reciting the object of the agreement, proceeded as follows:—

"It is now necessary to institute a suit in Court for the recovery of possession of the whole of the properties consisting of the aforesaid *jote jummah*, *talook*, &c., and mesne profits; and as I have not the means to institute a suit at my own expense, I have determined to sell you a moiety or 8 annas share of the 12 *annas* 6 *gundas* 2 *cowries* 2 *krants* of the above *jote jummah*, being the share left by my maternal grandmother, to which I am entitled; an 8 *annas* share of *talook* aforesaid, and an 8 *annas* share of the mesne profits during the period of dispossession; and having fixed the consideration for the same

(1) 5 B. L. R., 611, 2 P. C. J., 597.
* 11 Ben. L. R., p. 36.

at Rs. 3,000, and received the purchase money in cash, I sell the same to you, and execute this deed of sale. The said amount is deposited with *Dwarkanath Lahory, mooktear*, the agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be defrayed out of that sum. In the event of the suit being decided in my favor, we shall each of us take the costs, mesne profits, *jote jummah*, and the *taloob* in the shares mentioned above. We will both of us institute the said suit in Court as Plaintiffs. Neither of us shall be able, without consent of the other, to compromise, settle, or make any adjustment whatever of the case. One *Ooma Churn Sircar*, of *Mullickpore*, has obtained a decree against me for Rs. 600, on account of money advanced as a loan. If he in the mean time execute the decree, you will pay the amount of the debt from the aforesaid amount of deposit. Whatever sums shall be spent till the final decision of the suit, in excess of the said amount of deposit, you are to pay. You shall never be able to make any demand or claim against me on account of those sums, or the amount of the debt due to the said *Ooma Churn Sircar*; even if you do, it shall not be admitted. In whatever way the suit is decreed, I will give and receive 8 *annas* thereof as aforesaid, that is in half shares. The 14th *Bhadro* 1273."

Nothing more was done under the agreement, no money passed, and *Ooma Churn Sircar* in the agreement mentioned having taken out execution against *Jogessur Ghose*, *Jogessur* applied to the Appellant's *mooktoar* to deposit the money, but this was not done.

Thereupon *Jogessur*, instead of instituting the intended proceedings against *Issur Chunder*, agreed to an amicable partition, which was embodied in a document dated the 26th *Pous* 1273 (January 9th, 1867), satisfied *Ooma Churn Sircar's* decree, and saved his estate.

On the 20th September 1867, the Appellant commenced the present suit by filing a plaint against these Respondents, and some persons holding as lessees under them, seeking to have the deed of sale executed by *Ramnarain* declared a forgery, and all the proceedings taken thereunder since his death declared to be fraudulent, and claiming possession of half of the property under the deed executed by *Jogessur*, together with the mesne profits.

On the 20th July 1868, the Subordinate Judge dismissed the Plaintiff's case on the ground that she could not sue alone.

On the 10th September 1868, the Plaintiff appealed to the High Court, and on the 10th June 1869, a Division Court (*Loch* and *Mitter*, JJ.) held that the Subordinate Judge was wrong in dismissing the suit on that particular ground; but as both parties admitted that the evidence had been given, and the case was ready for hearing on the merits, the Court proceeded to examine the evidence and decide the case on the merits.

After deciding that the deed of gift from *Ramnarain* was a true document, and that the property claimed under it by the Respondent *Issur Chunder* was properly so claimed, the judgment proceeded as follows :—

"It is urged that the Plaintiff has a right to the moiety of whatever property remains to *Jogessur*, who admits the sale to Plaintiff, and whose witnesses prove the execution by him of the bill of sale. *Jogessur*, however, denies that any consideration passed to him: the Plaintiff brings three witnesses to prove that payment in cash was made to *Jogessur*. Their evidence appears to us inconsistent with the terms of the bill of sale, and highly improbable when considered with that document. The deed sets forth (*recites.*) Now it is clear that the money was to remain in deposit with Plaintiff, though nominally under the charge of her *mooktear*, *Dwarkanath Lahory*, for she bound herself to pay out of that money the amount of *Ooma Churn's* decree, should he execute it against the vendor, and yet we are told by the witnesses that the money was paid to *Jogessur*, and that before the deed was registered. But it is said that it was part of the bargain that *Jogessur* was to take the money and deposit it with *Dwarkanath Lahory*, as if it is likely that the Plaintiff or her servants would pay over the money to a man in *Jogessur's* needy position, and trust him to deposit it with another servant of the Plaintiff. It appears to us that the evidence of payment is unworthy of credit, and that no consideration actually passed, and that the contract is consequently not a valid contract. The Plaintiff has done nothing to fulfil her part of the contract, and we think, therefore, that, under the late ruling of the Privy Council, in the case of *Rajah Sahib Prolad Sen* v. *Baboo Budhu Singh* (1.) the present

(1) 2 B. L. R., P. C., 111, see 116 and 117; S. C., 12 Moore's I. A., 301, 2 P. C. J., 431.

action must fail. We think it very probable, as stated by the witnesses for the defence, that *Jogessur* having for some cause quarrelled with his relatives, did execute the deed to the Plaintiff, who was quite ready to assist him, in hopes of getting an interest in the Defendant's property, which she might use to her own advantage. Under this view of the case, we think it unnecessary to determine whether the Plaintiff did or did not ask *Jogessur* to join her in carrying on the suit. No evidence has been given on this point. We dismiss the suit with costs in both Courts."

The Plaintiff then appealed to Her Majesty in Council.

Mr. *Doyne* and Mr. *Mortimer* for the Appellant contended that the Court were in error in finding the deed by *Ramnarain* to be genuine, but even if it were, the Plaintiff was entitled to recover one-half of a third. No objection could be taken as to this being champerty—*Fischer* v. *Kamala Nuiker* (2.) The suit was properly framed for the purpose of impeaching the proceedings taken by *Jogessur*, and the High Court were wrong in dismissing the suit.

Mr. *J. D. Bell* for the Respondents.—The action is misconceived: whatever right the Appellant might have to sue for specific performance or to recover damages, she cannot sue in ejectment—*Rajah Sahib Prolad Sen* v. *Baboo Budhu Singh* (3.) Even a suit for specific performance or for damages would not have been successful in the absence of a tender on the part of the Plaintiff of performance on her part.

Mr. *Doyne* in reply.

Their LORDSHIPS gave the following judgment:—

This suit was based upon a deed executed by *Jogessur Ghose*, in favor of the Plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated: it recites that *Jogessur Ghose* was entitled to certain properties from his maternal grandmother, that he had been dispossessed of the whole of those properties, and thus proceeds (as above, 11 Bengal Law Rep., p. 37.)

It appears that a short time after, in September 1866, *Jogessur Ghose* entered into a deed, which may be termed one of compromise, with *Issurchunder Dutt*, who was the claimant and in actual possession of the greater part of the property referred to in the previous deed, and that by this deed of compromise, a portion of the property was divided between them. Thereupon this suit was brought by the Plaintiff. It is material to observe that it is not a suit claiming specific performance, or damages for breach, of the contract entered into with the Plaintiff by *Jogessur Ghose*, but that it is in the nature of an action of ejectment. It is a suit to recover possession of the property mentioned in the first deed brought not only against *Jogessur Ghose*, but against *Issurchunder Dutt*, the Plaintiff seeking to recover possession of the property by virtue of the title acquired under that deed, not only against *Jogessur Ghose*, but also against *Issurchunder Dutt*, whom he alleged to have obtained possession of the property under forged conveyances.

The Court below dismissed the suit upon a technical ground, namely, that the Plaintiff could not sue *Issurchunder* without joining *Jogessur Ghose* as a co-Plaintiff. The High Court decided, in their Lordships' opinion rightly, that this was not a proper ground for dismissing the suit, and hearing it upon its merits, determined it in favor of the Defendants.

The principal question is the effect of the first deed, whether it operated as a present transfer of the property, or only as an agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention, the case was referred to of *Rajah Sahib Prolad Sein* v. *Baboo Budhoo Singh* (1). Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage wherein their Lordships say:—"The Court below seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to

(2) 8 Moore's I. A., 170, 1 P. C. J., 733.
(3) 2 B. L. R., P. C., 111, see 116 and 117; S. C., 13 Moore's I. A., 301, see 306, 2 P. C. J., 431.

(1) 2 B. L. R., P. C., 111; S. C., 12 Moore's I. A., 275, 2 P. C. J., 429.

the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is in their Lordships' opinion very questionable. It is certainly not supported by the two cases cited in the judgment under review" (which are there referred to) "in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do" (2). Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both *Jogessur Ghose* and the Plaintiff were to be parties.

This construction of the deed disposes of the case; for even if the Plaintiff be entitled to complain of breach of contract by *Jogessur*, she cannot recover under it possession of the property against *Jogessur*, *a fortiori* cannot she recover against *Issurchunder Dutt* who was no party to the deed. It may be observed that, even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the Plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to *Dwarkanath Lahory*, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition, but was prevented by the wrongful act of the Defendant. There are no such allegations, and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the Plaintiff was not the performance of this condition, but something very different, namely, the payment to the Defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they will humbly advise Her Majesty that this appeal be dismissed with costs.

(2) 2 B. L. R., P. C., 117; 12 Moore's I. A., 306, 2 P. C. J., 433.

10th, 11th, 22nd May, and 14th June, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

CHOWDRY WAHED ALI, (Defendant) ... *Appellant,*

versus

MUSSAMUT JUMAEE, (Plaintiff) ... *Respondent.*

Act XXIII. of 1861, s. 11—Decree—Representative—Act VIII. of 1859, s. 203.

The decree of the High Court affirmed under the circumstances of the case, but *held* (contrary to the opinion of the majority of a Full Bench)—Where a decree against a person in a representative capacity has been properly passed, and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of Act XXIII. of 1861, s. 11.

* 11 B. L. R., p. 149.

This was an appeal from a decision of a Full Bench of the High Court given on the 13th August 1868, in which a decree of the Principal *Sudder Ameen* dated the 27th July 1867 was affirmed by a majority of the Judges.

The circumstances under which the case came before, and was decided by, the Full Bench, are fully detailed in the report of the case before the High Court (1.)

Sir *R. Palmer*, Q. C., and Mr. *Doyne*, for the Appellant.—Assuming the judgment of the High Court of the 10th July 1863 to have been against the Respondent in her representative capacity, and not personally, she could in that suit have urged that ground of exemption, and no new suit is permissible either to restore to her such neglected opportunity, or to correct any error of judgment of the Court in that suit. The effect of that judgment of the 10th July 1863 was in fact to make the Respondent personally liable to make good to the Appellant the entire mesne profits of the part of the property to which the decree declared the Appellant entitled. She having acted in concert with the other Defendants to disturb the Appellant's possession was personally liable. But in addition to this, she received assets from her father, *Waris Ali*, not perhaps directly from him, but by possession for some years with her co-heirs of the property. It was clearly not competent to the Appellant to bring the present suit: see Act XXIII. 1861, s. 11. It cannot seriously be contended that a party sued in a representative capacity is not a party to the suit within the meaning of that section.

Mr. *Cowie* for the Respondent.—The Courts have all found as a fact that the property which is the subject-matter of this suit was the property of the Respondent in her own individual character, and that she never took any assets by descent from her father. The judgment being against her in her representative character, a sale of her own property in the absence of evidence of a *devastavit* was absolutely void, or, if not void, voidable as against the Appellant as purchaser, he being the execution-creditor at whose suit the sale was effected. There is nothing in the Civil Procedure Code to prevent a new suit being instituted to obtain relief when her individual property has been affected by the decree made against her only in her representative character. No proceedings were taken in accordance with ss. 203 and 211 of Act VIII. of 1859.

Mr. *Doyne* in reply.

Their LORDSHIPS gave the following judgment:—

This was an appeal from the judgment of a Full Bench of the High Court at Calcutta, affirming a decision of the Principal *Sudder Ameen* of *Patna* in favor of the Respondent, the Plaintiff in the suit below.

The suit was brought by *Mussumut Jumaee*, the Respondent, to obtain a declaration that an execution-sale of certain *mouzahs*, under color of a decree made in a former suit brought against her and others by the Appellant, should be set aside, and her possession of the *mouzahs* confirmed. It may be convenient to designate the former suit, which led to the sale complained of, as suit A. Suit A was itself the sequel of a protracted litigation, and became in its turn the starting point of new and intricate proceedings.

The Appellant, who was mortgagee of *Mouzah Mayjara*, had obtained decrees in suits against his mortgagors for the mortgage-debt, under which he attached their interest in that *mouzah*. *Waris Ali*, the father of the Respondent, and the Respondent and other persons, intervened, claiming interests in the *mouzah*. *Waris Ali* claimed to have advanced money to the mortgagors under certain *bhurnanamas*. The Respondent's claim was distinct. She was married to *Enayet Ali*, and she claimed certain shares of the *mouzah* under a purchase made previous to the Appellant's mortgage. Notwithstanding these claims, the *mouzah* was sold under the Appellant's decrees, and purchased by him. Being unable to obtain possession of the *mouzah*, the Appellant brought suit A to recover it, making *Waris Ali* and the Respondent and other

(1) 2 B. L. R., F. B., 73.

persons (in all 103) Defendants, charging them with combining to keep him out of possession. *Waris Ali* set up his claim under the *bhurnanamas*, which were ultimately held to be invalid. The Respondent, however, established her title to the shares of the *mouzah* she claimed. During the pendency of suit A, *viz.*, in January 1856, *Waris Ali* died, and thereupon, under the 104th section of Act VIII. of 1859, his heirs, *viz.*, the Respondent and her brother and sister, were entered in the register as Defendants in his place. Thus the Respondent became a party to the suit in a double capacity, which led to the confusion in the proceedings to be presently noticed. On the 29th November 1861, the Judge of *Patna* made a decree in favor of the Appellant for possession, and "for mesne profits to be charged on the Defendants jointly and separately." Although the Judge had stated in his judgment that the title of the Respondent to the share she claimed was proved, and therefore ought to have decreed to that extent in her favor, his decree does not so find, nor does it separate her from the other Defendants in the award of possession and mesne profits against them. This ill-advised and erroneous decree in suit A was the origin of a labyrinth of intricate and too often irregular proceedings, through which it is not easy to find the way to a definite end. The Respondent *Jumaee*, amongst others, appealed against it to the High Court. On the 10th July 1863 that Court gave judgment to the effect, that it having been adjudged by the Judge at *Patna*, that *Jumaee* had a good title as purchaser to the share of the *mouzah* claimed by her, she was needlessly made a party to the suit, and it was ordered that she should be released from it with costs. This judgment undoubtedly went too far in releasing *Jumaee* altogether from suit A, as her learned counsel, Mr. *Cowie*, fairly admitted; because the grounds on which it proceeded do not touch her liability in her representative capacity as one of the heirs of *Waris Ali;* but apparently the decree stands unreversed; a circumstance which it is material to bear in mind.

Although no attempt appears to have been made to review or alter this decree, proceedings, now to be noticed, were taken, by force of which the sale (sought to be set aside in the present suit) of *Jumaee's* private estate to the Appellant, as purchaser under his own decree, took place. They are succinctly described by the Chief Justice in the following extract from the judgment now under appeal:—

"On the 17th August 1863, *Wahed Ali*, the then Plaintiff, applied to the Court at *Patna* to execute the decree which he had obtained for mesne profits. *Jumaee*, the present Plaintiff, appeared upon that application and urged, that according to the decree of the High Court of the 10th of July 1863, she had been wholly discharged from liability. *Wahed Ali* admitted that she had been discharged by that decree so far as her private interests were concerned, but contended that she remained liable as one of the heirs of *Waris Ali*. The Judge of *Patna* took that view of the case, and on the 5th October 1863, ordered a sale of that part of the property which belonged to her in her own right, and which had been attached in execution of the decree.

On the 7th of October 1863, the Plaintiff petitioned the Judge, contending that, even if she were liable as heiress of her father, she could only be liable, under ss. 203 and 211 of Act VIII. of 1859, to the extent of assets inherited from him. On the same day the Judge ordered the petition to be rejected; and, on the following day, the 8th October 1863, the Plaintiff's own portion of the property, which had been attached under the execution against her in her representative capacity, was sold under the execution, and *Wahed Ali*, who was then the Plaintiff in the suit, became the purchaser under his own decree. Numerous other proceedings took place to which it is not necessary to refer. It is sufficient to say that, on the 15th of March 1864, the Judge confirmed the sale.

"The present Plaintiff petitioned the High Court against the order for execution and the sale of her property; and, on the 8th of July 1864, the High Court ordered that the decree of the 5th of October 1863 should be amended by declaring that the present Plaintiff was only liable to the extent of assets inherited

from her father, so that, in fact, the order under which the Plaintiff's private property was sold in execution was so far altered that it did not justify the sale which took place under it on the 8th October 1863.

"The Plaintiff again appealed to the High Court against the order of the 15th of March 1864, confirming the sale under the execution; and, on the 30th of January 1865, the Court declared that the sale could hold good only if the Plaintiff had received assets from her father's estate, and in that case only to the extent of the assets so received. The case was therefore remanded to the Judge to make inquiry upon that point. The Judge upon that remand found that the Plaintiff had inherited nothing from her father, and on the 27th of May 1865, set aside the confirmation of the sale.

"From that order *Wahed Ali* appealed to the High Court; and, on the 18th September 1865, a Division Bench held that as the sale had been confirmed, there was no power to cancel it; that the two orders of the 8th of July 1864 and the 30th of January 1865 were wrong, and they advised *Wahed Ali* to apply to the High Court for a review of the order of the 30th of January 1865. *Wahed Ali* acted upon that advice, and applied for a review of the judgment of the 30th of January 1865, and, on the 28th of September 1866, the Division Bench held that the sale could not be set aside except by a suit by the present Plaintiff in the Civil Court. They amended the order of the High Court of the 30th of January 1865, and the order of the Judge of the 27th May 1865, and restored and confirmed the Judge's order of the 15th of March 1864, by which the sale had been confirmed."

The above summary seems to be in substance correct, except that the order of the 8th July 1864 appears to be, technically, not an order to amend the decree, but to declare in the execution proceedings what was the limit of *Jumaee's* liability under it. The result, so far as a result can be extricated from these involved and contradictory proceedings, appears to be, that whilst the High Court held the sale of *Jumaee's* private property to be utterly wrong, and at first ordered it to be set aside, they, in the end, reversed their own orders, on formal grounds, leaving the order for sale and confirmation to stand, but suggesting to *Jumaee* to obtain redress by a new suit. Accordingly she brought the present suit, and obtained the concurrent judgments of the Courts of *India* in her favor, which the Appellant now seeks to reverse: first, on the merits; and, second, on the ground that it was not competent to the Respondent to bring this suit.

On the merits it was at first contended that she was personally liable in suit A for having acted in concert with the other Defendants to disturb the Appellant's possession. Their Lordships, however, think that not only is this liability unsustained by the evidence, but the amended decree, in any view of the amending order, absolves her from it.

It was next contended that she had received assets from her father, *Waris Ali*, and was therefore liable. It was scarcely insisted that any had descended from her father, but it was strongly urged that from the time of his death to the end of suit A, a period of five years, she was in joint possession with her co-heirs of the *mouzah* which was the subject of suit A, and must therefore have received profits, which she was bound to account for. It is sufficient to say that their Lordships can discover no clear and definite proof, either in suit A, or in the present suit, that this was so; and the Courts below having assumed to the contrary, it is impossible their Lordships can now, for the first time, find the fact of such possession.

The case is thus reduced to a question of procedure, *viz.*, whether it was competent to the Respondent to bring the present suit. The Appellant's contention is founded on s. 11 of Act XXIII. of 1861, which, among other things, enacts that "any question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit, and the order passed by the Court shall be open to appeal." This enactment was undoubtedly passed for the

beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation. They therefore feel bound to say they are unable to assent to some of the reasons on which the High Court have founded their judgment. They cannot concur in the general proposition that a party sued in a representative character is not a party to the suit within the meaning of s. 11 of the Act of 1861, which is, as the Chief Justice observes, to be read as part of Act VIII. of 1859. The 203rd section of Act VIII. makes express provision for the manner of execution in such cases: *viz.*, (1) against the goods of the deceased person, and (2) in certain events against the Defendant "to the extent of the property not duly applied by him, in the same manner as if it had been against the Defendant." It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own private property may be attached and sold. It is true, that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable, and proper to be ascertained in the suit in which the decree is made, during the progress of the execution proceedings founded upon such decree. It does not seem to their Lordships to follow that because all the provisions relating to execution cannot be applied to a Defendant sued in a representative character, such a Defendant be regarded as a party to the suit, within the meaning of such of them as may be applicable to his case. It may be true that "cross-decrees" cannot be set off between parties to suits in different characters under s. 209; and that decrees cannot, in the first instance, be enforced by imprisonment against a party sued only in a representative character under s. 201. But it may be observed, that, in a case where there is a finding that the property of the deceased has not been properly applied, and when the decree under s. 203 may be executed against the Defendant to the extent of the property wasted, as if it had been against him personally, there would seem to be no inconsistency in holding the clause relating to imprisonment to be applicable. In a case then, in which a decree has been properly passed, and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit, with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of s. 11 of the Act of 1861. But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the Respondent. It has been already pointed out that the original decree was amended by the High Court on appeal by a decree directing *Jumaee* to be released from the suit altogether. This decree was obviously erroneous, for it is clear she ought not to have been released from the suit in her representative character as one of the heirs of *Waris Ali*, but only in her own personal capacity. The decree releasing her from the suit altogether was, as the Chief Justice observes, probably so drawn up by mistake. Still it was so drawn up, and it does not appear to have been ever formally set right. It is true that by the order of the High Court of the 8th July 1864, upon *Jumaee's* own appeal against the order for sale of her private estate, the Court, by declaring that her liability under the decree as one of the heirs of *Waris Ali* extended only to such property as she might have inherited or received as such heir, implied and affirmed that she was liable to this extent. But this order was made, not on an appeal against the decree, but against the order of sale made in the execution proceedings. In point of form, therefore, the decree releasing her altogether was left standing; and although the mistake may have been in substance corrected by the order of the 8th July, that order was not acted upon by the present Appellant; and, on the contrary, it was at his instigation, swept away by the subsequent proceedings above referred to. If that order had been acquiesc-

ed in and acted upon by the Appellant, it might perhaps have been regarded as a virtual amendment of the decree, but even in that case the sale of the Respondent's private estate, of which she now complains, could not properly have taken place under it. However, the Appellant refused to acquiesce in it, choosing to rely on his strict right; and upon his objection that in point of procedure it was wrong and could not affect the orders of sale of the 9th October 1863, and of confirmation of the 15th March 1864, it was set aside, or at least declared to be without force. When, therefore, the Appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit A, his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit A is ineffectual, as actually drawn up, to support any execution against *Jumaee*, and that the proceedings which may have virtually set it right, and warranted some execution, have lost all efficacy for that purpose by his own acts. Their Lordships* cannot find, after the incongruous proceedings above described, that there exists any decree authorizing an execution against the Respondent's estate; and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree.

Their Lordships therefore being of opinion that the decrees under appeal are substantially just, and that under the peculiar and exceptional circumstances of the case, Act XXIII. of 1861 was not a bar to the suit, will humbly advise Her Majesty to affirm the decrees, and to dismiss this appeal with costs.

13th May, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

WOOMATARA DEBIA, (Plaintiff)* ... } *Appellant,*

versus

UNNOPOORNA DASSEE and others, (Defendants)... } *Respondents.*

Act VIII. of 1859, s. 2—Res Judicata—Costs of several Respondents.

Where a party, failing to obtain judgment for the possession of land claimed by her in her first suit as *taufir*, brought a fresh suit claiming the land as property belonging to her *talook* according to the true boundary line, *held* that her suit was barred by s 2 of Act VIII. of 1859.

Where Respondents were in the same interest, but severed in their defences, only one set of costs was allowed, and that to the Respondent who first entered appearance.

THEIR LORDSHIPS delivered the following judgment:—

Their Lordships propose to dispose of this appeal upon the only point that was dealt with by the High Court, namely, whether the present suit can properly be brought consistently with the second section of the Act of Civil Procedure. That clause is in these words:—"The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

The first question that occurs to their Lordships upon that section is, what is meant by the cause of action? And in the present case they are clearly of opi-

* 11 B. L. R., p. 158.

nion that the cause of action in both suits was the dispossession of the Appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV. case. The result of those proceedings was to affirm the possession of the Defendants in the land which was the subject of the first suit, and to leave the party who felt aggrieved by them to her remedy by a civil suit.

The first suit was accordingly brought, and in the present suit both Courts have found, and it has been fairly admitted at the bar, that the land which is now in dispute is a portion of the land which was then sued for. The identity, therefore, of the subject-matter of the two suits is admitted, and, as their Lordships have already said, the cause of action in both was the dispossession of the Appellant by reason of the proceeding then taken.

It is sought, however, to distinguish the case upon the ground that the Appellant, who was the Plaintiff in the former suit, was fit in that suit to admit that no portion of the land then sued for was included within the limits of *Talook Shahazadapore*, as originally settled and defined by the *doul*, but that she had as *talookdar* of that *talook* acquired title to it as *taufir*, that is, that by gradual squatting or encroachment, she had enlarged the boundaries of her *talook*, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her.

Now, it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for, which included the lands now sued for, belonged as of right to the *talookdar*, or whether they fell within lot 32, which belonged to the Defendants? and it was open to the Plaintiff, the present Appellant, in the former suit to shape her title in either of three ways. She might have said, as she did say, according to Mr. *Doyne's* argument to-day, that the whole of the land then claimed was *taufir* land; or she might have said, a portion of the land fell within the *talook* as originally settled and formed part of the 7,000 odd *bigas* mentioned in the *doul*, and the residue of it is *taufir* land; or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that should the proof of that fail, that portion also was to be considered as *taufir* land.

With the full knowledge of all the circumstances, she chose to say:—"I admit that I am in possession of all that I was entitled to under the *doul*, but I claim this land, the whole of it, as *taufir* land." The contention now is that, although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say:—"The boundary was improperly drawn, so as to include in the Defendants' holding that which of right should have been within my originally settled *talook*, and, as I now claim in that way that which I might have claimed in the former suit, I am not precluded from bringing this second suit." It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed upon principle.

It is clear that it does not fall within the principle of the decision given by Lord Justice *Turner* at this Board upon the earlier Regulation in which he takes the distinction that the Regulation "was only to prevent the retrial of the same question," and that it was not intended to apply "to cases like the present, in which new circumstances had intervened and altered the nature and character of the questions to be determined." Here no new circumstances at all have intervened.

Nor does it appear to their Lordships necessary to decide whether in some of the cases put by Mr. *Doyne*, where the party was suing entirely under a new and a different title, such a distinction as he contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the *talookdar* of this *talook* to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued

upon had been put forward and could not prevail; and that if the *talookdar* had any title at all, it was by way of *taufir*.

The Court of Appeal, proceeding on the admission of the Plaintiff that the whole of the originally settled *talook* was in her possession, and that all she had been dispossessed of was claimed by her only as *taufir* lands, dealt with that claim; but it is perfectly clear that, if the Plaintiff had chosen to put forward the other title in the way I have suggested, the Court would have dealt with the whole question and considered it, that question being in point of fact a mere question of quantity and boundary, and whether the Plaintiff was in any way entitled to recover the lands sued for from the Defendants, who are the Defendants also in the present suit.

It therefore seems to their Lordships that the case really falls within the principle and letter of the section in question, which has been properly decided to be a bar to the suit.

They think it desirable to remark that the principle upon which their decision in this case proceeds seems to be almost identical with that laid down in a judgment delivered by Lord *Westbury* in the case of *Kalama Natchiar* (1.) In that case a party had brought a suit, claiming under a will, having, as Defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise and resting his title upon the issue whether the estate was separate or undivided, and Lord *Westbury* said:—"That being the state of the case, we are now called upon to approve of a suit subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the Appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suit of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the Plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favor. When a Plaintiff claims an estate and the Defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward. The present Appellant might have insisted on the validity of the alleged will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the Appellant of setting up the will were allowed."

The present case is even stronger than that referred to, inasmuch as in the latter the party was a Defendant in the first, and Plaintiff in the second suit, whilst the Appellant is Plaintiff in both suits, and as such had in both the means of shaping her case as she chose.

Their Lordships, therefore, entirely concurring with the judgment delivered by *Phear*, J., in the High Court, are of opinion that this appeal must be dismissed. It is possible that the Appellant has lost what she might have been entitled to; but if she has lost it, the loss is entirely the result of her own mode of dealing with her case in the former suit.

Their Lordships have only further to observe that the appeal must of course be dismissed with costs, but that the ordinary rule of this Board is to give only one set of costs to the Respondents in the same interest. We have not had an opportunity of knowing why there has been a severance in defence, or whether there are any special grounds why that rule should be varied.

(1) 11 Moore's I. A., 50; see 72; 2 P. C. J., 25; 212.

After some discussion at the bar on this point, Sir *James Colvile* said:—

Their Lordships see no ground for departing from the general rule of allowing but one set of Respondents' costs; and considering that those represented by Sir *Roundell Palmer* were first in the field, and had entered their appearance first, their Lordships think that the Collector as Court of Wards, and representing the infant Defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other Respondents; or, at most, had applied for leave to join in their case. Their Lordships do not think that there was a necessity for his increasing the costs by coming forward as a separate Respondent. Their Lordships therefore think they ought not, in justice to the Appellant, to do more than give one set of costs, and that they ought not, in justice to the principal and original Respondents, to deprive them of any part of their costs.

22nd, 23rd, 24th and 25th May, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BABOO BISSESSURNATH and others, (Plaintiffs)* } *Appellants,*

versus

MAHARAJAH MOHESSUR BUX SING BAHADOOR and others, (Defendants) ... ... } *Respondents.*

Boundary—Riparian Proprietors—Custom—Proof—Reg. XI. of 1825, s. 2.

The Plaintiffs sued to obtain possession of land on the ground of the existence of a custom in the district that where land which had once been alluvial lies between two branches of a river (or two rivers,) and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the land-owner on the side of the channel which at any given time is fordable. *Held* (without deciding whether such a custom falls within s. 2, Reg. XI. of 1825) no clear and definite usage had been established.

A fluctuating boundary between *ellaks* does not necessarily affect the rights of landed riparian proprietors.

An *ikrarnamah* between two *zemindars* as to the mode of determining the boundaries of their estates in the event of changes in the channel of a river, cannot bind persons claiming under one with whom the perpetual settlement was subsequently made as to the lands in his possession, he being a stranger to that *ikrarnamah*.

THEIR LORDSHIPS gave the following judgment:—

THIS was a suit to recover possession of a large tract of land which had at one time been alluvial, but which for a great number of years had been regularly cultivated and inhabited, lying between two streams described by the Plaintiffs (who are now the Appellants,) as branches of the *Ganges*, but which might perhaps be more correctly described, the one as being the river *Dewa*, and the other as being the river *Ganges*. The Plaintiffs were the owners of a *zemindari*, of the name of *Manjhee*, on the north side of the north channel; the Defendants were the owners of a *zemindari*, of the name of *Arrah*, on the south side of the south channel, both streams flowing from the west and joining each other to the east of the property in dispute. It appears that the tract of land between these two channels was, as early as the year 1790, in the possession of one *Noorool Hossein*, with whom, as occupier and proprietor, a settlement was made by the Government in the year 1790, and that in the year 1800, a permanent settlement was made with his son. The Defendants claim the land in question by purchase from a descendant of *Noorool Hossein*, and it appears to be undisputed that *Noorool Hossein* and his heirs and those who succeeded him in title down to the present Defendants have held uninterrupted possession of this land from 1790 to the present day. The Plaintiffs seek to eject the present possessors, the Defendants,

* 11 B. L. R., p. 265.

upon these grounds; it appears that in the year 1849 or 1850, the great volume of water left the northern channel and took the southern channel, whereby the northern channel which before had been deep became fordable, and the southern channel which before had been fordable became deep, and they allege that, upon that state of facts, they are entitled to obtain possession of the whole of the land lying between these two channels, by virtue, first, of an alleged custom; secondly, of an *ikrarnamah* executed in 1780 between the then proprietor of the *zemindari Manjhee* and the then proprietor of the *zemindari Arrah*.

It is necessary to examine separately these two grounds on which the Plaintiffs rely. First, as to the custom. The custom on which the Plaintiffs rely is nowhere to be found clearly stated in their pleadings, and their Counsel found some difficulty in quite accurately defining it. It appears to their Lordships that, in order to succeed in disturbing a possession of such long duration, under the circumstances of this case, it is necessary for the Plaintiffs to establish a custom existing in the district in which these properties are situated to the effect that, where land which had once been alluvial lies between two branches of a river (or, it would appear, between two rivers,) and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable; in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable. It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep, and the other fordable, because it could not apply if both were deep, or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other without necessarily any alteration in the beds or banks of the channels.

This being the custom which it appears to their Lordships that the Plaintiffs are bound to make out in order to establish their case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

A question has indeed been suggested, whether a custom of this description falls within the terms of Regulation XI., s. 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no "clear and definite usage" such as would be necessary to support the Plaintiffs' case has been in point of fact established by the Plaintiffs. Reference has been made very frequently in the record, and in the course of the argument, to certain proceedings on the part of the Government which took place in 1780, and the *ikrarnamah* executed by the proprietors of the respective estates at that time in pursuance of those proceedings, but their Lordships are of opinion that the effect of those proceedings and *ikrarnamah* amounts to no more than this: that there being a dispute, indeed a violent quarrel, as it would appear, between two *Zemindars* whose properties were contiguous the one to the other, the Government adopted a settlement at the time between them which appeared to be equitable and expedient, and to be in conformity with what had been done on previous occasions by previous owners of the same properties, and that this arrangement made with these two landowners by the Government was acquiesced in, adopted, and ratified by the *ikrarnamahs* which has been referred to, which it will be necessary subsequently to state more in detail. This by no means amounts to that clear proof which would be required to support a distinct custom of this description, and to sustain the claim of the Plaintiff to transfer to themselves this property from those who have been in possession of it for 80 years or more. The other evidence which has been relied upon in support of the custom consists

mainly of supposed admissions on the part of the Defendants in the course of various legal proceedings; but upon examination those admissions do not appear to amount to more than this, that the Defendants or their predecessors appear in certain proceedings to have insisted upon a rule somewhat similar to that which the Plaintiffs now allege, but by no means identical with it, as applicable to these *zemindaries*, and do not point to "a clear and definite usage" binding all property within the district.

Reference has been made also to various proceedings with respect to other properties, in which the Government authorities have treated the main channel of the *Dewa* as the boundary between certain *zillahs*; and to one case in which they appear to have intimated that that boundary should be applied also to certain private properties; but the circumstances of these cases are not so distinctly before their Lordships that they are enabled to treat them as proof of such a custom as that which has been before described, and upon which it is necessary for the Plaintiffs to rely. It may be observed that it by no means follows that, if a certain fluctuating boundary, *viz.*, the course of a river, is adopted between two *zillahs*, its adoption for that purpose affects the rights of landed proprietors in those *zillahs*. The case of *Rai Manick Chand* v. *Madhoram* (1), which has been referred to, is to the effect that there may be a fluctuating boundary between *zillahs*, which by no means affects the rights of landed proprietors.

Their Lordships are of opinion that sufficient evidence has not been given to prove this custom, which is necessary in order to make out the Plaintiffs' case. They agree, indeed, with *Raikes*, J., who says in his judgment:—"I think it is fully made out that, when claims were preferred to an island, a new formation in the *Ganges*, by rival riparian proprietors, the custom was to award possession to the proprietor on the side on which the alluvial lands were fordable; and if the question before us was for the possession of newly formed lands, and we were asked to apply the custom to such lands, I should have no hesitation in doing so;" but their Lordships also agree with what *Raikes*, J., further says:—"But this is not the nature of the present suit."

Their Lordships are, therefore, of opinion that the Plaintiffs have failed to make out the first ground upon which they rely.

The second ground is the *ikrarnamah* that was entered into between the then owner of the *Pergunna Arrah*, *Rajah Bickramageet Singh*, who is the grandfather of the Defendant, and *Mahomed Tegh Ali*, who was then the owner of *Pergunna Manjhee*, under whom the Plaintiffs claim title; and it is to this effect (1):—The *Rajah* recites that there

(1) 3 B. L. R., P. C., 5; S. C., 13 Moore's I. A., 1; 2 P. C. J., p. 473.

(1) "I, *Rajah Bickramageet Sing*, am the *zemindar* of *Sirkar Shahabad*, in the province of *Behar*. Whereas between myself, the declarant, and *Mahomed Tegh Ali* and *Berriar Sing*, *zemindars* of *Pergunna Manjhee*, in *Sirkar Sarun*, in respect of the suit regarding the *diara* lands of the villages of *Pergunna Arrah*, *Sirkar Shahabad*, and *Pergunna Manjhee*, a dispute was pending, accordingly, to investigate into this matter, Mr. *Mathew Leslie*, from the Council of *Azeemabad*, and Mr. *Greme*, *zillahdar* of *Sirkar Sarun*, arrived on the land in dispute, and took the statements of both parties, and inspected the map of the *diara* lands. As the case was not disposed of here, the gentleman of the Council of *Azeemabad* and Mr. *Greme* forwarded to the Council at *Calcutta* a report of the dispute between the parties, and a map of the *diara* lands and of the river *Ganges*. Thereupon orders were received from the Council at *Calcutta*, that on whichever side the *Ganges* be fordable, the *diara* lands will appertain to that side. According to this order, Mr. *Mathew Leslie*, of the Council from *Azeemabad*, and Mr. *Greme*, *zillahdar* of *Sarun*, again came to the *diara* (accreted) lands aforesaid, and finding that the river *Ganges* on the side of *Pergunna Arrah*, *Sirkar Shahabad*, had dried up and was fordable, and on the side of *Pergunna Manjhee* it was a flowing current with deep water, gave possession to me, the declarant, from 1187 *Fusli*, of the *diara* lands aforesaid, with all the crops thereon. I accordingly took possession of the *diara* lands aforesaid, with all the crops thereon, and converted the produce to my use. Therefore I declare, and give this writing, that the

had been a suit with respect to *diara* lands of certain villages which he describes; then that Mr. *Mathew Leslie* and Mr. *Græme* had been sent to survey the land in dispute, and taken the statements of both parties. Then he goes on to say:—"The gentlemen of the Council of *Azeemabad* and Mr. *Græme* forwarded to the Council at *Calcutta* a report of the dispute between the parties, and a map of the *diara* lands," which, unfortunately, is not now forthcoming. Then he recites that orders were received from the Council at *Calcutta*, that on whichever side the *Ganges* was fordable, the *diara* lands will appertain to that side; and then that Mr. *Leslie* and Mr. *Græme* came again to the *diara* lands, "and finding that the river *Ganges* on the side of *Pergunna Arrah*, *Sirkar Shahabad*, had dried up and was fordable, and on the side of *Pergunna Manjhee*, it was a flowing current with deep water, gave possession to me the declarant, from 1187 *Fusli* (1779) of the *diara* lands aforesaid, with all the crops thereon;" and that he therefore took possession. Then he says:—"Therefore I declare and give this writing that the boundary of the *diara* between *Pergunna Arrah*, *Sirkar Shahabad*, and *Pergunna Manjhee*, *Sirkar Sarun*, has been fixed in this manner that, if the river *Ganges* becomes fordable on the side of *Pergunna Arrah*, the *diara* lands will belong to the *zemindars* of *Arrah*; and if it becomes fordable on the side of *Pergunna Manjhee*, *Sirkar Sarun*, then they will belong to *Pergunna Manjhee*. If any or either of us act contrary to this agreement, our act shall be false and void, and we will be liable to punishment by the Government." A duplicate of this agreement was executed by *Mahomed Tegh Ali*, the then *zemindar* of *Manjhee*. It has been contended, on the one hand, that this agreement relates only to newly formed lands or alluvial lands which may be formed after its date; on the other, that it distinctly refers to the lands in question, at all events in their then state, and that it is applicable to them now. But, be that as it may, assuming the meaning given to this document by the Appellants to be correct, their Lordships are of opinion that, whatever may have been its effect as a contract between the two *zemindars* who executed it, it clearly cannot be binding upon the Defendants, who derive their title from *Noorool Hossein*, who was a stranger to it. Their Lordships are of opinion that it was not in the power of the then *zemindar* to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title.

Their Lordships are therefore of opinion that the Plaintiffs fail also on the second ground of claim.

That being so, it is unnecessary to go into a question which has been raised of the identity of the lands.

For these reasons their Lordships are of opinion that the Plaintiffs fail to make out their case; and they will humbly advise Her Majesty that the decree of the High Court in India be affirmed, and that this appeal be dismissed with costs.

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boundary of the *diara* between *Pergunna Arrah*, *Sirkar Shahabad*, and *Pergunna Manjhee*, *Sirkar Sarun*, has been fixed in this manner, that, if the river *Ganges* becomes fordable on the side of *Pergunna Arrah*, the *diara* (accreted) lands will belong to the *zemindars* of *Arrah*; and if it becomes fordable on the side of *Pergunna Manjhee*, *Sirkar Sarun*, they will belong to *Pergunna Manjhee*. If any or either of us act contrary to this agreement, our act shall be false and void, and we will be liable to punishment by the Government. I therefore write and execute these few words by way of agreement that it may come of use in time of need The 13th *Jaishta*, 1187 *Fusli* (4th June 1780.")—11 B. L. R., 270-71.

25th May, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir R. Phillimore, and the Right Hon. Sir Montague Edward Smith.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NOGENDER CHUNDER GHOSE and another, (Plaintiffs)* ... } *Appellants*,

versus

MAHOMED ESOF & others, (Defendants) ... } *Respondents*.

Alluvion—Diluvion—Accretion—Regulation XI. of 1825, s. 4. (1).

Where a *chur* formed in the middle of a river, and was settled with *A*, and by the recession of the river new land appeared, which was really a deposit on the ancient site of *A*'s land though adhering to the *chur*, it was held to be *B*.'s land.

The first rule established by s. 4, Regulation XI. of 1825, does not apparently contemplate land other than that commonly known as alluvion, *viz.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law. There is no express provision in the Regulation for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears on the recession of the sea or river, and there is nothing to take away or destroy the original proprietor's right; such a case is to be determined by the general principles of equity and justice under the 5th rule contained in s. 4.

A title founded on the original ownership and identification of land re-appearing is to be confined *primâ facie* to the reformation on that site.

The cases of *Mussamut Imam Bandi* v. *Hurgovind Ghose* (1) *Lopez* v. *Maddanmohan Thakur* (2) and *Eckowri Sing* v. *Hiralal Seal* (3) commented on.

THEIR LORDSHIPS delivered the following judgment:—

THE subject-matter in dispute on this appeal is a portion of *chur* land thrown up by the *Kurnafoolee*, a navigable and tidal river in the district of *Chittagong*.

The Appellants are the representatives of one *Anundonarain Ghose*, and, as such, are the *zemindars* of *Turruf-Tej Sing*, situate on the eastern shore of the river. Their estate appears to have been, in 1837, the subject of a careful Government revenue survey, and, as then surveyed and settled, comprehended three *mouzahs*, named *Kalagaon*, *Chukra*, and *Lakhera*, of which the *chittahs* or measurement-papers made

* 10 Ben. L. R., p 406.

(1) *Regulation XI. of* 1825, *s.* 4. *First.*—"When land may be gained by gradual accession whether from the recess of a river, or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government, by a *zemindar*, or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue, to which it may be liable under the provisions of Regulation II. of 1819, or of any other Regulation in force. Nor, if annexed to a subordinate tenure, held under a superior landholder shall the under-tenant whether a *khood kast ryot* holding a *maurasi istemraree* tenure at a fixed rate of rent per *beegah*, or any other description of under-tenant liable by his engagements, or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable."

"*Fifth*—In all other cases, *viz.* in all cases of claims and disputes respecting land gained by alluvion—or by dereliction of a river or the sea—which are not specifically provided for by the rules contained in this Regulation, the Courts of Justice in deciding upon such claims and disputes shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not by general principles of equity and justice."

(1) 4 Moore's I. A., 403; 1 P. C J., 371.

(2) 5 B. L. R., 521; S. C., 13 Moore's I. A., 467; 2 P. C J., 594.

(3) 2 B. L. R., P. C., 4; S. C., 12 Moore's I. A., 136; 2 P. C J., 399.

on the occasion of that survey are set forth in the record.

The Respondents, other than the Collector,—so far as it is necessary to notice them—are the co-sharers in an estate known as *Talook Koreban Ally*, and situate on the western shore or bank of the river. That estate was also surveyed and measured in or about the year 1839, and the *chittahs* of one of the villages included in it, *Bakolea*, is set forth in the record.

These parties, though made Respondents, have not appeared on the appeal, which has been therefore heard against them *ex parte*. Their title however has been fully and ably supported by the learned Counsel for the Government which is in the same interest with them.

From what has been stated, it appears that the estates of the Appellants, and these *talookdars*, whom it will be convenient to call the Respondents, speaking of the Government, whenever it is necessary to do so, as the Government, were, as originally measured and settled, bounded and separated by the *Kurnafoolee*.

Sometime before 1847, that river threw up in its main and navigable channel certain islands or *churs*, of which it is only necessary to specify two, *viz.*, *Chur Durmeean* and *Chur Dukhin*. A settlement of these was made by Government with the Respondents in 1847; the revenue assessed on *Chur Dukhin* being Rs. 200-6-6. *Anundonarain Ghose* is said to have presented at least one petition complaining of this proceeding; but, for the purposes of this litigation, it must be assumed that the *churs* in question were the property of Government, and were duly granted to and settled with the Respondents. And it appears from some of the proceedings, that they were treated as appurtenant to *Mouzah Bakolea*.

Before the end of 1852, the river had swept away the whole of *Chur Durmeean*, but had formed another low *chur* in the vicinity of its site. Nor is there now, if there ever was, any question that this, which was known as *Lami* or *Lamchi Chur*, was settled by Government with the Respondent in lieu of *Chur Durmeean* in December 1852.

Besides this latter *chur*, however, the river had before 1854 thrown up a considerable quantity of other *chur* land towards its eastern shore. This included the land now in dispute, or so much of it as was then above water. The record shows that Government determined to make no claim to this under Act IX. of 1847 as an island thrown up in a large and navigable river, but that, having been claimed by several of the proprietors in the neighbourhood, it was, in order to prevent affrays, attached by the Collector until the right of possession should be determined, and thereupon became the subject of a proceeding under Act IV. of 1840 before the Magistrate who had to adjudicate on the *primâ facie* right to possession between no less than sixteen different claimants. That officer began by directing the *darogah* to make a local investigation and cause a map to be prepared. The result of this was the *darogah's* map No. 43, which is in evidence, and his report of the record. This map shows four principal *churs* on the eastern side of the then main channel of the river, A, B, C, and D. Of these A and B are colored green, and represent the land then in dispute. C and D are colored yellow, and are treated as *churs* not in dispute which had been settled with the Respondents. D, their Lordships believe, is admitted to be the *Lamchi Chur*. Whether C is or is not the *Dukhin Chur*, or whatever remained of that *chur*, is still matter of dispute. But it is perfectly clear that it was, in 1854, treated as *chur* land which had been settled with the Respondents, and was then in their undisputed possession.

A was divided into several portions, and the result of the Magistrate's proceedings was to award possession of these to different claimants; *Grindoohunder Ghose* and *Sreemutty Noberungeny Dassee*, who then, as managers or otherwise, represented the estate of *Anundonarain Ghose*, getting part, and the Respondents getting the larger portion lying to the west of the old channel of the river which was adherent to their settled *Chur* D. It is, however, unnecessary to pursue this part of the case, since the title to no part of A is now in dispute. B was claimed by those who

then represented the Appellants' estate as a re-formation on the site of that part of their *Mouzah Kalagaon*, which had been previously diluviated, or washed away by the river. It was claimed by the Respondents as formed by "alluvion on the east of the *Dukhin Chur*, within the *chuckbund* recorded in their decree of the Appellate Court." The *darogah* found that *Chur* B was an accretion to the *chur* marked C, which had been settled with the Respondents. But he also found that it had been formed by alluvion in the place where the lands of *Mouzah Kalagaon*, belonging to the Appellant's *zemindary*, were formerly broken; and that during the ebb-tide men could walk on foot from the said *mouzah* to the said *chur*. The Magistrate's proceeding shows how that officer dealt with the question of possession. He seems to have considered that the disputed *churs*, being still under water at flood-tide, could not have been effectually in the possession of any of the parties; that claims founded on re-formation upon a site capable of identification could not be tried in any but a regular civil suit, and that the adherence of the land in dispute to lands not in dispute constituted a *primâ facie* title by accretion, on which he ought to award possession. He accordingly did award possession of B to the Respondents as the holders of the settled *Chur* C, and left those who represented the estate of *Anundonarain Ghose* to their remedy by civil suit. The date of this proceeding was the 22nd of December 1854.

The present suit was accordingly brought by Mr. *Fagan*, who had been appointed Receiver of *Anundonarain Ghose's* estate by the late Supreme Court of *Calcutta*. It was not, however, commenced until the 3rd of May 1861, *i. e.*, more than six years after the date of the Magistrate's award. The Appellants seek to account for this delay by attributing it to circumstances connected with the administration of *Anundonarain's* estate. However that may be, it is obvious that the consequences of this delay, in so far as it may have occasioned any difficulty in the determination of the questions between the parties by means of the loss of evidence, or the intermediate changes caused by the action of the river, ought to fall upon the Appellants. The suit, as originally brought, was to recover possession of 71 drones of alluvial land; the Defendants to it were not the only co-sharers in *Taluk Koreban Ally*, but also *Horo Lal Mohunt*, another of the sixteen claimants before the Magistrate: and the lands appear to have been claimed partly as a re-formation on sites forming part of the wholly or in part, diluviated villages of *Mouzahs Kalagaon*, *Chukra*, and *Lakhera*; and partly as an accretion to such re-formed lands. The Collector, as representing Government, was afterwards made a party to the suit; Government having an interest adverse to the claim of the Appellants, inasmuch as it was entitled to the additional revenue assessable on the lands in dispute, if they were an accretion to the *chur* land of the Respondents; whereas, it was not entitled to any additional revenue upon them, if they were a re-formation on the Appellant's lands, and, therefore, included within the limits of his formerly settled *semindary*.

The first proceeding in the suit which it is material to notice, is the local inquiry made under the order of the Court by the *ameen Moonshee Ashanoollah*. His report bears date the 28th of December 1861; and the map accompanying it is No. 7. The report and the map showed, among other things, that of the 71 drones of land claimed, between 8 and 9 drones composed or formed part of a *chuck* marked in the map with the Bengali letter (*kha*); and were in the possession of the Defendant, *Horo Lal Mohunt*, though claimed adversely to him in another suit by one *Abdool Mujeed*. A compromise was afterwards effected between Mr. *Fagan*, as Receiver, and this person, who admitted the Appellants' title, and there is no longer any question touching this portion of the land claimed, or with the *Mohunt* as Defendant. The report and map also proved that between 44 and 45 drones, forming other part of the land claimed, composed the *chuck* marked in the map with the Bengali letter "খ" (*kha*); and that they were held by the Defendants, the co-sharers in *Taluok Koreban Ally* on the strength of the Magistrate's award. The son and representative of *Abdool Ali*, one of these

Defendants, afterwards made a compromise with the Receiver (admitting the title of the Appellants) in respect of his share which comprised between 4 or 5 drones of the disputed land. It is not easy, if possible, to distinguish these 4 or 5 drones on map No. 7: but they are indicated on map No. 20, which will be afterwards mentioned. The result of this *ameen's* investigation and his report was altogether in the Appellants' favor. He found that all the land in the two *chucks* was a reformation on sites which, upon local inquiry and measurement, he succeeded in identifying with the *dags* appertaining to the diluviated *mouzahs* of the Appellants' *zemindary;* and in paragraph 5 of this report, he seems to intimate that no part of *Chur Dukhin* was to be found in the disputed land; and that the latter could not be identified by any *dags* as formed on the site of any part of the Respondent's *Mouzah Bakolea.* The last sentence of this paragraph, however, suggests a doubt whether he clearly apprehended the Respondent's case; and did not make some confusion between *Mouzah Bakolea,* as originally settled, and the *Chur Dukhin* to which, as they alleged, the land in dispute had accreted. This map did not give in detail the *dags* by which the identification of the site was said to have been established.

The suit, at this stage of it, was transferred from the Principal *Sudder Ameen* to the *Zillah* Judge, who caused a second local investigation to be made by another *ameen* named *Guggun Chunder Dutt.* His report and the map made by him is that numbered 20. This report and map purporting to be founded on local survey, the comparison of *dags,* and the examination of witnesses, go to establish these facts: 1st, that the whole of the *chur* marked A in that map, being all the land that now remains in dispute, was a reformation on the site of the Appellants' diluviated *mouzahs;* 2nd, that the *chur* marked B was a similar re-formation, but comprised the lands in respect of which the compromises with the *Mohunt* and the heir of *Abdool Ali* had been effected; and, 3rd, that the *Chur Dukhin* settled with the Respondents in 1847 had then been diluviated, no part of it being included in *Chur* A, and its site being assumed to be identical with that of a sandy *chur* in process of re-formation near the western shore of the river. These conclusions were supported by, and in a great measure founded on, the supposed tracing and identification of the *dags* contained in the measurement papers of the Appellants' estate as measured and surveyed in 1837. No attempt seems to have been made by this *ameen* to trace in the disputed land the *dags* of the Respondents' *Mouzah Bakolea,* or *Kismut Dukhin Chur.* His view of the formation of the *chur* in dispute is thus stated in the 5th paragraph of his report:—"The disputed *chur* has arisen on the site of the diluviated lands of the Plaintiffs at first on the eastern part of the river, and gradually increasing, has accreted on the southern and eastern parts to the Plaintiffs' original land. It is not seen that the alluvion began as accretion to the *Kismut Dukhin Chur* alleged by the Defendants to be settled with them."

The suit was after this heard by the Judge, who erroneously dismissed it on the ground that it was barred by limitation. This was set right by a decree of the High Court dated the 22nd of June 1863, which remanded the cause, directing the Judge to inquire and decide whether the whole or any portion of the land claimed was in the possession of the Defendant for more than twelve years prior to the suit, and, if not, to try it on its merits and with reference to the provisions of Regulation XI. of 1825.

The form of this remand seems to have led to another local investigation by a third *ameen* named *Gour Mohun Biswas,* whose report is dated the 10th of March 1865, and whose map is numbered 29. The object of this investigation was to trace, in the disputed land, if possible, land which had been settled with the Respondents in 1847, or at all events more than twelve years before the commencement of the suit. The report speaks of *Mouzah Bakolea,* but their Lordships conceive that the attempt really was to trace the *dags* of *Chur Dukhin,* which after the settlement and survey of 1847, seems to have been treated as appurtenant

to *Mouzah Bakolea*. This report was altogether adverse to the contention of the Respondents. The investigation occupied fourteen days, and its result was to show that the boundaries of the Respondents' settled land would fall within the then main channel of the river, and considerably to the west of the disputed *chur*. This report, therefore, by negativing the case of the Respondents, went to confirm that made in favor of the Appellants by the reports of the two other *ameens*.

The cause then came on for a second hearing before the Judge who tried it on the following issues:—1st, whether the suit was barred by limitation; and, 2ndly, whether the land in suit was a formation on or an accretion to the original site of land in the Plaintiffs' estate; or whether it formed a portion of or an accretion to the land settled with the Defendants. He found both these issues in favor of the Appellants. He seems to have held that the first was determined by the result of the last local investigation, which showed conclusively that the disputed *chur* contained no part of the land settled with the Respondents in 1847. On the second issue he found, in conformity with all the *ameen's* reports, that the land in suit was clearly a formation on the original site of the Plaintiffs' estate, and was connected with it, and that the Plaintiff was, therefore, entitled to be placed in possession of it.

This decision was reversed, and the suit dismissed on appeal to the High Court, by a decree dated the 1st of December 1865, which, on a re-hearing on review before the same Judges, was confirmed by an order dated the 1st of April 1867. The present appeal is against that decree, and that order on review.

Their Lordships cannot say that either judgment of the High Court affords satisfactory grounds for the dismissal of the Appellants' suit.

The first deals only with the latest *ameen's* report, and explains away the effect of that by assuming that, in making his measurements, he may not have taken a correct starting point. The *Zillah* Judge, however, in his judgment, expressly states twice that no objection was taken before him to the *ameen's* starting point. The investigation was carefully conducted in the presence of the Respondents' agents, and it is difficult to suppose that the objection would not have been taken, if there was any foundation for it. Again, the learned Judges of the High Court proceeded on the assumed incompatibility of the case thus made by the Appellants with the state of things which existed in 1854 at the date of the Magistrate's proceeding. They came to the conclusion that *Chur Dukhin* was the *chur* marked C in the *darogah's* map; that the Magistrate had carefully decided against the title set up by the Appellants and in favor of the Respondents; that the disputed *Chur* B was an accretion to *Chur Dukhin;* and that the latter had never been diluviated.

But if, for the sake of argument, it be admitted that C in the *darogah's* map correctly represented what then remained of *Chur Dukhin*, it would by no means follow that what constituted C in 1854 had not afterwards been washed away, and the conclusion that it still existed as part of the land in dispute seems to be incompatible with the reports of all the *ameens*, and notably with that of the last. Moreover, as their Lordships have already observed, the Magistrate by his proceeding seems expressly to have declined to decide on the rights resulting from an identification of site, and merely to have held that the land in dispute, being adherent to C, was *primâ facie* to be treated as an accretion to it. Again, the judgments under appeal do not seem to their Lordships effectually to distinguish or deal with the questions raised in the cause.

It undoubtedly lay on the Appellants, who were seeking to disturb the Respondents' possession of nearly seven years' duration, to show a good title to the land in dispute. They seem to have set up an alternative title, claiming the land either as a re-formation on a site identified with that of their diluviated *mouzahs*, or as an accretion to their estate by reason of its being a formation opposite to their lands, and only separated from them by a small channel, fordable at low water. This latter was the question chiefly discussed on the review; and if it had been the only

ground on which the Appellants could recover, their Lordships would have great difficulty in saying that they had made out a good title, or had shown that the Magistrate was wrong in treating the land in question as an accretion to the Respondents' settled land represented by C, and in awarding possession of it accordingly. But it seems to their Lordships that, inasmuch as the result of all the local investigations, including that of the *darogah*, was in favor of the assertion that the land now in dispute was a re-formation upon the site of the Appellants' diluviated *mouzahs*, the *Zillah* Judge was right in finding that fact to be proved. The question then arises, what is the legal result of such a finding? Is the *primâ facie* title to the land thus shown capable of being displaced by any better title existing in the Respondents? According to their Lordships' view of the evidence, no part of *Chur Dukhin*, at the date of the decree, formed part of the disputed land, which may be assumed to be correctly indicated by *Chur* A, in the map No. 20 of *Guggun Chunder ameen*. They are, however, not so clear that *Chur* C in the *darogah's* map, did not correctly indicate what remained of *Chur Dukhin* in 1854. This supposition is no doubt inconsistent with the report of the last-named *ameen*, confirmed in some measure by the map of a Deputy Collector made in November 1852 (No. 30,) which also assigns a different site to the now diluviated *Chur Dukhin*. On the other hand, it is difficult to see how the award of the Magistrate ever came to be made, if C in the *darogah's* map did not correctly indicate land settled with the Respondents, and then in their possession. And this latter map is on that point consistent with the Collector's map, No. 46.

Whilst, therefore, their Lordships think that the Appellants have established the identity of the site of the land in dispute with that of lands originally included in their *zemindary*, and afterwards washed away by the river, they will, for the determination of this appeal, take as also proved, that the *chur* marked C on the *darogah's* map, though it has since been swept away, existed in 1854 as a *chur* settled with, and in the possession of, the Respondents, and that the land in dispute was then adherent to it. They here advisedly use the term "adherent," because it appears to them that there is an important distinction between mere physical adhesion and that "accretion" or *incrementum latens*, which, by reason of its gradual and imperceptible formation, is recognized by the law as belonging to the persons to whose land it is adjacent. In the present case, the evidence touching the manner in which the *chur* in question was formed, is extremely scanty; and their Lordships are by no means satisfied that it was such as would make the land an "accretion" according to the strict legal definition of the term.

Their Lordships have now to consider what is the law applicable to the facts thus found, and what are the rights of the parties thereunder. And the long and able arguments addressed to them on this subject, render it desirable to review the law of alluvion which obtains in *Bengal*, as declared by the positive provisions of Regulation XI. of 1825, or by the decided cases, which the learned Counsel for the Respondents have contended cannot easily, if at all, be reconciled with each other.

The 1st section of the Regulation,—after specifying as the subjects which called for legislation the following cases, *viz.*, 1st, the throwing up of *churs* or small islands in the midst of the stream or near one of its banks; 2ndly, the carrying away of portions of land by an encroachment of the river on one side, and an accession of land at the same time or in subsequent years, gained by the dereliction of the water on the opposite side; and, 3rdly, similar instances of alluvion, encroachment, and dereliction on the sea coast bordering the southern and south-eastern limits of *Bengal*—enacts that the rules declared by the following sections shall have force of law throughout the presidency of *Fort William*. The 2nd section provides that local usage, whenever it exists, shall prevail. The 3rd section that, when there is no local usage, the general rules declared in the 4th section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion, or by dereliction either of a river or the sea.

This 4th section is divided into five clauses :—

The first deals with land gained by gradual accession (*i. e.*, alluvion in the proper sense of the word,) and provides that it shall be considered an increment to the tenure of the person to whose land or estate it is annexed, subject to the right of Government to assess additional revenue upon it.

The second provides that the former rule shall not be applicable to cases of sudden avulsion, where the identity of the land is not destroyed, preserving in that case the rights of the original owner.

The third makes a *chur* or island thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, the property of the Government, if the channel between it and the shore be not fordable, but provides that, if such channel be fordable at any season of the year, the *chur* shall be considered an increment by alluvion to the tenure of the person whose estate is most contiguous to it, and shall be subject to the provisions of the first clause.

The 4th clause deals with *churs* in small rivers, the beds of which have been recognized as the property of individuals ; giving them to the proprietor of the bed of the river. And the 5th clause provides that, "in all cases of claims and disputes respecting lands gained by alluvion, or by dereliction of a river or the sea, which are not specially provided for by the foregoing rules, the Courts shall be guided by local usage, if any be established as applicable to the case ; and, if not, by general principles of equity and justice."

Two observations arise on this statute :—

1. There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of "alluvion," *viz.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law.

2. No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluvination, reappears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case ; which must therefore be determined by "the general principles of equity or justice" under the 5th rule.

That the right of the proprietor in the case last put exists and is recognized by law in *India*, is established by at least two cases decided at this Board, and therefore binding on their Lordships, *viz.*, the case of *Mussamat Imam Bandi* v. *Hargavind Ghose* (1) and the recent case of *Lopez* v. *Madanmohan Thakur* (2,) decided on the 11th July 1870.

The former is a clear authority that the identity of the site may be established by maps and ancient documents ; although by the long submergence of the land, all external marks and means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates ; or of dispute between one party claiming the land as a re-formation on his original land, and the other claiming it as an accretion under the first cl. of the 4th section of the Regulation. The latter, however, was clearly the issue between the parties in the case of *Lopez* v. *Madanmohan Thakur* (2). It may, however, be said that that case is distinguishable from the present by its peculiar circumstances, inasmuch as in the former the encroachment of the river had in the first instance swept away the surface of the Plaintiffs' *mouzah*, and made the Defendant, who held lands behind those so swept away, for the first time a riparian proprietor ; and because the Plaintiff had, by the preparation of the *tanabundee* map and otherwise, taken peculiar precautions to preserve and protect his right in the soil against his neighbour as well as the Government.

It was, moreover, contended that some at least of the principles laid down in the case of *Lopez* v. *Madanmohan Thakur* (2) are in conflict with the previous decision of this Board in the case of *Eckowri Singh* v. *Hiralal Seal* (3). That case had not

(1) 2 B. L. R., P. C., 4 ; S. C., 4 Moore's I. A., 403 ; 1 P. C. J., p. 371.
(2) 5 B. L. R., 521 ; S. C., 13 Moore's I. A., 467 ; 2 P. C. J., p. 594.
(3) 12 Moore's I. A., 136 ; 2 P. C. J., 390.

been reported when that of *Lopez* v. *Madanmohan Thakur* (1) was decided, and does not appear to have been cited in the argument. Their Lordships cannot, however, perceive any inconsistency between the two judgments. The decision in the case of *Ekkowri Singh* v. *Hiralal Seal* (2) seems to have proceeded on two grounds, namely, 1st, that it was not competent to the Plaintiffs, who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, *viz.*, "one simply of original ownership of the site of the lands re-formed;" and, 2ndly, that, had such a title been properly pleaded, the evidence failed to establish the identification of the site. The case of *Mussamat Imam Bandi* v. *Hargavind Ghose* (3) is cited in the judgment, which throws no doubt upon the validity of such a title if properly pleaded and proved.

Again, the learned Counsel for the Respondents, and, in particular, Mr. *Pontifex*, argued broadly that, by diluviation into a navigable river, land is permanently lost to the original proprietor, and becomes the property of the State; and in support of this proposition, they relied much on an American work, "*Houk* on Navigable Rivers," which they argued was the more deserving of attention, by reason of the similarity which exists between the great rivers of *America* and those of *India* in their conditions and mode of action. This authority, however, does not appear to their Lordships to assist the Respondents' case. The law of alluvion in *America* seems to be less favorable to riparian proprietors than that of *India* or of *England*. For Mr. *Houk* draws a distinction between estates consisting of a given quantity of land, and defined by a mathematical line, though by one on the margin of a river, and those of which the river is the nominal boundary. He holds that in the former case, alluvion, however small, and however gradually and imperceptibly formed, is the property of the State. And after dealing with this question, he says in s. 258:—"Nevertheless, it is possible that, by the action of the sea, or a change of the channel of a river, the land so granted may be partly lost. No doubt in case afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased, and no further. While, however, the land is submerged in the river, the title is in the State." This is consistent with the civil law, Dig. Lib. XLI., tit. I., s. XXX., and with the law of *England* as declared in the passage cited in the case of *Lopez* v. *Madanmohan Thakur*, (1) from Hale "De Jure Maris."

In *India* the point thus taken seems to be concluded by the authority of the decided cases. The learned Counsel did not contend for a distinction between a tidal river and a navigable river, which has ceased to be tidal. Their Lordships have no reason to suppose that, in *India*, there is any such distinction as regards the proprietorship of the bed of the river, though in respect of the mode of accretion, there must be some difference between the effects produced by the daily flux and reflux of the tide, and the changes which are mainly consequent on the annual floods. Now, if there is no such distinction, it is clear that the *Ganges* at *Bhaugulpore*, as in the case of *Lopez* v. *Madanmohan Thakur* (1), and at *Patna*, as in the case of *Mussamat Imam Bandi* v. *Hargavind Ghose* (2), is a navigable, through no longer a tidal, river; and, consequently, that these cases are direct authorities against Mr. *Pontifex's* proposition. Their Lordships accede to what is said in the case of *Lopez* v. *Madanmohan Thakur* (1), to the effect that a proprietor may, in certain cases, be taken to have abandoned his rights in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX. of 1847, s. 5. For in the present case, there is nothing from which such abandonment can be inferred. If an ap-

(1) 5 B. L. R., 521; S. C., 13 Moore's I. A., 467, 2 P. C. J., 594.
(2) 12 Moore's I. A., 136; 2 P. C. J., 399.
(3) 2 B. L. R., P. C., 4; S. C., 4 Moore's I. A., 403; 1 P. C. J., p. 371.

(1) 5 B. L. R., 521; S. C., 13 Moore's I. A., 467, 2 P. C. J., 594.
(2) 2 B. L. R., P. C., 4; S. C., 4 Moore's I. A., 403, 1 P. C. J., 371.

plication for remission of revenue was made, that application was refused.

The Appellants having then established a *primâ facie* title to the land in dispute as a re-formation, the question is whether the Respondents have a superior title to it as an accretion to their settled *chur*. It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site; unless it be that, where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist, and so bars inquiry.

In the present case it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved, and that there are peculiar reasons why the title of the Plaintiffs should be preferred to that of the Defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the *chur* cast up by the river, and settled with them by Government. Let it be granted that the first effect of the retrocession of the river was to leave bare this *chur* in the midst of the stream, and that the land then cast up was beyond the confines of the Plaintiffs' estate. The river continues to recede, more land appears, and new land, though adherent to that first discovered, is really a deposit on the ancient site of the Plaintiffs' land. Why should the ownership of that which is thus regained be altered by the fact that, from some accidental cause, land forming the outer edge of it first emerged as an island? The *darogah's* map seems to show that this must have been the course of the river'r action. Nor, as their Lordships have already observed, is there any trustworthy evidence which traces the history of the disputed land, or shows that, by gradual and imperceptible accretion, it became adherent to the *chur*, which upon the whole evidence must be taken to have now ceased to exist. Such a case as the present is very distinguishable from the ordinary case contemplated by the Regulation in which a river, gradually shifting its channel in one direction, continually eats into one bank, and leaves the other, never ceasing to flow between the competing estates.

Their Lordships are not insensible to the difficulties of identification, and to the danger of encouraging claims of this kind on insufficient evidence. They lay down no rule as to the strictness of proof which the Courts in *India* may require in such cases.

They also consider that a title founded on the original ownership and identification of site is to be confined *primâ facie* to the re-formation on that site. And if, in the present case, it had appeared that some part of the land in dispute had been thrown up beyond the original boundaries of the Appellants' estate, a question might fairly have arisen between the Appellants and the Respondents whether that was to be taken to be an accretion to the estate of the former, or to the settled *chur* of the latter. But upon the evidence they are satisfied that the whole of the land which continues to be the subject of the suit is a re-formation within the limits of the Appellants' original estate. This being so, their Lordships are of opinion that the *Zillah* Judge was right in decreeing the whole to the Appellants. And they will humbly advise Her Majesty to allow the appeal; to reverse the decree of the High Court; and to order that, in lieu thereof, a decree be made dismissing the appeal to that Court, and affirming the decree of the *Zillah* Judge. The Appellants must have from the Respondents, the Plaintiffs in the suit, the costs of the litigation in *India*, and those of this appeal. There will be no order as to the costs of Government on this appeal.

31st May and 4th June, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMCOOMAR KOONDOO and another, (Defendants,)* ... } *Appellants,*

versus

JOHN & MARIA MCQUEEN, (Plaintiffs) ... } *Respondents.*

Vendor and Purchaser—Notice—Equitable Doctrine of secret Ownership.

It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an enquiry that, if prosecuted, would have led to a discovery of the real title.

THEIR LORDSHIPS gave the following judgment:—

THEIR Lordships do not think it necessary to call upon Mr. *Leith* to reply, having come to the conclusion that the judgment of the High Court cannot be sustained.

The suit was brought by the Respondents to recover 3½ *bigas* of land and some buildings erected upon it, situated at *Howrah*, near *Calcutta*. The land had been purchased by the deceased father of the Appellants, *Ramdhone Koondoo*, from a Mahomedan woman, of the name of *Bunnoo Bebee*, in June 1843. Their father and they, since his death, have held undisputed possession from that time until the present suit was brought, a period of 24 years.

The short facts are these:—*Alexander Macdonald*, who lived in *Calcutta*, and cohabited with *Bunnoo Bebee* as his mistress, had two children by her,—*Alexander Macdonald*, who is dead; and *Maria*, one of the Respondents, who married Mr. *McQueen*, the other Respondent. The father died in 1834. The history of the property appears to be this:—The land, which is perpetual leasehold, at a fixed rent, was conveyed in August 1831 by the then proprietor to *Bunnoo Bebee* by a deed of sale, and the price paid at that time was only Rs. 130. In the following September the deed was registered, and thereupon the *zemindar* granted a fresh *pottah* to *Bunnoo Bebee*, at the fixed rent of Rs. 35. It does not appear with any certainty that *Macdonald*, the father, was in possession of the land and of the buildings. At all events, it is not clear upon the evidence that he ever resided upon the property. There are two witnesses who speak to his residence. One of them says that he did not live in the new *bungalow*, and the other says he did. The evidence is far from satisfactory to establish the fact that he really did reside upon the property. But it is clear that, after his death, *Bunnoo Bebee* did go to reside upon it, and she resided there for some time. She afterwards let it, and received the rent from the tenants. Then, in June 1843, she sold the property to *Ramdhone Koondoo*, and conveyed it to him by a deed of sale. The price she obtained was Rs. 945, and there is nothing to show that that was not the full value of the property. At the time she sold, she made a surrender to the *zemindar* of the leasehold interest, and a fresh *pottah* was granted to the purchaser, under which undisputed possession was held for 24 years. During that time the purchaser erected important buildings upon the land, and increased the value to such an extent that the property is valued in the present suit at Rs. 40,000. *Bunnoo Bebee* died before the commencement of the present suit; there is a contest as to the time of her death, which was material only as regards the question of limitation; and as it is not now necessary to consider that point, it becomes immaterial to determine the precise period

* 11, B. L. R., p. 46.

of her death, whether in 1856 or 1861. Their Lordships, however, see no reason to dissent from the view which the High Court have taken of that fact in the case.

The claim put forward in this suit is that the purchase, although in the name of *Bunnoo Bebee*, was a purchase *benami* by *Macdonald;* that he was the real purchaser, but had used her name in making the purchase. His will is put in evidence, and the Respondents claim under it. Undoubtedly, if the purchase was a *benami* purchase, they have established a *primâ facie* title to this estate, or at least to a moiety of it.

The answer of the Appellants is that their father purchased the estate of *Bunnoo Bebee* without any notice of the *benami* title, and that they are entitled to hold it, notwithstanding there may have been, originally, a resulting trust in favor of *Macdonald*. It certainly would require a strong case, to be established on the part of the Respondents, to defeat a possession for so long a period, of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by *Macdonald*, and with *Macdonald's* money, on his own behalf. Their Lordships cannot help observing that the evidence, even on that cardinal fact, is extremely scanty. It rests almost entirely on the admission made by *Bunnoo Bebee* in the inventory made by her after *Macdonald's* death, in which she treats the property as part of the estate of *Macdonald*. There is some evidence that *Macdonald* improved the property after the purchase, by building a new *bungalow* upon it; but that evidence, without the admission, would clearly be insufficient to establish the fact that the purchase, contrary to all the documents, was made by *Macdonald* and with his money. Their Lordships however do not feel it necessary to express any definite opinion upon the fact of the purchase being *benami*, having come to the conclusion that, assuming it was so, the Appellants have established their right to hold the property against the *benami* title.

It is scarcely suggested that the purchaser had any notice that the title was other than or different from the apparent one. None of the documents give any notice whatever that the transaction was other than it appeared to be. On the contrary, all the documents are entirely consistent with the purchase having been made by *Bunnoo Bebee* herself, or by somebody for her benefit. The case, therefore, cannot be put on the ground of actual notice, but it was said,—and this appears to have been the ground upon which the High Court decided in favor of the Respondents,—that there were circumstances which ought to have put the purchaser upon inquiry, and that if he had inquired, he might have discovered the real title.

It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the Courts in *India*, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.

The High Court treat the defence as an attempt to introduce "a very peculiar doctrine of the English Court of Chancery." Their Lordships cannot think that this is a correct view of the defence which is set up in this case. It is one to which, no doubt, the Court of Chancery in *England* gives effect, but it only gives effect

to it in a peculiar manner, because of the distinction in *England* between legal and equitable estates, and legal and equitable remedies. If this case had arisen in *England*, the Respondents would have had no *locus standi* whatever in a Court of Law, and must have resorted to a Court of Equity.

After the discussion which has taken place, the case seems to result in this:—Whether or not, under the circumstances of this case, the purchaser ought to have inquired? The High Court think that he ought to have made inquiry, because of the *status* and position of *Bunnoo Bebee*. The learned Counsel, who has argued this case for the Respondents, does not himself rely upon that circumstance as one which ought to have put the purchaser upon inquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her children upon this estate, and some times letting it, which should have put any one upon inquiry whether she was the real owner or not. It is admitted that, if an inquirer had gone to the office of the *Zemindar*, or to the public registry, he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have had money to purchase for herself, or that others might not have purchased by way of gift to her; on the contrary, the circumstance that she had cohabited with one or two persons of some property might have fairly led to the supposition either that she had acquired money, or that gifts had been made to her for her advancement and comfort in life.

But circumstances have been relied upon at the bar which were not adverted to by the High Court. In cases of this kind the circumstances which should prompt inquiry may be infinitely varied; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought to have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected to lead to some result. Mr. *Cowie*, feeling that the case must really depend upon the existence of such circumstances, has referred to two: first, he says that, if any inquiry had been made, it would have been found that *Macdonald* had been in possession, and had improved the property. It has been already observed that the facts do not show, with anything like distinctness, that *Macdonald* was in possession during his life-time. There is evidence that he had built upon the property, but, supposing inquiry had been made, and the fact ascertained, it would not lead to the inference that, contrary to the apparent title, he had purchased the land for himself; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living.

The other circumstance relied on is that, in the deed of sale itself from *Bunnoo Bebee* to the Appellants' father, she says she made the sale with the consent of her family. If this had been shown to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained, there might have been some ground for the superstructure of argument which was built upon it, but their Lordships have no evidence and no suggestion that this is not in common form; on the contrary, it appears that, in the deed of sale to *Bunnoo Bebee* herself from her own vendor, the same expression occurs. It appears to their Lordships that the clause is one without any specific force or meaning, inserted, like many other general phrases in Indian deeds, to exclude any possible objection that might be raised against them. It is very like that which so frequently occurs after a full conveyance:—"I and my heirs have no longer any claim." Those words are often unnecessary, but they are of very frequent occurrence. Their Lordships therefore think that the two facts relied on as those which ought to have put the purchaser on inquiry do not support the contention made at the bar, and that the whole case

of the Respondents fails on its substantial merits.

Other questions have been raised in the case with which it is not now necessary to deal. Their Lordships, in the result, are glad to come to a conclusion by which it is quite evident substantial justice will be done. There has not been a suggestion throughout of any collusion between the purchaser and *Bunnoo Bebee*, or that the purchase was not made entirely *bonâ fide* on his part, and without notice of any title other than that he took from her.

In the result their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the judgment of the High Court. Their Lordships will further advise Her Majesty that the suit be dismissed, and that the Appellants should have the costs in *India* and of this appeal.

8th June, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature, North-Western Provinces, Agra.

PAHALWAN SINGH and others, (Plaintiffs)* ... } *Appellants,*

versus

MAHARAJAH MUHESHUR BUKSH SINGH BAHADOOR, (Defendant) ... } *Respondent.*

Act VIII. of 1859, s. 14—Jurisdiction—Suit for Land—Res Judicata.

A brought a suit in the Court of *S* against *B* for certain land as being an accretion to an estate in the district of *S*. *B* claimed it as being part of his estate in the district of *G*, to which district he alleged the land had in a former decision been found to belong. The Court of *S* held that the land was an accretion to *A's* estate in the district of *S*. In a subsequent suit brought by *B* in the Court of *G* against *A* for the land to which the subject of the former suit had been found to be an accretion,—*Held*, that the holding in the former suit necessarily decided that the land claimed by *B* was in the district of *S*, and therefore that the Court of *G*, under Act VIII. of 1859, s. 14, had no jurisdiction.

THEIR LORDSHIPS gave the following judgment:—

THE question with which their Lordships have at present to deal is that upon which the judgment of the High Court of the North-Western Provinces, which is under appeal, has entirely proceeded, *viz.*, whether the *Ghazeepore* Courts had jurisdiction to try the cause, having regard to the 14th section of the Code of Procedure? That article is in these words (*reads*. 14.)

The High Court of *Agra* have come to the conclusion that that section was a bar to the present suit, and that it was their duty to act under the latter part of the clause in question. Their Lordships are of opinion that that was a correct decision upon the section as applied to the facts of this case.

The question, as it seems to their Lordships, is what was the *res decisa* in the former case? In that suit an objection was taken, similar to that which is taken in this suit, to the jurisdiction of the *Shahabad* Court. It was treated as if the land in dispute was within *Zillah Ghazeepore*, or an accretion to land in the possession of the Defendants, which belonged to *Zillah Ghazeepore*, and it was contended that by reason of a former decision of the Collector of *Ghazeepore*, the latter part of this section applied, and that the Court of *Shahabad* had no jurisdiction to entertain the suit. That was decided against the Defendants in that suit, who are the Plaintiffs and Appellants in this suit.

In order to decide that case, the Principal *Sudder Ameen*, who was the Judge of first instance, thought it advisable to try the question of jurisdiction, together with the merits of the suit, and he came to the conclusion that the whole of the land colored yellow in the map which has been produced in both suits,—and it is the most favorable way of putting the case for the Appellants

* 12 B. L. R., p. 391.

to suppose that nothing but that land was then in dispute,—was an accretion to the Plaintiff, the *Maharajah's* settled estate in *Shahabad*. That decision was confirmed by the High Court. It then came here upon appeal, and this Board, confirming generally the decisions of the two Courts, held that, treating the whole of the yellow land as alluvial accretion, there were grounds for giving a portion of it to the Defendants, the present Appellants, as an accretion to their land, which had formerly, at all events, been in *Ghazeepore;* but that the other land, the portion on the other side of the line which they drew, was to be treated as an accretion to the land marked green; and that the Plaintiff, the *Maharajah*, in that suit, was entitled to recover that as an accretion to his settled estate; affirming, therefore, with the above exception, all that had been done by the Courts below, *viz.*, that the land was alluvial land, and that it was an accretion to the settled estate of the Plaintiff in *Shahabad*.

Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-matter in the particular suit. And it seems to their Lordships impossible, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the *Maharajah* in *Shahabad*. He came as Plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in *Shahabad*. From the map and the evidence, it is obvious that, if an accretion to his land, it could be an accretion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of *Shahabad*, and that proposition necessarily implied that the green land was a part of the settled estate in *Shahabad*.

It seems, therefore, to their Lordships that the decision of the High Court of the North-Western Provinces was correct, and that being the case, their only duty is to advise Her Majesty to dismiss this appeal with costs.

20th June, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir B. Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GOLAM ALI, (Defendant)* ... ... } *Appellant,*

versus

KALLYKISHEN THAKOOR and another, Executor and Executrix of the late BABOO GOPAUL LOLL THAKOOR (Plaintiff) ... ... } *Respondent.*

Special Appeal—Appeal to Privy Council—Practice.

Where a case has been heard by the High Court on special appeal, and on appeal to the Privy Council it is desired to include in the appeal the decisions of the lower Courts on the facts, an application for special leave to do so, should be made previous to the hearing. The Judicial Committee will not, as a rule, allow a petition of appeal from those decisions to be put in at the hearing, *nunc pro tunc*.

THEIR LORDSHIPS delivered the following judgment:—

THEIR Lordships have considered Mr. *Doyne's* application, and the conclusion they have come to is this that, for the reasons which I am about to state, they would not be justified in the present case in giving special leave to include in this appeal an appeal against the decisions of the two Judges who have dealt with the

* 12 B. L. R, p. 107.

questions of fact in the cause,—the Deputy Collector, and the Judge to whom there was an immediate appeal from him.

They have looked at the petition of appeal to Her Majesty, and, it is perfectly clear, that appeal is preferred simply against the order of the High Court on the special appeal. It is undoubtedly true that it has, recently at least, been the practice to allow the whole case to be opened upon questions of fact, as well as questions of law, although the High Court, the appeal to it having been merely a special appeal, has been able to deal only with the latter. The mode of accomplishing this, if the party thinks it necessary for the justice of his case, is to apply to their Lordships in due time for special leave to appeal against the decisions of the subordinate Courts; an application to be granted, not as of course, but on sufficient grounds. No such application has been made in the present case; but it is stated by Mr. *Doyne* that the Board has been in the habit of granting this privilege at the hearing *nunc pro tunc*, if they thought the justice of the case required it. We are not aware of, nor is Mr. *Doyne* able to refer us to, any case in which this was done, nor does our recollection supply one; although, if their Lordships saw clearly that the justice of the case could not be reached without allowing such an application, they do not say that they would not grant it under any circumstances, or upon any terms. They are of opinion that nothing but very special circumstances ought to justify the granting of leave to appeal against the other decrees at so late a period as the hearing of the appeal; and that no such circumstances exist in the present case. The question is one of those which it is extremely difficult for a tribunal like this to deal with,—the simple question of parcel or not parcel, whether a certain portion of *chur* land is included in a particular tenure, or remained liable to assessment for rent. It is emphatically one of those questions which are best decided, and can only be satisfactorily decided, upon the spot; and in re-opening the decisions on the facts in the present case, we should be running counter to that general rule which governs the proceedings of their Lordships, namely, that where there have been two concurrent findings upon questions of fact, this tribunal will not, except upon very special grounds, disturb them. Therefore, their Lordships think they would not be justified in granting this application. Of course, they are ready to hear whatever may be argued further upon the question whether the decision of the High Court upon the special appeal was correct or not, and if it were not correct, what order that Court ought to have made on the grounds before it. (1.)

This case was then argued on the merits, and their Lordships dismissed the appeal with costs.

25th June, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir B. Peacock, the Right Hon. Lord Justice Mellish, the Right Hon. Sir M. E Smith, the Right Hon. Sir R. P. Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

THE HONORABLE SRI MAHARAJA VIJAYARAMA GAJAPATI RAZ MANEA SULTAN BAHADUR GARU, Zemindar of VIZIANAGRAM, K.C.S.I., (Defendant)* ... } *Appellant,*

versus

SRI RAJA LAKSHMI CHALLAYA, (Widow of the Plaintiff) ... ... } *Respondent.*

Plaint—Act VIII. of 1859, ss. 26, 29—Titles of Honor.

Where the Government has recognised a person as having a right to bear particular titles, a plaint

(1) This ruling was followed in the case of *Raja Nilmoney Singh Deo* v. *Beer Singh* and *The Government*, which was decided by the Judicial Committee on 18th July 1872.

* 12 B. L. R., p. 448.

in a suit against such person does not contain "the description of the Defendant" in accordance with s. 26 of Act VIII. of 1859 if such titles are omitted. In such a case the Plaintiff should, on the objection being taken by the Defendant, be ordered to amend the plaint; and if such order is not complied with, the plaint should be rejected.

THEIR LORDSHIPS gave the following judgment:—

THIS is an appeal against the judgment of the High Court, which reversed the decision of the Judge of the Civil Court of *Vizagapatam*, dated—and the date is material for the decision of the present question—the 5th July 1865. The question which the appeal raises is the effect to be given to the 26th and 29th articles of the Code of Procedure. The 26th article requires that the plaint shall contain the name, description, and place of abode of the Defendant, as far as they can be ascertained, and the 29th section provides that if the plaint does not contain the several particulars thereinbefore required to be specified therein, the Court may reject the plaint, or, at its discretion, may allow the plaint to be amended.

In the present case a plaint was filed by the *Raja* of *Bobbily* against the Appellant, whom I may shortly describe as the *Maharaja* of *Vizianagram*. The objection taken to the plaint was that the Defendant was described on the face of that plaint by titles which did not correspond with the full titles to which he was entitled, and by which he ought to have been described. The Judge thought that objection was made out, and he directed that the Plaintiff should have liberty to amend his plaint by amending the description of the Defendant, in accordance with the description which had been given to him in the Gazette, by which he was appointed a member of the Governor-General's Council for making Laws, namely, the "Honorable *Maharaja Meerza Vezearam Guzzeputty Raj Munea Sultan Bahadur* of *Vizianagram*." He gave the Plaintiff a "week's time to amend his plaint by entering the name and distinction of the Defendant as above set forth, and in default the plaint will stand rejected." The Plaintiff, the Respondent, declined to amend his plaint, and failed to do so. The Judge then rejected the plaint under the 29th section, and upon appeal to the High Court that order of rejection was reversed, and it was held that the identity of the Appellant having been ascertained by the imperfect description, the order to reject the plaint ought not to have been made.

The dispute between these parties seems to have been a very ancient one. There appears to have been a feud between those two great proprietors for a considerable time as to the titles to which they were respectively entitled. It further appears, however, that as early as 1861 the then Agent of the Governor of *Madras* in *Vizagapatam* had ascertained what titles were the titles by which those parties were respectively known. I think the phrase is what titles "were in vogue," and he ordered that in all official documents those titles should be given by the one to other. The Respondent or his father raised an appeal against that order. There was an elaborate report made by a Mr. *Carmichael* to the Government, and the Government of *Madras* passed an order upon that, which is dated the 26th April 1865, by which they ruled that the order of the Agent should stand, and that those titles should be treated as the titles necessary to be given in official documents. That, therefore, was a recognition by the Local Government of *Madras* that the Appellant was entitled to the titles specified in the order of the Agent, Mr. *Fane*. It was also something more, because, while this question was pending before them, the Government of *India*, by the then Viceroy, had formally conferred upon the Appellant the title of *Maharaja*. Therefore, if there had been any question upon his claim to that title at an earlier date, that doubt was entirely removed by the formal act of Government, and the grant of the title from that which must be taken to be in *India* the fountain of honor.

Now it is no doubt the fact that the plaint in the present case was filed before that order of the Government of *Madras* to which I have just referred. It was, however, filed after the grant of the title of *Maharaja*; and after the appointment of this gentleman to be a member of the

Governor-General's Council for making Laws, by the notification in the Gazette in which he received his full titles, and was described in the manner in which the Judge afterwards required the Respondent to describe him; and further it is certain, that the order of the Government of *Madras* was passed and issued before the question raised upon this objection under the Code came to be tried and the decision of the Judge upon it was passed, because that, as I stated, was not until July 1865.

In these circumstances the question for their Lordships' consideration is, whether the order of the Judge, which he was competent to pass, and indeed ought to have passed, under the Code of Procedure, or whether the decision of the High Court reversing it, is the correct one?

No doubt the question which is now brought before their Lordships might by some persons be considered frivolous. It does not appear to their Lordships, however, to be by any means a light question. It is certainly (as one of their Lordships remarked in the course of the discussion) strongly against the policy of the law that anything should be done which tends to increase that which has been always one of the great social evils of *India*, *i. e.*, the indisposition of persons of consequence to appear as suitors in Courts of Justice. It appears to their Lordships that upon the proper construction of the Code the description contemplated by the 26th article includes all those titles by which the party is generally known; and that if a Plaintiff from animosity, from pique, or anything in fact but a *bonâ fide* dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult, as insult no doubt it would be treated not only in *India* but even in other countries.

In the present case it is not necessary for their Lordships to consider whether if there were a *bonâ fide* dispute in the suit, or otherwise, as to the existence of the title, or as to the right of the party to bear a particular title, the Judge would in every case exercise a sound discretion in rejecting the plaint. For it appears to their Lordships that here the matter was entirely put by the proceedings already referred to beyond dispute, and that it was impossible to say that the titles, if properly treated as falling within the term of description, could not be ascertained. An order had been passed in the district, with the view, apparently, of keeping the peace between these great proprietors, that in all official documents each should describe the other by a certain title; that order had been recognized after appeal and discussion and inquiry by the Government of *Madras;* the titles themselves had been recognized by the highest authority in *India*,—by the Governor-General in Council,—and confirmed by a distinct grant of the principal title, that of *Maharaja*, and therefore there could be no pretence or excuse for saying that there was any doubt whatever as to the legal right of the Appellant to bear those titles which he claimed to bear. Their Lordships are therefore of opinion that the Judge of the Civil Court was competent to pass the orders which he passed; and that he exercised a sound discretion in first requiring the Respondent to amend his plaint, and afterwards in rejecting that plaint when the first order had been contumaciously disobeyed.

The only point on which their Lordships have entertained a doubt is whether it was essential for the Judge to require the term "Honorable,"—which seems to be less matter of description than a mere honorary distinction, applying to those who are members of the Council,—to be stated in the plaint. It is, however, to be observed that the Respondent, when he appealed to the High Court, did not raise any point as to that. He raised broadly the question whether he was bound to give the Appellant what he called his honorific titles, or whether it was not sufficient simply to describe him in a way in which he could be distinguished from any other person.

Their Lordships are aware that in coming to the before-mentioned conclusion they are ruling that which is in some degree in conflict with a decision passed by the High Court of *Bengal* in the case of *Kissen Chand Golacha* v. *Megraj Kooturia*

Roy Bahadur (1.) It is to be observed, however, that, as it was fairly admitted at the bar, that case is in one particular distinguishable from the present, inasmuch as there the Defendant had not taken the objection in the first instance, but had asked for further time, and afterwards took the objection by way of afterthought. It is, however, scarcely necessary to observe that even if the case had been on all fours with the present, it would not have been a decision, passed as it was by a Division Bench of the High Court, which would have been binding upon their Lordships; and for the reason which I have stated, their Lordships are of opinion that it is not the true construction of the Act in question to say that where a man has titles, the claim to which titles cannot rationally be disputed, and by which he is generally known, all that the Code requires is that he should be described in such a way as has been contended for by the Respondent.

Their Lordships, under these circumstances, will humbly advise Her Majesty that the decree under appeal be reversed, that the order of the *Zillah* Judge be affirmed, and that the Respondent do pay the costs of this appeal, and in the High Court.

(1) 12 B. L. R., p. 445.

4th, 5th, 6th and 27th July, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir B. Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MOLLWO, MARCH, and others, (Plaintiffs)* ... } *Appellants,*

versus

THE COURT OF WARDS, on behalf of the estate of RAJAH PERTAB CHUNDER SINGH, (Defendant) ... } *Respondent.*

Partnership—Payment of Debt out of Profits—English Law.

Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common; but where a contract is entered into between partners and a third person for the protection of that person as a creditor, whereby it is agreed that he shall receive in consideration of advances commission on the net profits of the partnership business, and large powers of control over the business are given to him, but no power to direct transactions, the Court, if satisfied that the contract was one of loan and security, will not interpret it as constituting a partnership.

THEIR LORDSHIPS delivered the following judgment:—

THE action which gives occasion to this appeal was brought by the Plaintiffs (the Appellants), merchants of *London*, against the late *Rajah Pertab Chunder Singh*, to recover a balance of nearly three *lacs* of rupees, claimed to be due to them from

* 10 B. L. R., p. 312.

the firm of *W. N. Watson* and Co., of *Calcutta*. The *Rajah* having died during the pendency of the suit, the defence was continued by the Respondents, the Court of Wards, on behalf of his minor heir.

The plaint alleged that the firm of *W. N. Watson* and Co. consisted of *William Noel Watson, Thomas Ogilvie Watson*, and the *Rajah*, and sought to make the *Rajah* liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the firm to the Plaintiffs during the time when it is contended that the *Rajah* was in partnership with the two *Watsons*.

The questions in the appeal depend, in the main, on the construction and effect of a written agreement entered into between the *Watsons* and the *Rajah*; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two *Watsons* commenced business in partnership, as merchants, at *Calcutta*, in 1862, under the firm of *W. N. Watson* and Co. Their transactions consisted principally of making consignments of goods to merchants in *England*, and receiving consignments from them. In January 1863, they entered into an agreement with the Plaintiffs regulating the terms on which consignments were to be made between them, and under which *W. N. Watson* and Co. were authorized, within certain limits, to draw on the Plaintiffs in *London* against consignments. The *Watsons* had little or no capital. The *Rajah* supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the *Watsons* obtained discount, and which the *Rajah* met at maturity. In the middle of 1863, the total amount of these advances was considerable, and the *Rajah* desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the *Watsons*. Accordingly, an agreement was entered into on the 27th August 1863, between the *Rajah* of the one part, and "Messrs. *W. N. Watson* and Co.," of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the *Rajah* to them, the *Watsons* agreed to carry on their business subject to the control of the *Rajah* in several important particulars which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title-deeds of certain tea-plantations, and they also agreed that "as further security" all their other property, landed or otherwise, including their stock-in-trade, should be answerable for the debt due to him. The 10th and 13th clauses of the agreement were as follows:—"*10th*.—In consideration of the said advances made and the liability incurred as aforesaid by the *Rajah*, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st May 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished." "*13th*.—The firm shall, in addition to the said commission, pay to the *Rajah* interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now or hereafter payable on the said acceptances." This agreement is not signed by the *Rajah*, but he was undoubtedly an assenting party to it. Subsequently to the agreement the *Rajah* made further advances, and the amount due to him ultimately exceeded three *lacs* of rupees. In 1864 and 1865, the firm of *W. N. Watson* and Co. fell into difficulties. An arrangement was then made under which the *Rajah*, upon the *Watsons* executing to him a formal mortgage of the tea-plantations to secure the amount of his advances, released to them, by a deed bearing date the 3rd March 1866, all right to commission and interest under the agreement of August 1863, and all other claims against them. In point of fact, the

Rajah up to this time had never received possession of any of the property or moneys of the firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of 27,000 rupees on this account was, indeed, on the 30th September 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the *Watsons*. Some evidence was given as to the extent of the interference of the *Rajah* in the control of the business. It seems the *Rajah* knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the *Rajah* availed himself only in a slight degree of the powers of control conferred upon him by the agreement; in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the *Rajah* do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the *Rajah* on the ground that he was an ostensible partner, and therefore liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the *Watsons* to the Plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the *Rajah*. The liability therefore of the *Rajah* for the debts contracted by *W. N. Watson* and Co. must depend on his real relation to that firm under the agreement.

It was contended, for the Appellants, that he was so liable:

1. Because he became by the agreement, at least as regards third persons, a partner with the *Watsons*; and

2. Because, if not "a true partner" (the phrase used by Mr. *Lindley* in his argument), the *Watsons* were the agents of the *Rajah* in carrying on the business; and the debt to the Plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of *India* and at their Lordships' bar, on the basis that the law of *England* relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in *India* on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of *India*, so far as they may be peculiar and differ from those in *England*, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the *Rajah*, as creditor, and the firm consisting of the two *Watsons*, as debtors, by which the *Rajah* obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the *Watsons* by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the *Rajah* as a creditor of the firm. It was contended at the bar that, whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial, for it takes one term only of the contract and at once raises a presumption upon it, whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the

participant liable as a partner to third persons. (See this pointedly stated by *Blackburn*, J., in *Bullen* v. *Sharp*) (1). The rule had been laid down with distinctness by *Eyre*, C. J., in *Waugh* v. *Carver* (2), and the reason of the rule the Chief Justice thus states:—"Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace* v. *Smith* (3), and I think it stands upon fair grounds of reason." The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord *Eldon*) "to a given quantum of the profits." This distinction was stated to be "clearly settled" and was acted upon by Lord *Eldon* in *Ex parte Hamper* (4), and in other cases. It was also affirmed and acted on in *Pot* v. *Eyton* (5), where *Tindal*, C. J., in giving the judgment of the Court, adopts the rule as laid down by Lord *Eldon*, and says:—"Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." The present case appears to fall within this distinction. The *Rajah* was not entitled to a share of the profits "as such;" he had no specific property or interest in them *qua* profits, for, subject to the powers given to the *Rajah* by way of security, the *Watsons* might have appropriated or assigned the whole profits without any breach of the agreement. The *Rajah* was entitled only to commission, or a payment equal in proportion to one-fifth of their amount. This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction, both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened, since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox* v. *Hickman* (1,) and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh* v. *Carver* (2,) and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox* v. *Hickman* (1) had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet that, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in *Grace* v. *Smith* (3), that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be

(1) L. R., 1 C. P. 86, see 109.
(2) 2 H. Bl., 235, see 247.
(3) 2 W. Bl., 998.
(4) 17 Ves. 403, see 412.
(5) 3 C. B., 32.

(1) 8 H. L. C., 268.
(2) 2 H. Bl., 235.
(3) 2 W. Bl., 998.

unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner. Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the introduction to Mr. *Lindley's* excellent treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership, the parties must have agreed to carry on business, and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the *Rajah* to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the *Rajah* was constituted, in fact, the managing partner. The contract undoubtedly confers on the *Rajah* large powers of control. Whilst his advances remained unpaid, the *Watsons* bound themselves not to make shipments or order consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt. On the other hand, the *Rajah* had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the *Watsons* to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt. Their Lordships are of opinion that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The *Watsons* evidently wished to induce the *Rajah* to continue his advances, and, for that purpose, were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests. It may well be that, where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, *viz.*, one of loan and security.

Some reliance was placed on the Statute 28 & 29 Vict., c. 86, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the

Statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the fifth clause of the Act, so far as regards *England*, it is not necessary for their Lordships to consider. The Indian Act, XV. of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the Appellants that if "a true partnership" had not been created under the agreement, the *Watsons* were constituted by it the agents of the *Rajah* to carry on the business, and that the debt of the Plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency, which flows from that relation cannot arise, and the relation of principal and agents must, on some other ground, be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that, if it exists, it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the *Rajah*. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the *Watsons* and the *Rajah*, so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the *Rajah*, as principal, in any other character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The *Watsons* were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire; his powers were confined to those of control and security; and subject to those powers, the *Watsons* remained owners of the business and of the common property of the firm. The agreement in terms, and, as their Lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, *viz.*, one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward as ostensible traders others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the *Rajah* was not liable for the debts of the firm of *W. N. Watson* and Co., took a corret view of the case: and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

23rd, 24th, 25th July, and 26th November, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJKISHEN SINGH, (Plaintiff) ... *Appellant,*

versus

RAMJOY SURMA MOZOOMDAR and others, (Defendants) ... *Respondents.*

Family Custom—Regs. XI. of 1793 and X. of 1800—Discontinuance of Family Custom.

In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown.

Quære.—Whether Regulation XI. of 1793 or Regulation X. of 1800 would govern a case where the claim rested only on a continuing family usage?

Held, on the evidence, that from the acts of the members of the family the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure, and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails.

THIS was an appeal from a decision of the High Court of *Bengal*, dated the 24th January 1865, reversing a decree of the Principal *Sudder Ameen* of *Mymensingh* of the 10th January 1862.

The *Solicitor General* (Sir *G. Jessel*,) Mr. *Leith*, Mr. *Doyne*, and Mr. *W. C. Mozoomdar* for the Appellant.

Mr. *Cowie* and Mr. *Bell* for the Respondents.

The facts and arguments are sufficiently stated in the judgment of their Lordships, which was as follows:—

This suit was originally brought by *Rajah Prankishen Singh* against *Hurrosoondree Debee*, widow of one of his uncles *Gopeenath Singh*, and some purchasers from her, to recover possession, "by right of family custom," of one-third of 14 *annas* of *Pergunnah Soosung*. *Rajah Prankishen* died during the progress of the suit, and the present Appellant is his eldest son. *Hurrosoondree* is also dead; the Respondents, *Buroda Debia* and *Pranoda Debia* are daughters of *Gopeenath* and *Hurrosoondree*; the Respondent *Gour Kishore Lahoree* is their grandson, being a son of *Buroda Debia*.

The plaint states that, "according to family custom prevalent in the *raj* or estate, the right of the Plaintiff, as proprietor, accrued to the estate since the death of his father, *Rajah Bishonath Singh*." The claim is rested entirely on the ground of family custom, under which it is alleged that the estate was descendible on the eldest son, to the exclusion of the other sons.

It appears that the entire 16 *annas* of the *pergunnah* were at one time enjoyed by the ancestors of the family, but 2 *annas* were afterwards alienated, and it appears to be assumed on both sides that these 2 *annas* were a long time ago given as dower on the marriage of a daughter of one of the possessors.

*1 I. L. R., Cal., p. 186.

Rajah Raj Singh, the grandfather of the Plaintiff *Prankishen*, died in 1822, leaving three sons, *Bishonath* (the father of the Plaintiff *Prankishen*,) *Gopeenath* and *Juggernath*; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the *pergunnah*, and praying to be registered, and that they were so registered for the 14 *annas*. *Gopeenath* held the one-third of the estate until his death; his widow *Hurrosoondree* succeeded to the possession, and when the present suit was commenced against her in 1861, *Gopeenath*, and she as his widow, had been in possession for nearly forty years, *viz.*, from 1822 to 1861.

The Appellant contends not only that the estate is descendible on a single heir male, but also that it is impartible and inalienable. The High Court came to the conclusion that the Plaintiff had failed to establish by evidence the exceptional family custom on which he relied, and reversed the contrary decision of the Principal *Sudder Ameen*.

The two main questions argued at the bar were—1st, Whether the family custom had been proved? and 2nd, if so, what was the effect upon it of the acts and conduct of the family on *Rajah Raj Singh's* death in 1822, and subsequently?

There is, undoubtedly, evidence which leads reasonably to the belief that, formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate, and the tenure by which it was held under Mahomedan rule. Some firmans and other documents, filed in a former suit, and which were sought to be made evidence in the present to show the early title, are referred to by the Principal *Sudder Ameen* and the High Court in the following manner. The Principal *Sudder Ameen* says:—"It appears by a decision of the *Sudder* Court of the 12th May 1856, filed by the answering Defendants, that the *zemindari* above named was formerly acquired as a *jagir* by *Rajah Ramjibon*, by a firman of the year 1650 A. D., granted by the emperor *Shah Jehan*, and at his death that *jagir* was conferred upon his son *Rajah Ram Singh* by a firman of the year 1680 granted by the emperor *Shah Alum Ghir*; and after his death it was conferred as a *jagir* upon *Rajah Kishore Singh*, son of *Rajah Run Singh*, by a firman of the year 1749, granted by the emperor *Ahmed Shah*."

The High Court, referring to these documents, say:—"It may be admitted, as held by the Judges who disposed of the case on the 12th May 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the Plaintiff, a *jagir* for military services, and as such held by one of the members of the family, usually the eldest son or brother, and that women were excluded from the succession, as being incapable of performing the duties required from the *jagirdar*. This succession, however, was not regulated by any family custom, but by the will of the sovereign power, and on referring to the judgment of 1856, we find mention made of three firmans from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded not by right of primogeniture, but by the will of the sovereign." And again:—"The copies of the firman, bearing date 29th *Shaban* (1st *Juloss*), of *Ahmed Shah*, and of the *hibandmah* from *Ram Singh* to *Run Singh*, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of *Kishore Singh* to *Raj Singh*, dated 25th *Maugh*, 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and even if genuine it proves nothing, so we are thrown back upon one single document, bearing date the 22nd year of the reign of *Mahomed Shah*, which is denounced by the opposite party to be a forgery. This document purports to be a firman from the emperor *Mahomed Shah* to *Run Singh*, confirming the *jagir* of *Soosung* to him, and requiring him to keep up a certain body of troops, consisting of cavalry and infantry. Admitting, for the moment, that this docu-

ment is genuine, it really proves nothing in support of Plaintiff's allegation. It does not prove the property to be *raj*, for no such name is used. It is termed a *jagir*, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee, also, is not styled or in anywise recognized as a *rajah*, but simply as a *zemindar*, so that this document establishes nothing which the Plaintiff seeks to prove. But, looking at the document, we have little doubt that it never came out of the royal office, either at *Delhi* or elsewhere. It is written on common paper, and stamped with an oval seal, which could be prepared in any *bazaar* of *India*, and nothing is shown by which we might test the genuineness of the seal."

Their Lordships find great difficulty, upon these judgments pronounced by Judges who had greater opportunities than they possess of testing the genuineness of the documents, in drawing any safe conclusion from them; and the learned counsel for the Appellant felt the same difficulty, and did not press them, contending they were not material to his case. If these documents could at all be relied on, their Lordships agree with the High Court in thinking that they point to the conclusion that the estate was held under the Mahomedan rulers as a military *jagir* on the tenure of military service, by virtue of grants made from time to time to individual members of the family, and was not strictly an inheritable estate. If, on the other hand, reliance cannot be placed on these documents, then it is left altogether in doubt what was the original character of the estate, and the nature and conditions of its tenure.

Although much of what appears in the record, including the elaborate pedigree, must be rejected, there is still evidence that the manner of succession, relied on by the Appellant, however originating, did, in fact, prevail for some time in the family.

On the death of *Rajah Kishore Singh* in 1784, a *perwannah* was issued to his younger brother, *Rajah Raj Singh*, by the East India Company, who then held the grant of the *Dewanny*. It was addressed to him as "*Zemindar* of 14 *annas* share of *Pergunnah Soosung*," and states the death of the late *Rajah*; and goes on thus: "The *Zemindari* of *Kismut*, 14 *annas* of *Pergunnah Soosung*, which were fixed on your brother, has, according to custom, been confirmed to you." It thus appears that *Rajah Kishore Singh* had a living brother, and this *perwannah* was properly relied on as affording evidence that the deceased *Rajah Kishore Singh* had, notwithstanding, held the *zemindari* as sole possessor. *Rajah Kishore* had no sons, but left a widow, and the fact that she did not succeed to the *zemindari*, and that his brother *Rajah Raj Singh* was confirmed in it on his death, also points to the conclusion that the custom was supposed to prevail at the time of *Rajah Raj Singh's* accession in 1784. *Rajah Raj Singh* continued to hold the *zemindari* until his death in 1822. He was recognized as *zemindar* by the British Government at the time of the Perpetual Settlement, and the settlement of the 14 *annas* share of *Pergunnah Soosung* then was made with him at the old *Peshkush* (tribute), and not on a newly calculated *jumma*. It should, however, be observed that it appears from the accounts of the Collectorate that the other 2-*anna* shares, formerly severed and alienated, were settled with the *zemindars*, who owned them precisely in the same manner.

In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military *jagir*, requiring the render of services, if any such ever existed, were, as conditions of tenure, impliedly at an end; and that the *zemindari*, so far as relates to tenure, was thenceforth held under the Government as an ordinary *zemindari* free from any such conditions. The settlement would not, however, of itself, have operated to destroy a family usage regulating the manner of descent. It would not have had this effect in the case of a well established *raj*: see *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab*

Sahee (1,) and even in the case where the origin could not be shown, it may be assumed that it would not, of itself, affect an existing family custom.

Regulation XI., 1793, was passed soon after this settlement. That Regulation has been held not to be applicable to the succession of a well-established *raj*: see *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (1) and *Baboo Gunesh Dutt Singh* v. *Maharajah Mokeshur Singh* (2.) But the Respondents contend that, notwithstanding the qualificaion placed upon it by Regulation X., 1800, it does govern a case like the present, where the claim rests only on a continuing family usage, and not on the peculiar character of the *zemindari* itself or on a local or district custom: see *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa* (3.) Their Lordships do not think it necessary to give any opinion on the positive effect of Regulation XI., 1793, for they think that, in the present case, there is sufficient ground for the presumption that, after the settlement and this Regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.

Their Lordships propose to refer to the most important of these acts. It has been already stated that, upon the death of *Rajah Raj Singh* in 1822, his eldest son *Bishonath*, and his two younger brothers, *Gopeenath* and *Juggernath*, presented a joint petition to the Collector. It was a public act, and the document is distinct and unequivocal in its terms. The three petitioners, who are each described as *Rajah*, and sons of *Rajah Raj Singh*, state that the *raj* of 14-*anna* shares of *Pergunnah Soosung* was recorded in the *Serishta* in their father's name, and that he being dead, "they are the heirs and proprietors of the property," and they pray to be so registered, and were registered accordingly as joint proprietors.

It is plain that this was not a merely nominal petition, for there is clear evidence that the three brothers took and enjoyed in equal shares the profits of the estate. The three brothers also agreed by a document, in which they are described as "in possession and proprietors," to pay the Government revenue of 17,240 rupees. In 1829 *Juggernath* died, and thereupon his widow, *Ranee Indromonee*, was registered as joint owner with *Rajahs Bishonath* and *Gopeenath*. In April 1832, *Rajahs Bishonath* and *Gopeenath*, and the *Ranee Indromonee*, presented a joint petition praying for time to pay the amount of a decree obtained against them. The petition describes them as "*Zemindars* of the *Pergunnah*." Afterwards, *Rajah Gopeenath* died, and his widow, *Ranee Horrosoondree*, was also registered as owner for his share. In 1839, and again in 1841, suits were brought against tenants by the *Rajah* and the two *Ranees* for rents due, and in 1842 a joint suit was instituted by the three for possession of part of the estate.

The transactions above enumerated show a series of important acts in dealing with the estate as joint family property, extending over a period of twenty years, all founded upon the footing that the ordinary rules of succession governed the descent.

It is now necessary to advert to some subsequent litigation. It is alleged that, in 1843, *Hurrosoondree* and a son she had adopted, brought a suit against *Rajah Bishonath* and *Indromonee* for a partition of the *zemindari*, in which the *Rajah* set up as a defence that the *raj* was impartible, and descended on the eldest male heir. It is said that this defence was successful. But the proceedings in this suit were not satisfactorily proved, and the attempt to rely on it as an estoppel failed. Other litigation followed, raising the same question, but with a different result. *Indromonee*, the widow of *Juggernath*, died, leaving an alleged adopted son, whose guardian claimed the possession for him. This was opposed by *Bishonath* on the ground of the family custom, but, in the end, possession was awarded to the guardian. In 1847 *Bishonath* commenced a regular suit to obtain the one-third share

(1) 12 Moore's I. A., 1; 2 P. C. J., 348.
(2) 6 Moore's I. A., 164; 1 P. C. J., 521.
(3) 2 Moore's I. A., 441; 1 P. C. J., 217.

of *Juggernath*, on the ground that the alleged adoption was invalid; and also again setting up the family custom of primogeniture. In this suit, which went on appeal to the High Court, a Full Bench decided against the existence of the custom. *Rajah Bishonath* died in August 1853. After his death, his son, *Rajah Prankishen* (the Plaintiff in the present suit), did not prosecute an appeal to Her Majesty in Council which had been commenced against the above decision of the High Court, but brought another suit against the guardian of this adopted son of his uncle *Juggernath* on the ground that the adoption was not *bonâ-fide*, and claimed one-third of the estate as heir to his uncle. This suit is founded on the assumption that the custom had been negatived in the former one, for *Prankishen* now claimed, not on the footing of the custom, but as heir to his uncle, according to the ordinary rule of succession, and upon the ground that the adoption was not *bonâ fide*, he succeeded in the suit.

Various considerations were put forward by the learned Counsel for the Appellants to destroy or diminish the effect of the facts which have just been adverted to. It was suggested that *Bishonath* may have allowed his brothers to take, each, one-third share for maintenance, but their Lordships are of opinion that the evidence points very clearly to the conclusion that the brothers were admitted to the possession as co-heirs and co-sharers, not on sufferance merely, but as of right. The learned Solicitor-General, indeed, admitted that the acts of *Bishonath* amounted virtually to a grant to his brothers of one-third shares during their lives, but he denied that they amounted to more. In their Lordships' view, however, *Bishonath* admitted his brothers to the succession, intending them to have full, complete, and equal ownership of the estate with himself.

It was then contended for the Appellant, that if this were so, it was an attempt to do what the Hindu law would not allow.

It has already been stated that the acts of *Bishonath* and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family custom, but as an incident or condition of tenure which had been determined by the settlement, and consequently assumed that thenceforth the succession would conform to the ordinary law. Their conduct, indeed, goes far to disprove that a family custom, properly so called, ever existed; but assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact, discontinued.

It was urged that this could not be done without the consent of the sovereign power, *viz.*, the British Government. There is no question, in the present case, of the maintenance of a *raj* or principality, or of a tenure differing in its general qualities from an ordinary estate under the British Government. Their Lordships are certainly not prepared to hold that descent on single male heirs was, after the settlement, a condition of the tenure on which this estate was held, requiring the assent of the sovereign power to a change in the manner of succession, and giving to the Government the right to resume the estate upon its violation. Their Lordships consider that, at the highest, no more has been alleged and proved in this case, than a family custom regulating the descent *inter se*, and which, if existing, the settlement, of itself, did not disturb.

It was also urged that the effect of the custom was to create successive life estates in the heirs male of this family, analogous to a feudal entail, which could not be barred, and which prevented alienation, or any change in the manner of descent, which it was contended would be a virtual alienation. It will be collected from what has been already said, that their Lordships do not consider that such is, as a question of tenure, the nature of the estate, and in their view the family custom alleged in this case has not this effect.

Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family

usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon. Their Lordships can have no doubt that in this case the special custom of descent, if it ever existed, was designedly discontinued after *Raj Singh's* death by *Bishonath* and his brothers—and that in fact the estate was enjoyed by the brothers and by their widows according to the ordinary law of succession, and on the footing that the custom was at an end—and not only that there was this enjoyment in fact, but that the parties were registered in the public registers, and suits were brought against third persons by the brothers and the widows, on the assumption that they were co-heirs and co-sharers of a joint family estate.

Prankishen, the Plaintiff in this suit, appears at one time to have been disposed to dispute what had been done, and to set up the special mode of descent: but in the suit brought by himself against the alleged adopted son of his uncle *Juggernath*, already referred to, he claimed the one-third of the estate which *Juggernath* held, as his heir, and succeeded in setting aside the alleged adoption, and established his own right as heir to his uncle. He thus abandoned in that suit the custom which, in the present, he asserts to be still in existence. Supposing, therefore, that *Prankishen* had any inchoate right to the customary succession as the eldest son of *Bishonath*, their Lordships consider that the suit referred to affords proof of his ultimate adoption of what his father had done; and the presumption of acquiescence is strengthened by the fact that he did not prosecute the appeal in the suit brought by his father *Bishonath*, in which the custom had been negatived.

Their Lordships are glad to be able to uphold the judgment of the High Court, since by doing so, they confirm the possession and enjoyment of this estate as it has existed since the death of *Raj Singh*, and maintain the order of succession which has in fact prevailed since the settlement in 1790.

In the view which their Lordships have taken of the case it becomes unnecessary to consider the point that the suit was barred by the Law of Limitation of suits.

Their Lordships being of opinion, for the reasons above given, that the decree of the High Court ought to be upheld, will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

25th July, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BABOO GUNNESH DUTT SINGH, (Plaintiff)* ... } *Appellant,*

versus

MUGNEERAM CHOWDHRY & others, (Defendants) } *Respondents.*

Malicious Prosecution—Libel—Witnesses' Privilege—Evidence—Onus Probandi.

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury.

In an action for damages for a malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable and probable cause.

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* 11 B. L. R., p. 321.

THIS was an appeal from a decision of the High Court (*Bayley* and *Pundit*, JJ.) of the 7th March 1866 (1), reversing a decree of the Principal *Sudder Ameen* of *Tirhoot* of the 24th June 1865.

The suit was brought by the Plaintiff, who was a near relative of the *Rajah* of *Durbungah*, against three landholders in the district and two of their servants, to recover damages for defamation of character.

Disputes had for some time been going on between the *Chowdhrys* (Defendants) and the Plaintiff. An affray took place between a tenant of the Plaintiff and the *Chowdhrys*, and one of the latter, *Kirtee Narain Chowdhry*, was killed. On the 8th December 1863, the Respondent *Mugneeram Chowdhry* appeared before the Assistant Magistrate at *Durbungah*, and stated, *inter alia*, that the deceased and the Respondent *Seetaram Chowdhry* had on the 6th December accompanied two peons of the Court of the Principal *Sudder Ameen*, who had come to attach the crops on the ground in dispute; and that on their arrival there they found the crops cut, and the Appellant there with armed men, whom he ordered to attack the deponent party, which was done, and *Kirtee Chowdhry* killed. On this information, the Magistrate, on the same day, ordered the arrest of the Appellant and his son, together with others charged by *Mugneeram*, and on the following day at noon, the Appellant appeared and surrendered himself to the Magistrate. He was kept in arrest, and afterwards sent forward in arrest to *Durbungah*, and on the following day, the 9th of December, enlarged on entering into his own recognizance and giving security, but he was obliged to attend the Magistrate's Court from day to day till the conclusion of the inquiry as against him. On the 14th of December, *Bhugwant Chowdhry*, one of the Respondents, gave his deposition before the Magistrate, in which he stated that he had gone on the 6th to the scene of the affray, and there found the corpse of *Kirtee* and certain wounded persons, and had been told that the attack had been made by the men belonging to the Appellant and his son. He had, in his information given on the 6th, when he appeared, not as a mere informant, but as a complainant along with the other *Chowdhrys* Respondents, charged the Appellant with the murder of the deceased *Kirtee*. The other Respondent *Chowdhrys* also gave their depositions against the Appellant. On the 14th of December, the Magistrate also examined the Court peons, *Keramut Khan* and *Deedar Bux*, who said they had gone to attach the grain on the lands in dispute. They spoke to an affray having taken place, but did not depose to recognizing the Appellant as being present there, or his son. On the 29th of December 1863, the Magistrate, having heard all the evidence for the prosecution, dismissed the case as against the Appellant and his son, but committed *Sookhun Lall Thakoor*, the Appellant's tenant, and others, to the Sessions. On the 2nd of January 1864, the Magistrate made a further order, in which he said that the evidence offered had failed to show that the Appellant was present, but fined him Rs. 500 on a wholly different ground, *viz.*, under the provisions of s. 154 of the Indian Penal Code, for not giving timely information of, and exerting himself to prevent, an apprehended affray. Of the parties committed to the Sessions, all were acquitted except one, *Sheikh Lallun*, who was convicted and sentenced to four years' imprisonment on the 22nd March 1864. On the 31st of August, the Respondent *Seetaram Chowdhry* presented a petition to the High Court, in which he repeated all the same accusations against the Appellant, and charged him with having given orders for the attack on *Kirtee Chowdhry*, and complained of the irregularity of the proceedings of the Magistrate and Judge, and asked that the High Court should, under its powers of supervision, direct the Judge to proceed with the case, after ordering the Magistrate to commit the Defendants to his Court. On the 21st of November 1864, the High Court called on the Judge for an explanation which was given by the Judge on the 16th December 1864, and on receipt of it the High Court declined to interfere. In the explanation submit-

(1) 5 W. R., 134.

ted by the Judge, the following passage occurred :—"The Assistant Magistrate, who committed several persons on charges of riot, &c., spoilt the case by sending in two sets of witnesses for the prosecution, who contradicted each other."

The Appellant, having been required to give bail and enter into recognizances, on the 29th of September 1864, filed his plaint in the Court of the Principal *Sudder Ameen* of *Zillah Tirhoot* against the Respondents, together with two other Defendants, to recover damages for the defamation of his character, on the ground that the charges made against him were false and malicious.

The Respondents *Gouree Dutt Chowdhry*, *Ajmut Roy*, and *Bhugwant Narain Chowdhry*, put in their written statements. The two first named asserted that they had nothing to do with the case, further than having been called as witnesses, and were not liable to the Plaintiff's claim, and the last submitted that the mere fact of his having been the person to give information did not make him liable. None of these three at all repeated or attempted to justify the imputation made against the Appellant.

On the 2nd of March, the Respondents *Mugneeram* and *Seetaram Chowdhry* put in their written statements in which they justified the imputation to the fullest extent, and maintained that the Appellant was guilty of the charge, and that it was well proved before the Magistrate :—

On 14th March 1865, the following issues were settled :—

"1. Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative, then, whether or not the charge of complicity in the wilful murder of *Kirtee Chowdhry*, deceased, preferred against the Plaintiff by the Defendants of the first party, simply originated from motives of humiliating the Plaintiff, and was therefore entirely groundless; and if the charge did emanate from such malicious motives, then, how far has the Plaintiff been disgraced by it; to what damages can he be entitled for it; and against which of the Defendants can such damages be adjudged?

"2. Whether the allegations of the Defendants Nos. 1 and 5 of the first party as to the truthfulness of the charge of complicity preferred by them against the Plaintiff, and to his having sustained no loss of honor by his attendance before the Magistrate on bail, is true or not?

"3. Is the statement of the remaining Defendants of the first and second parties, regarding the absence of all connection on their part with the criminal case in question, fit to be admitted by the Court?"

The Plaintiff examined four witnesses, *viz.*, *Amarut Ali* who deposed to the effect that he was a servant of the Plaintiff and in constant attendance on him; that bad feeling had existed between his master and the *Chowdhrys* in consequence of their unsuccessful attempts to obtain land; and that an affray took place between *Sookhun Thakoor* and the Defendants, when *Kirtee Chowdhry* lost his life, of which the Defendants took advantage, and charged the Plaintiff with murder. He spoke to the Plaintiff's being arrested and kept in custody and then bailed.

The seccond *Nisheeb Nusser* deposed that *Ram Dutt Chowdhry* conducted the criminal case against the Plaintiff, and that *Gouree Dutt* and *Ajmut Roy* were his servants.

The third *Sunker Dutt Jha*, one of the Plaintiff's managers, deposed to the same effect as the first witness.

The fourth witness *Buhrea Doss* deposed to *Ram Dutt Chowdhry* having managed the case.

Evidence as to the Plaintiff's character was also given.

The Defendants did not offer their own evidence, or call any witness, to prove that the Plaintiff had been present at the affray, or had given orders to attack, or that he had been in any degree connected with it.

On the 24th of June 1865, the Principal *Sudder Ameen* gave his decree in the case, awarding the Appellant as damages 20,000 rupees with costs to be paid by the Respondents, and dismissed the suit as against the Defendants *Ram Dutt Chowdhry* and *Nund Coomar Chowdhry*.

He held on the first issue that it was proved by the evidence that the Plaintiff and Defendants had been at variance before the death of *Kirtee Narain Chowdhry*,

and that the Plaintiff having been successful in the litigation which arose as to the digging of a tank, and the alleged rent-free lands, it had "engendered feelings of enmity and spite in the minds of the Defendants." On the second issue he held that it appeared from the evidence generally that "the charge against the Plaintiff was wholly groundless, and was preferred by them solely from motives of enmity, and for the satisfaction of a grudge." On the third issue he held that the Plaintiff was a person of high rank and dignity, and was much humiliated and degraded by his arrest, and being put to bail, but that having regard to all the circumstances, 20,000 rupees damages would meet the justice of the case.

On the 7th March 1866, the High Court on appeal reversed the decree of the lower Court, and dismissed the Plaintiff's suit with costs (1). The grounds on which the judgment of the Court proceeded were that, as to the Appellant *Bhugwant*, he was merely an informant at the Police office at the request of the wounded men, and had said nothing of his own knowledge, and was not therefore liable to damages, and as to the other Appellants, the Court doubted whether they also could properly be called prosecutors, or anything more than informants to the Police, over whose action they had no power of control. Without however deciding this latter point, the Court held that the Plaintiff had failed to make a case against them, even, supposing them to be prosecutors, inasmuch as he was bound to prove the innocence of the charge made, and had given no proof of it except "the order of the Magistrate by which he released the Plaintiff for want of proof," which, in the opinion of the Court, did not prove the Appellant's innocence, but only that he was not proved to be guilty; and, further, that even if such release did make for the Plaintiff a *primâ facie* case of innocence, it was not binding on the Civil Court, or on the Defendants, who were at liberty to plead and prove that the charges against the Plaintiff were well-founded, and that the Defendants had so done, and the Plaintiff had not produced any proof to rebut the Defendants' evidence of his guilt. The judgment concluded in these terms:—

"Now, even if we be inclined to hold that the Plaintiff and his son were not present as deposed to by these Appellants, we are quite satisfied that the quarrel arose out of a claim to rents made by the Plaintiff regarding certain lands alleged to be purchased by *Mugneeram* and others, which they asserted were *lakhiraj*, and that the lease of the village in which these lands were situated to the Plaintiff's servant was a nominal transaction by the Plaintiff while he kept himself in the background. We are not in a position to say that it was not the Plaintiff who caused certain persons to go to the place of the *riot;* and that when by these acts the affray took place, the Plaintiff was legally as well as morally responsible for those acts which led to the murder of the brother of *Mugnee*, and the wounding of several others. We admit the Plaintiff had a remedy against these acts by prosecuting them for perjury in stating from motives of enmity and malice that he and his son were present, when they were not present at all, but he did not do this. Under all these circumstances we think a decree for any damages to the Plaintiff is not proper, and we accordingly reverse the decision of the lower Court, and dismiss with costs the Plaintiff's case, and decree this appeal with all costs."

From that decree the Plaintiff appealed to Her Majesty in Council.

Mr. *Doyne* for the Appellant.—The High Court were wholly wrong on the evidence as to *Bhugwant* being a mere informant put in motion by the others; for it is clear on the evidence that the *Chowdhry* Respondents were a joint family, having the same interest in the subject of the suit, and at all times acting in concert, and all fully possessed of the actual facts of the whole case. Besides this, it is clear that *Bhugwant* was not a mere informant, but a prime mover, and joined with the other members of his joint family as complainant, and that, if the charge against the Appellant were untrue, it was so to *Bhugwant's* knowledge. The doubt thrown out as to the other Appellants to the High Court being more than informants is opposed to the whole evidence, as they appear first to have sent *Bhugwant* to inform, and

(1) 5 W. R., 134.

afterwards to have conducted the prosecution, and the Defendant *Seetaram* had, after the discharge of the Appellants, repeated the slanders against the Appellant in a petition to the High Court. The order of the Magistrate releasing the Appellant is not of the doubtful character apparently imputed to it by the Division Bench, but is as express as such orders usually are. It may be admitted that it was open to the Defendants to have pleaded and proved that he was guilty of the death of *Kirtee Narain*, and that the Civil Court was not in anywise concluded by the order of the Magistrate, if such an allegation had been made by the Defendants, and proved to the satisfaction of the Court; but it is wholly erroneous to say that the Defendants generally did so plead, inasmuch as only two of them, *Mugneeram* and *Seetaram*, ventured to repeat the charge against the Plaintiff (Appellant) in this suit, and no evidence whatever was offered by any of the Defendants to justify such a charge. Under this state of facts, there was no evidence to rebut, and on the whole record it appears that there never was any *bonâ fide* ground for making so grave and unfounded a charge against the Plaintiff. It is also to be observed that there is no evidence whatever to show that the lease to *Sookhun* was nominal, or that the Appellant was the real though secret mover in the affray, and that the whole evidence points to the affray having been brought about by the lawless conduct of the *Chowdhry* Respondents. It cannot be contended that the charges made by the Respondents against the Appellant were privileged, and the Respondents were clearly bound to show the truth of them, on pain, in default of so doing, of having a decree given against them for damages. But even supposing the charges to be *primâ facie* privileged, they are taken out of the privilege by their manifest malice and falsehood. Independently however of the other evidence in the case, the order of the Magistrate discharging the Appellant, when combined with the fact that no further criminal proceedings were taken against him, was, supposing the privileged character of the charges, sufficient *primâ facie* proof of the Appellant's innocence and the Respondent's malice to have shifted on them the burthen of proving the truth or *bonâ fides* of the said charges, which they have not even attempted to do.

The Respondents did not appear.

Their LORDSHIPS delivered the following judgment:—

The material facts in this case may be very shortly stated.

It would appear that an affray took place between the partisans of the *Chowdhrys*, who were the Defendants in the suit below, and of *Baboo Gunnesh Dutt Singh*, who was the Plaintiff in the suit below. The cause of the affray and the circumstances attending it are involved in some obscurity, but their Lordships think it sufficiently appears that it originated in some attempt on the part of the partisans of the *Chowdhrys* to assert some real or pretended right which was resisted by the partisans of the *Baboo Gunnesh Dutt Singh*, and that in the course of that affray one of the *Chowdhrys* was killed, and some were wounded. It would appear that some of the *Chowdhrys* who were Defendants in the suit below preferred a charge against *Gunnesh Dutt Singh* of having been accessory to this murder by inciting his partisans to violence, and *Gunnesh Dutt Singh* was brought before the Magistrate, who, however, upon hearing the case, dismissed it as against him for want of proof, and declined to commit him for trial. Thereupon *Gunnesh Dutt Singh* brought the present action.

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion, with the High Court, that if it had been, strictly speaking, such an action, it could not have been maintained; for they argee with that Court that witnesses cannot be sued in a Civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evi-

dence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the Plaintiff in the Court below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution; and that being so, if we apply the principles of English law to the case, the burden of proof lying upon the Plaintiff would be this,—he would have to prove in the first place that the Defendants were the prosecutors of the criminal proceeding against him: next that they were actuated by malice, and further that their proceeding was without any reasonable or probable cause.

It appears to their Lordships that the issues of fact as stated do in substance raise the same questions which would be raised in an action for malicious prosecution in this country. We find the first issue of fact to be stated thus:—"Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative then, whether or not the charge of complicity in the wilful murder of *Kirtee Chowdhry*, deceased, preferred against the Plaintiff by the Defendants of the first party, simply originated from motives of humiliating the Plaintiff, and was therefore entirely groundless." The other issues of fact appear to their Lordships to substantially state the same questions which would come before a Judge and Jury in an action for malicious prosecution in this country.

With respect to the proof of those issues, it appears to their Lordships that the Plaintiff did substantially prove that the Defendants, or at all events two of them, were the prosecutors on this occasion, although some little doubt is expressed upon that subject by the High Court. It appears to their Lordships also that some evidence was given by the Plaintiff of malice on the part of the Defendants. That evidence was not of a very clear or conclusive kind, but their Lordships are disposed to say that the case of the Plaintiff on this issue was on the whole sufficiently made out.

We now come to the third issue, namely, whether or not the Plaintiff has given any proof of the want of reasonable and probable cause, or, as it is put in the statement of the points in the Court below, that the proceeding was altogether groundless. Their Lordships are of opinion that it rested upon the Plaintiff to prove this, or at the least to give *primâ facie* evidence of it calling for an answer. Their Lordships agree with this statement which they find in the judgment of the High Court:—"We find on the record of the case that the Plaintiff has given no other proof of his innocence and of the falsehood of the statements of these four Appellants except a copy of the order of the Magistrate by which that officer released the Plaintiff for want of proof." The Plaintiff, it is true, gave in evidence certain depositions of the Defendants; but those depositions, taken by themselves, were evidence of his guilt, not of his innocence. Then what evidence does he give to rebut them? He puts in the decision of the Magistrate, which was neither more nor less than this (although it is a good deal amplified by the *Sudder Ameen* in the Court below,) that the case is not proved against him in the opinion of the Magistrate. Their Lordships are of opinion that this decision was no evidence whatever against the Defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution, on the bare proof (without more) of the dismissal of the charge, might very injuriously affect the administration of the criminal law. It was in the power of the Plaintiff himself to go into the witness-box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence. Undoubtedly in this country, where a man sues for

defamation of character, whether in the form of an action for a malicious prosecution or of libel or slander, it is expected that he who of all men is best able to give evidence of his own innocence should be put into the witness-box; and it is very rarely indeed that a Plaintiff in any such suit obtains substantial damages if he does not give evidence or a good reason for not giving it. Not only does the Plaintiff not give evidence himself, but although he calls witnesses for the purpose of showing malice on the part of the Defendants, he calls none for the purpose of establishing his own innocence, or of disproving the charge against him.

Under these circumstances their Lordships concur with the judgment of the High Court, which appears to be substantially based upon the ground that in their opinion no proof had been given, not even *primâ facie* proof, certainly not such as the Plaintiff if he had been an entirely innocent man would have had it in his power to give, of the groundlessness of the charges preferred against him; in other words, that there was no evidence on the part of the Plaintiff of want of reasonable and proper cause for the institution of this prosecution.

Their Lordships do not think it necessary to follow the High Court in some observations which they have made as to the effect of the evidence upon the Plaintiff's character; a subject on which they give no opinion; but on the ground already stated, namely, that they substantially agree with the finding of the High Court that no sufficient evidence was given on the part of the Plaintiff of this being a malicious and a groundless prosecution, their Lordships will humbly advise Her Majesty that the decision of the High Court should be affirmed, and this appeal dismissed.

30th and 31st July, 1872.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the Chief Court of the Punjab.

WILLIAM HAY, commonly called LORD WILLIAM HAY, (Co-Respondent)* — *Appellant*,

versus

WILLIAM GORDON, (Petitioner) ... — *Respondent*.

Act IV. of 1869, s. 17 (1)—Act XIV. of 1859, s. 1, cl. 16—Concurrent Judgments on Facts—Confirmation by High Court of Decree of District Judge.

Act IV. of 1869, s. 1, cl. 16, does not apply to divorce suits.

A decree of a High Court confirming the decree by a District Judge for dissolution of marriage reversed, so far as it affected the co-respondent and condemned him in costs. The circumstances of the case took it out of the general rule not to reverse the concurrent findings of two Courts on a question of fact.

IN this suit, which was brought under Act IV. of 1869 in the Judge's Court at *Umballah*, on the 25th June 1869, the petitioner prayed for a dissolution of his marriage with his wife *Louisa Elizabeth*, and to condemn the Appellant in costs.

The grounds stated in the plaint were adultery with a Mr. *Watson* (since deceased) in 1853, and adultery with the

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* 10 B. L. R., p. 301; Cowell's Sup. Vol., 106.

(1) *Act XIV. of* 1859, *s.* 17.—"Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court. Cases for confirmation of a decree for dissolution of marriage shall be heard (when the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference, the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a

Appellant in 1859 and 1860, and adultery with other persons in 1860.

The petition was served on the Appellant in *England* in August 1869.

On the 13th August he sent out instructions to *India* to retain Counsel for him to act upon the instructions, which were that he should apply for further particulars and obtain a commission to examine the Appellant.

These instructions were not attended to; but on the 15th November 1869 the issues were settled; and on the 18th November the case was tried, witnesses being examined on both sides; and the Additional Commissioner of *Umballah* made a decree *nisi* for the dissolution of the marriage with costs against the Appellant.

In January 1870, the Appellant saw a report of the case in a newspaper, and immediately sent out to *India* an affidavit denying his guilt, and stating the circumstances under which he had sent out instructions for his defence. His Counsel accordingly presented a petition to the Chief Court of the *Punjab* (to which Court the decree had been sent for confirmation under Act IV. of 1869), in which he submitted that the suit was barred by limitation; that the decree of the Judge was not justified by the evidence; that the Appellant had been taken by surprise by the rapid way in which the case had been disposed of; and that he was willing to have been examined as a witness in the case, but he had not had an opportunity of being so examined. It also objected to the non-joinder of other persons as co-Respondents. It prayed that, unless the Chief Court dismissed the petition on the other grounds that his evidence might still be received under a commission. The Chief Court (*C. R. Lindsay, H. S. Cunningham,* and *J. S. Campbell*) on the 23rd July rejected the application on the grounds hereinafter mentioned in their Lordships' judgment, and confirmed the decree, condemning the Appellant to pay costs. The evidence taken in the case is also fully referred to in that judgment.

Lord *William Hay* appealed to Her Majesty in Council against the decision of the Chief Court.

Mrs. *Gordon* died pending the appeal.

Dr. *Deane*, Q. C., and Mr. *Leith* for the Appellant.—Act XIV. of 1859, s. 1, cl. 16, applies to all suits save those mentioned in the other clauses, and must be taken as applicable to divorce suits. But even if not barred by limitation, there has been such gross delay pressing hardly on the Appellant that the petition ought to have been dismissed. The Court below had not issued rules of practice as provided by Act IV. of 1869, s. 62, and the Appellant ought to have been allowed to give his evidence. He has not had a fair trial. The learned Counsel then commented upon the evidence.

Mr. *C. Pollock*, Q. C., and Mr. *R. A. Pritchard* for the Respondent.—Act XIV. of 1859 does not apply. S. 7 of the Indian Divorce Acts says that the principles under which the Divorce Court in *England* acts are to be applied, and limitation is no bar to a proceeding for a divorce in that Court. The delay is not of such a nature as to prevent the Respondent obtaining relief, the co-Respondent being in *England*. The Appellant has only himself or his legal advisers to blame for not applying for a postponement, and taking the necessary steps to give his evidence on the hearing of the suit. The suit was fully contested, and it was in the discretion of the Chief Court to allow or to refuse to allow additional evidence. The two Courts have agreed on a question of fact, and this Board will not in such a case interfere.

Their LORDSHIPS delivered the following judgment:—

This is an appeal brought by Lord *William Hay*, the co-Respondent, against a judgment of the Chief Court of the *Punjab*, confirming a judgment of the Addi-

Court composed of such two Judges, and in case of difference, the opinion of the senior Judge shall prevail. The High Court if it think further enquiry or additional evidence to be necessary, may direct such enquiry to be made, or such evidence to be taken."

tional Commissioner at *Umballah*, whereby Colonel *Gordon* obtained a dissolution of his marriage with his wife on the ground of her adultery with Lord *William Hay*, and Lord *William Hay* was ordered to pay the costs of the suit.

Before the year 1869, the Indian Courts had only power to decree divorces *a mensâ et thoro*. The power of the Court of divorce in this country of granting divorces *a vinculo* was first introduced into *India* by Act IV. of 1869, which enacts that subject to its provisions "the High and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in *England* for the time being acts and gives relief." There is a power to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in *India*. But it would appear that no rules have been made, and therefore the principles and rules which obtain in the Divorce Court in this country are as nearly as may be to be applied in *India*. Power is given to District Judges in the first instance to hear divorce causes, but their decrees are not final, or indeed operative at all, until confirmed by the decree of the High Court, which is empowered to direct further enquiry to be made or additional evidence to be taken. In this case the High Court was the Chief Court of the *Punjab*.

The first question which has been raised is whether or not the Statute of Limitation is a bar to this suit? It is argued that the cause of action arose in 1859 or 1860 when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel *Gordon* says that the misconduct of his wife came to his knowledge. Act XIV. of 1859, after prescribing particular terms of limitation for certain actions, enacts that with respect to all suits and actions not before specifically provided for the term of six years shall apply, that is six years from the time when the cause of action accrued. Their Lordships are of opinion that the provisions of that Act do not apply to suits for divorce *a vinculo*, which at the time when it passed were unknown in *India*. They are confirmed in the view which they have taken of the intention of the Legislature by the Limitation Act which was passed last year (Act IX. of 1871,) which expressly enacts that its provisions shall not apply to suits under the Indian Divorce Act.

The Appellant further relied upon substantially two grounds; the first was that justice had not been done him in this suit, inasmuch as he ought to have had an opportunity of being examined in this country by a commission; and secondly, that upon the general merits of the case the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The petitioner does not aver with any particularity at what time in those years the acts of adultery were committed. Lord *William Hay* left *India* in 1862, and has resided in *England* ever since. In 1862 Colonel *Gordon* says he became aware of his wife's adultery by what he regarded as a confession by her in a certain letter which will be subsequently referred to, and that at that time he endeavoured to establish a case by the examination of witnesses in *India*; but it would appear that those very witnesses, who have been now called for him, at that time either could not or would not give evidence sufficient to establish his case. This suit was instituted in June 1869. Lord *William Hay* for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took what undoubtedly was the proper proceeding of applying to an able Counsel for his opinion, and that Counsel advised in substance that application should be made to the Court in *India* for further particulars, and upon these particulars being obtained for a commission for the examination of Lord *William Hay*. Lord *William Hay*, upon the 13th of August, wrote to Mr. *Chisholm* at *Simla*, who held a power-of-attorney from him, enclosing a copy of his Counsel's opinion, and requesting that an advocate might be retained for him to act upon the instructions therein contained.

It appears that Mr. *Cunningham* was so retained, but it does not appear that this gentleman acted in conformity with those instructions; the reasons for his not so acting do not appear.

The cause was heard before the Commissioner of *Umballah* on the 18th and 19th November 1869. The Commissioner pronounced against Lord *William Hay*, decreeing a dissolution of the marriage on the ground of adultery with him and condemning him in costs. Lord *William Hay* states in his affidavit that he was not aware of this decision until January of the next year 1870, when he received a short report of the case in *The Mofussilite* newspaper; that he then sent out an affidavit (which appears in the record) denying his guilt, stating a variety of circumstances, and among other things setting out the opinion of Counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to *India*, it appears that his Counsel before the Chief Court of the *Punjab*, Mr. *Plowden*, upon the 19th of May, presented a petition to that Court containing various grounds of defence, and stating this among other things:—"The co-Respondent is and always has been willing to tender himself as a witness in the case, and prays that, if the petition be not otherwise dismissed as against him, his evidence may be taken by commission." Upon the hearing of the cause before the Chief Court of the *Punjab* in July 1870, the Court declined to comply with this request on these grounds; they say:—"We see no likelihood of any sort of advantageous result from the issue of a commission. We have Lord *William Hay's* positive denial on oath on the record, and though we should be anxious to offer a litigant so circumstanced every possible facility and indulgence in the hearing of the case, it is not, we think, necessary, and would not therefore be expedient now, at the last moment, to re-open the proceedings by the grant of a commission which could scarcely bring any new fact before us, would place Lord *William Hay's* disavowal in no stronger a light, and would postpone the relief prayed for," and the Court subsequently make this observation:—"With regard to the co-Respondent, we have further to remark that his explanation of his proceedings is not, in our opinion, satisfactory, and that we cannot regard the course which he has pursued as in any degree adequate to the gravity of the occasion, or as indicating a serious intention to resist the present proceedings." Their Lordships are not able to agree with the Chief Court that Lord *William Hay's* general denial in the affidavit is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord *William Hay* has all along seriously and earnestly desired to resist these proceedings to the best of his ability. Upon this part of the case their Lordships have come to the conclusion that it would have been desirable and proper, under all the circumstances, to accede to Lord *William Hay's* application for a commission to examine him.

But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord *William Hay* can be supported.

In their Lordships' opinion, the evidence against Lord *William Hay* is entirely that of the native witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the Respondent, Mrs. *Gordon*, *viz.*, her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord *William Hay*, is the following, in letter H, which must have been written somewhere about April 1862 from *England* to her husband then in

India:—"I have your letters as to what occurred at *Simla*. *Herbert* always told me that you knew of it, and did not care. Lord *William Hay* told me the same thing. *Herbert* always told me that *Emily* knew of it, and I firmly believe that both you and she did." What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a gentleman at *Simla*, referred to by the name of *Herbert*. It appears that the person here designated as "*Herbert*," told her that her husband knew of this adultery, and did not care. She also says "Lord *William Hay* told me the same thing." It appears to their Lordships that the view taken of this expression in her letter by the Court above is more correct than that taken by the Court below, *viz.*, that it does not amount to a confession on her part of any adulterous intercourse with Lord *William Hay*, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her husband's supposed sentiments regarding it.

On this part of the case—the lady's confessions—a Mrs. *Byrne* is called, who lives at *Simla*, and whose house Mrs. *Gordon* rented. This lady is the grandmother of a Mr. *Johnson*, who was retained in this case to get up the evidence on the part of Colonel *Gordon*, and she does speak to a communication from Mrs. *Gordon* which would undoubtedly lead to the inference that she had committed adultery with Lord *William Hay*. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. *Deane*, that this lady should, if the statement be correct, not have communicated it in 1862 to Colonel *Gordon*, who was then attempting to procure sufficient evidence to obtain a divorce, as Mrs. *Byrne* must probably have well known.

Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. *Gordon*, written or verbal, are, according to well known principles of law, admissible against Lord *William Hay*; and they now refer to the only evidence against him, which is that of the native witnesses. Without going through that evidence in detail, it may be enough to say that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of "*Boonah*," who speaks of having seen a horse tied up near Mrs. *Gordon's* house at 12 o'clock at night, which she heard from some grooms was the horse of Lord *William Hay*, those grooms not being called. There is evidence of Lord *William Hay* coming to the house on a good many occasions and dining there very frequently, but that is not evidence which, if taken alone, would at all lead to the inference of adultery. There is the evidence of a jampan bearer to the effect that on three occasions he, together with other bearers (it appears there would be four bearers of the jampan), took Mrs. *Gordon* to Lord *William Hay's* house about 8 or 9 o'clock at night, it does not appear at what time in the year. According to his account, the jampan bearers and the jampan remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous or even of a clandestine character. Further, there is the evidence of a man of the name of *Torab*, who had been in the service of Colonel *Gordon* from the year 1856 down to the present time, and this is the only witness who speaks of any familiarities between Lord *William* and Mrs. *Gordon*. His statement is to the effect that Lord *William Hay* frequently came to Mrs. *Gordon's* when her husband was absent (indeed her husband does not seem to have been much at *Simla*); that Lord *William* came to dinner two or three times a week, sometimes in company, sometimes alone, and the witness goes on to say that when he would take away the coffee, Mrs. *Gordon* and Lord *William Hay* would be sitting on a sofa together, he with his arm round her waist. This witness appeals in confirmation of his statements to the evidence of an *ayah* of the name of *Peerun*, who, if not supposed to have witnessed the same familiarity, still was constantly in the house, and would, of course perfectly well known whether Lord *William Hay* was there frequently or not. *Torab* says, that the *ayah* was aware of the frequency

of Lord *William Hay's* visits, and of the familiarity between Lord *William Hay* and Mrs. *Gordon*, and that he and the *ayah* were in the habit of discussing it together, and both of them discussing it with Mrs. *Byrne*. He also states that in the year 1862, when he was in Colonel *Gordon's* service, upon Colonel *Gordon* questioning him concerning the facts to which he was then deposing, he denied all knowledge of them; he adds, "last year Colonel *Gordon* gave me great encouragement" (*dilasa* is the native word) "to speak the truth, and promised to forgive me everything if I would; then I told the *sahib*."

The *ayah Peerun*, upon being called, contradicts the evidence of *Torab*; and is, in fact, a witness in favor of Lord *William Hay*. She, instead of confirming the account which *Torab* had given as to Lord *William Hay's* frequent visits and his intimacy with Mrs. *Gordon*, says this:—"I was in Mrs. *Gordon's* service about nine years ago. Know of nothing between her and Lord *William Hay*. He only called on her twice to my knowledge;" this entirely agrees with Lord *William Hay's* own account in his affidavit, where he says that he only called twice upon Mrs. *Gordon*; one of his visits being to a certain extent on a matter of business, and that he dined once in the house of Colonel *Gordon*. She does speak, and so does one other witness, to an occurrence, certainly somewhat extraordinary, *viz.*, Mrs. *Gordon* going to Lord *William Hay's* house at night, or late in the evening, breaking some of his windows and cutting some creepers outside the house. *Pursoo*, the other witness who speaks to this transaction, represents that Lord *William Hay* declined to have anything to say to her. He says, "I told the *sahib*; he said, if she won't go send for the guard, as she was drunk and might strike me with the knife. I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion that the only evidence against Lord *William Hay* was that of the native witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important particular by Mr. *Johnson*, the gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. *Johnson*. The passage to which the Chief Court refers would appear to be this:—"One morning I was taking my early ride about 7 or 7-30. I saw Mrs. *Gordon* coming down the steps which lead out of *Littlewood*; the *ayah* was with her. I passed close to her, but did not speak; her hair was hanging down." It does not appear to their Lordships that the fact of Mr. *Johnson* meeting this lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones, leading, it is true, to Lord *William Hay's* house, but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native witnesses.

The case, therefore, in their Lordships' view, as far as Lord *William Hay* is concerned, resolves itself into this: the only part of the evidence of any importance is that of a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow servant whom he vouches. Lord *William Hay* must be taken, as the Chief Court of the *Punjab* properly assumes, to have given a general denial of the truth of this evidence; if that denial has not been specific, and has not been tested by cross-examination, the fault, having regard to his desire to be examined on commission, cannot be regarded as his. Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

Their Lordships are not unmindful that they have on more than one occasion laid it down as a general rule, subject to possible exceptions, that they would not reverse the concurrent findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of *India*. This is certainly the

first case which has come before their Lordships, and probably not many suits of this description have been tried in *India*. It is to be observed that in this case it can scarcely be said that there have been two separate judgments, inasmuch as the Legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord *William Hay* the statements of Mrs. *Gordon*, and regarding those statements as confirming the credibility of the evidence of the native witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against the Respondent, and that which was admissible as against the co-Respondent. At the same time they attach a good deal of importance to the finding of the Judge below upon the credibility of the native witnesses, based as that finding was in a great measure upon evidence not admissible. For these reasons their Lordships have come to the conclusion that it is not one of the cases to which the ordinary rule above-mentioned should be applied.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal and to reverse so much of the decree of the Chief Court of the *Punjab* as is appealed against, and that in lieu thereof the suit be dismissed as against Lord *William Hay*, with the costs in the Courts below and the costs of this appeal.

2nd August, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, the Right Hon. Sir Barnes Peacock, the Right Hon. the Lord Justice Mellish, the Right Hon. Sir M. E. Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the Chief Court of the Punjab.

RAJAH SALIQRAM and others, (Plaintiffs*) ... } *Appellants*,

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, (Defendant) ... } *Respondent*.

Forfeiture—Confiscation—Act of State—Jurisdiction—Circular Orders—24 & 25 Vict., c. 67 (Indian Councils Act, 1861.)

The status of the King of *Delhi* was that of a king recognized by the British Government; and the confiscation of his territories in 1857 was an act of State, and not an act done under color of any legal right of which a Municipal Court could take cognisance. His tenure of the territories assigned him by the Government was a tenure merely *durante regno*, and no power was conferred upon him of creating incumbrances which would survive his deposition.

The word "confiscation" does not necessarily import that the appropriation is to be made as a penalty for a crime, nor when used in that sense does it necessarily imply that the forfeiture has accrued upon conviction, but it may also be properly used as applicable to appropriations of property by Government as an act of State.

The Circular Orders, as to the liability of Government for debts of rebels, issued by the Judicial Commissioners of the *Punjab*, were not laws within the meaning of 24 & 25 Vict., c 67.

The cases of *Forester* v. *The Secretary of State* (1) and *Lalla Narain Doss* v. *The Estate of the ex-King of Delhi* (2) distinguished.

THIS was an appeal from a judgment of the Chief Court of the *Punjab*, dated the

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* 12 B. L. R., p. 167; Cowell's Sup. Vol., 119.
(1) 12 B. L. R., p. 120; *Ante*, p. 1.
(2) 11 Moore's I. A., 277; 2 P. C. J., 297.

14th February 1867, given in favor of the Respondent, and confirming two previous judgments of the Assistant Commissioner and the Commissioner of *Delhi*, dated respectively the 24th July 1865 and the 15th January 1866.

The suit was brought by *Saligram* and *Devi Singh* for the payment of a debt alleged to be secured on certain rent-free lands and other real property mortgaged to them by the ex-King of *Delhi*, and now in the possession of the Secretary of State for India in Council in trust for the Crown.

The facts of the case were briefly as follows:—On the expulsion of the *Mahratta* from Upper *Hindustan* in 1803, the British Government granted certain lands, known as the "Assigned Territories," for the support of the kings of *Delhi*. In "Notes of Instructions" to the Resident at *Delhi*, dated the 17th November 1804, providing for the administration of these territories, the Governor-General wrote:—

"The Governor-General does not deem it advisable to enter into any written engagement whatever with His Majesty, nor is it His Excellency's intention to solicit any concession, nor to interdict or oppose any of those outward forms of sovereignty to which His Majesty has been accustomed. His Excellency is desirous of leaving His Majesty in unmolested exercise of all his usual privileges and prerogatives."

In a letter dated the 23rd May 1805, the Secretary to Government, writing to the Resident at *Delhi*, set forth certain provisions made for the King; amongst others, that "His Excellency in Council has been pleased to determine that the territory to be assigned to the royal family shall remain under charge of the Resident at *Delhi*, and that the revenue shall be collected, and justice be administered, in the name of His Majesty, and under Regulations to be prescribed by the authority of the British Government;" and the Governor-General, in communicating these arrangements to the Court of Directors, spoke of the "throne of *Delhi*" being "placed under the protection of the Honorable Company." Under those arrangements the King continued to retain all the outward marks of royalty. Within the precincts of the *Delhi* palace he exercised nominal authority as a sovereign, and was exempt from the jurisdiction of the ordinary Courts of Law; the administration of the assigned territories beyond those precincts being conducted by British functionaries under the order of their Government.

On the 7th October 1841, the following rules were issued by the Government with reference to the King:—

i. "The administration of civil and criminal justice within the precincts of the royal palace at *Delhi* is under the care and control of His Majesty, who in all important cases advises with the Resident or Political Agent at his *durbar*. The ordinary tribunals, established by the British Government for the provinces of *Hindustan*, have no jurisdiction or authority therein. The Courts will regard the royal palace, in respect to all events that occur, and all persons who reside therein, as they would regard a foreign and independent territory.

ii. "The residents of the palace become amenable in their persons to the established Courts of Civil and Criminal Justice on leaving the precincts of the palace. The following persons are excepted from the operation of this rule.

iii. "The emperor and the heir-apparent are exempted in their persons from all civil and criminal process. The sons and brothers of the reigning, or any former, emperor are exempt in their persons from the process of the Civil, but not of the Criminal, Courts. The process of the Criminal Courts shall be served on them through the Lieutenant-Governor's Agent at *Delhi*, who will pay due regard to the rank and circumstances of the parties in communicating the said process.

iv. "All civil suits regarding property lying beyond the precincts of the palace, and otherwise cognizable by the established Courts, to which the privileged persons named in the preceding rule may be parties, shall be instituted or defended by the Lieutenant-Governor's Agent on their behalf.

v. "His Majesty the reigning King of *Delhi* has only a life-interest in the royal domain. His Majesty is the judge of the effect to be given to royal grants

made by himself, or by his predecessors, of any part of such domains. Parties possessing claims founded on such grants shall prefer their application for the gracious consideration of their case to His Majesty at *Delhi*, either direct or through the Lieutenant-Governor's Agent, but shall not be able to bring them before the ordinary Courts of Justice. Decisions thus passed by His Majesty will be respected and enforced by the civil authorities. All other claims, either against His Majesty or his grantees or agents, shall be heard in the Courts and decided as ordinary cases.

vi. "All process in cases cognizable under these rules by the Civil or Criminal Courts on persons resident in the palace shall be served through the Lieutenant-Governor's Agent."

At this period the King of *Delhi* became indebted to the Plaintiffs, who were bankers and shroffs, carrying on business in that place, and in the years 1845, 1846, 1847, and 1851, respectively, as security for loans from them, executed certain instruments in their favor.

On each of these instruments were endorsed the various payments which were made under the signature of the Resident, who made the payments periodically from the income of the properties. The first two instruments were formal deeds of mortgage; the last two, only *shukas*, or royal letters, but by an arrangement with the Lieutenant-Governor's Agent, that officer collected the revenue of the lands specified in the *shukas*, which were treated as hypothecating the particular lands so specified. By this arrangement these lands included *Mauza Ruboopoora*, and other villages forming part of the assigned territories. The last payment made under them was in 1855, after which date the King appears to have refused to allow the Commissioner to make any further payments, nor did the Plaintiffs sue him. In May 1857, the King resumed the management of his own affairs, and the Lieutenant-Governor's Agent ceased to collect the revenue, and to be in any way responsible in the matter. On the 18th of September in that year, after the mutiny, the King was captured by the British Government and made a prisoner of war, having been for some time the nominal head of the insurgents in *Delhi*.

On the 3rd of October 1857, the Commissioner of *Delhi*, in behalf of the Government, seized and took possession of his lands in accordance with the following order:—

"The confiscation of all Crown lands (*tayul-i-shahi*), villages, lands, gardens, &c., and of all the *jagirs* of *sultans*, *begums*, &c., having been deemed proper, it is ordered that *perwannas* be issued to the *tehsildars* of the south, north, and east, to confiscate all the villages and lands above specified, and also to confiscate any other village, lands, gardens, &c., of the above description not mentioned in the accompanying list; and that they should submit a statement of the extent of area and the amount of *jumma* and quality of land. A copy of this proceeding to be forwarded to the Collectors of the districts of *Paneeput*, *Goorgaon*, *Rohtuck*, *Hissar*, and *Sirsa*, with a view to the confiscation being carried out. A copy of this proceeding to be forwarded to the Commissioner of *Meerut* districts, with a view to orders being issued by him for the confiscation of any village, lands, &c., that may be situated in his districts."

The work of the Criminal and Civil Courts, suspended during the disturbance, was resumed; in the case of the former from the commencement of October 1857, in that of the latter not until the 1st July 1858, and the city of *Delhi* continued for some months under military government.

In pursuance of the order of the 3rd October 1857, as was admitted by the Plaintiffs themselves, all the property involved in the present suit was seized, and taken possession of, by the servants of the British Government before the end of the year.

The Plaintiffs, *Saligram* and *Devi Singh*, were concerned in the rebellion. For this offence they were tried and convicted, and punished with a fine of Rs. 10,000 each.

No investigation into private claims against estates confiscated under the special Acts of 1857, occurred before 1859. On the 4th February of that year, the Lieutenant-Governor considering that such claims

should be registerd and enquired into, the Secretary of the *Punjab* Government wrote to the Government of *India*, with reference to the debts of the *Nawabs* of *Jhuggur* and *Dadree*, in the *Delhi* territory, who were described as lately chiefs exercising sovereign powers, whose territory it was said had escheated to the British Government on account of their defection. The Lieutenant-Governor had expressed it as his personal opinion that—

"On the general question of the liability of a confiscated estate exempt from revenue for *bonâ fide* debts contracted by its rebel owner, whilst under ordinary circumstances the successors to a *jagir* was not liable for the debts of his predecessors, still it was to be held that, where a *jagir* reverted, by confiscation, to Government, common rules did not apply; and that the interests of justice required the protection of creditors from a political catastrophe which they could not have foreseen."

On the 9th of August, the Secretary to the Government of *India* answered:—

"I am directed to state that the Governor-General in Council agrees with the Lieutenant-Governor as to the particular cases under consideration. As to the general rule His Excellency considers that all debts contracted upon the security of the estate confiscated should be paid, but he would leave all other debts, such as ordinary personal and contract debts, to be dealt with according to the circumstances of each case. There is no reason why, in the case of prodigality and extravagance on the part of one who has become a rebel, the State should suffer, or why his creditors should benefit by his having rebelled."

In a later letter it was intimated that the Government could not "concur in the opinion of the Lieutenant-Governor in its extreme latitude." "All debts secured by mortgage," wrote the Secretary, "are to be paid, provided, of course, that they are just and properly supported, and have been contracted prior to the act of rebellion, and with no view to its commission." On the 9th of September 1859, the Judicial Commissioner forwarded this correspondence "for the guidance of his subordinates," and on the same day he issued a "Circular Order" (No. 112 of 1859), which stated that the Judicial Commissioner forwarded the letters, above alluded to, for the information and guidance of officials, on the question of the liability of Government for the debts of rebels, whose estates had been confiscated for rebellion. In 1860, the Plaintiffs applied for payment of the present claim to the Commissioner of the *Delhi* Division, and the application was by him referred to the Judicial Commissioner of the *Punjab* on the 18th June. In a letter of that date, he expressed it as his opinion that the payment of any such debts, in accordance with the directions of the Governor-General, must be treated as a matter of favor, to which convicted rebels could not be entitled, and, further, that a distinction was to be made in the present case, between the "rent-free villages," and the rest of the mortgaged property, as the former would be classed with "personal debts." In support of this latter view, he cited a decision of the 7th September 1859, by which certain claims had been rejected, which were preferred on the purchase and mortgage of certain *istemrari* tenures in *Goorgaon*, the confiscated property of outlawed rebels. And he mentioned that on the 10th May 1859, the Revenue Sudder Board of the North-Western Provinces had held that "the *mafi* privilege in *tayul* lands ceased with the confiscation, and the lien with it." The Judicial Commissioner of the *Punjab* expressed his opinion that as much of the claim as could be proved should be made good by Government; and the matter was laid before the Government of *India*, who, on the 28th of December, 1860, replied to this effect:—

"3. Of the claims now advanced, the Commissioner of *Delhi* has put forward as an instance that of *Saligram* and *Devi Singh*, who were convicted as rebels, and punished with a fine of Rs. 10,000 each. Their claim amounts to Rs. 90,000, and is described as the principal and interest due on a mortgage of certain rent-free villages, and other real property, once belonging to the ex-King.

"4. It was ruled in 1858 that the successor to a *jagir* shall not be liable for debts incurred by his predecessor, if he refuses to become responsible for them,

and foregoes all claim to the real or personal property which the deceased may have possessed independently of the *jagir*. But in the case of the *Nawab* of *Dadroe*, whose *jagir* was confiscated and granted in perpetuity to the *Raja* of *Jheend*, and in other similar cases, the Government admitted the principle that the creditors should be protected 'from the effects of a political catastrophe which they could not have foreseen.'

"5. It appears to His Excellency the Governor-General that a distinction may be drawn very properly, and consistently with the principles which have been laid down, between loyal creditors and those who took part in the rebellion.

"6. The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of the deceased grantees. The exception is in the case of such estates which have been confiscated; and this exception is based on the consideration, that 'the interests of justice require the protection of creditors from the effects of a political catastrophe which they could not have foreseen.' But creditors, who, like *Saligram* and *Devi Singh*, joined the rebellion voluntarily, accepted such security for their claims as the rebel cause might offer. They not only foresaw, but assisted to produce the catastrophe, and therefore the interests of justice do not require that they should be protected from its effects. They may have all that they are entitled to by the letter of the law; but the Governor-General would deny them that, which can be claimed only as a favor; for it is in the essence of a concession by favor, that it should be withheld where favor is not due.

"7. The Governor-General is of opinion that neither *Saligram* and *Devi Singh's* claim, nor that of any other creditor of the ex-King who has been convicted of rebellion, to the liquidation of their debts from the revenue of the Crown lands should be admitted."

In accordance with the opinion expressed in this letter, a second Circular Order (No. 5 of 1861), dated 12th January 1861, enclosing that further correspondence, was issued to the same authorities as the previous one, it being expressly stated to be in continuation of the former Circular.

On the 28th of November 1864, the Plaintiffs *Saligram* and *Devi Singh*, having been paid nothing under the mortgage since 1855, commenced the action out of which this appeal arose in the Court of the Assistant Commissioner of *Delhi*. Their claim was for Rs. 68,853-7-2, principal and interest. The plaint was based upon the Circular of 1859:—"The Defendant," it set forth, "owing to the late mutiny, confiscated all the landed estates of the late King; but by a Circular No. 112 of the Judicial Commissioner of these provinces, under the orders of the Supreme Government, all mortgages effected by the late King on these estates which the Defendant has confiscated are to be paid."

The material defences raised by the Defendant were, 1st, that the property alleged to have been mortgaged to the Plaintiffs, with all rights and interests in it, was seized by the Defendant on behalf of the British Crown on political grounds as an act of State, and consequently no claim against the Defendant for so taking possession was cognizable by any Municipal Court; the 2nd was to the same effect, but stated that the seizure was "during the continuance and in the prosecution of war." The 5th and 6th were in the following terms:—

"5. That the Circular No. 112, on which the Plaintiffs grounded their right to demand from Defendant the debts they sued for, was simply a private order addressed by one officer of Government in his executive capacity to others, directing them, as a matter of mere grace and favor, to relax in certain cases, where they would have operated hardly, the laws under which Government was free from legal liability in respect of debts secured on the *Delhi* Crown property, and certain other property, which had come into its possession as a consequence of the rebellion and war of 1857; and that the issuing of such an order could be of no effect whatever to bind the Government as Defendant in a Municipal Court.

"6. That the said Circular did not authorize the exercise of this grace and favor in respect of the debts claimed by the

Plaintiffs, as was clear from the wording of the said Circular, and as was further clear from the Circular 5 of 1861."

Several issues were raised, of which the 1st, 4th, 5th, and 6th were as follow:—

"1. Was the seizure of these properties by Government such an act of State, or act of war, as is not cognizable by a Municipal Court?

"4. Has the Circular in question the force of a legislative enactment?

"5. Do the Circulars issued by the Judicial Commissioner of the *Punjab* in his executive capacity bind the Courts of the *Punjab* or not?

"6. Does Circular 112 apply to the debts claimed by the Plaintiff?"

Other issues were raised as to the effect of Act IX. of 1859 and Act XXXIV. of 1860, which, however, were not insisted on by the Defendant's counsel in the argument before Privy Council.

The Assistant Commissioner gave judgment in favor of the Government on the 24th July 1865. On the question whether the seizure was an act of State, he entered at length into the *Tanjore* case (1), and the parallel it presented, and referred also to the decision of the Privy Council in the case of *The East India Company* v. *Syed Ally* (2), in confirmation of the opinion he deduced from that parallel, that the seizure was, and must be, considered as an act of that description. He also held that the seizure was an act of war, over which, by an established principle of law, no Municipal Court could claim jurisdiction.

The Plaintiffs appealed to the Commissioner of *Delhi*, who, on the 15th January 1866, confirmed the previous judgment.

The Plaintiffs then appealed to the Chief Court of the *Punjab*, and on the 14th February 1867, that Court (*Boulnois* and *Roberts*, JJ.) gave judgment dismissing the appeal. *Boulnois*, J., referred to the cases of *Le Caux* v. *Eden* (3), *Elphinstone* v. *Bedree Chund* (4), and *Kumachee Boye Sahaba* v. *The Secretary of State* (1), and held that the seizure of the mortgaged lands was an act of State, on political grounds, during the continuance and in prosecution of war, and that, consequently, no claim against those whom the Defendant represented, on account of their having taken possession of this property, was maintainable in any Municipal Court immediately after the seizure. He further held that there was nothing to show that there was any intention to make a rule, law or regulation by the Circular Order 112 of 1859; but that even if that order acquired the force of law by the operation of the Indian Councils Act, 1861, and the Plaintiffs' claim was within the words of that order, it was nevertheless expressly excluded by the order of 28th December 1860. Finally he was of opinion that the case was governed by the principle on which *Veer Rajender Wadeer* v. *East India Company* (2) was decided; that Courts of Law cannot take cognizance of acts of power exercised by Government in matters of State arising out of war.

Roberts, J., gave judgment to the same effect, citing, in addition to the cases referred to by *Boulnois*, J., the cases of *Wagentreiber* v. *The Secretary of State* (3) and *Lindo* v. *Rodney* (4).

From these several decisions the Plaintiffs appealed to Her Majesty in Council.

Mr. *Kay*, Q. C., and Mr. *Bush Cooper* for the Appellants.—The Appellants are *bonâ fide* incumbrancers created by the King long before forfeiture. Even admitting for argument's sake the confiscation to be an act of State, it could not affect the Plaintiff's rights as mortgagees. The British authorities gave the King estates to be dealt with at his will and pleasure, and all charges created by him survived his deposition. *Forester* v. *The Secretary of State for India* (5) and *Lalla Narain Doss* v. *The Estate of the ex-King of Delhi* (6) are in point. There

(1) 7 Moore's I. A., 476; 1 P. C. J., 684.
(2) *Id.*, 555; 1 P. C. J., 867.
(3) Doug., 50.
(4) 1 Knapp., P. C., 316; 1 P. C. J., 11.

(1) 7 Moore's I. A., 476; 537; 1 P. C. J., 684.
(2) 30 L. J., Ch., 226.
(3) Unreported.
(4) Doug., 613 note.
(5) 12 H. L. R., 120; *Ante*, p. 1.
(6) 11 Moore's I. A., 277; 2 P. C. J., 297.

is a difference between forfeiture and escheat. Where a man's property is forfeited on conviction, all *bonâ-fide* incumbrances created prior thereto are valid. Even in forfeiture for treason the only incumbrances affected are those after the date of the treason; 3 Inst., 211. The Government had perhaps a right to confiscate what was the King's, but not what had become the property of his creditors.

The Circular No. 112, issued by the Judicial Commissioner, entitles the mortgagees of estates held by the King to have payment; and this Circular, sanctioned by the Supreme Government, had the force of law under the Indian Councils Act, 24 & 25 Vict., c. 67, s. 25. The Circular is a fair and equitable recognition of the rights of the creditors of the deposed King. The learned Counsel referred to several American authorities as to seizures of property during the late war, but their Lordships were of opinion that the cases were not parallel.

Mr. *Forsyth*, Q. C., and Mr. *Merivale* for the Government.—As a matter of fact there existed, at the time of the confiscation by the Government, a state of war. The work of the Courts was suspended; see Co. Lit., 249 *b*; *Elphinstone* v. *Bedree Chund* (1). The case of *The Secretary of State* v. *Kamachee Boye Sahaba* (2) is in point. The names of the King of *Delhi* and the *Rajah* of *Tanjore* were included in the Appendix to the Report of a Committee of the House of Commons in 1832 as being similar in every way—The case of *The East India Company* v. *Syed Ally* (3). It is a matter which no Municipal Court could enquire into. The Plaintiffs seek relief not as having a right to bring an ejectment or to foreclose a mortgage, but under an alleged right founded on the Circular No. 112; and unless they can show such a right, the suit must be dismissed. This Circular has not the force of law: if it has, all the Circulars have; and if so, the subsequent Circulars expressly adverse to the Plaintiffs' particular claim are equally binding. The learned Counsel went at considerable length into the history of the King of *Delhi*.

Mr. *Kay*, Q. C., in reply.

Their Lordships gave the following judgment:—

The Appellants in this case are the heirs and representatives of *Rajah Saligram* and *Rajah Devi Singh*, the Plaintiffs in the suit. The Respondent, the Secretary of State for *India* in Council, is the Defendant. The suit was commenced on the 28th of November 1864 in the Court of the Deputy Commissioner of *Delhi*, to recover the sum of Rs. 68,858 odd, alleged to be due for principal and interest on certain bonds, which, in the plaint, are called mortgage bonds, executed by the late King of *Delhi*.

It was correctly stated by *Boulnois*, J., in delivering his judgment in the Chief Court of the *Punjab*, that the bonds all acknowledged debts, but that all did not mention the property by which the debts were secured.

The plaint, after stating that the claim is on four mortgage bonds of which the dates and amounts are specified, proceeds to describe the grounds of the Defendant's liability in the following words:—"The Defendant, owing to the late mutiny, confiscated all the landed estate of the late King; but by a Circular No. 112 of the Judicial Commissioner of those provinces, under the orders of the Supreme Government, all mortgages effected by the late King on those estates, which the Defendant has confiscated, are to be paid. The Plaintiffs having failed in their application to be reimbursed, as will be seen by the proceedings regarding their claim, and being referred to law to obtain their remedy, are necessitated to file this suit, and pray that a summons may issue against the Defendant, and he be declared to pay the amount claimed, with interest at the rate specified in the bonds up to realization of decree with costs."

The plaint, as pointed out by Mr. *Forsyth*, the learned Counsel for the Defendant, is not a suit for ejectment or foreclosure, nor does it pray that the Defendant may be declared a trustee for the

(1) 1 Knapp., P. C., 316; 1 P. C. J., 11.
(2) 7 Moore's I. A., 476; 1 P. C. J., 681.
(3) 7 Moore's I. A., 555; 1 P. C. J., 867.

Plaintiffs of the revenues collected from the hypothecated villages. It does not even allege that the Defendant, at the time of the commencement of the suit, was in possession of the property. The claim appears in its terms to be founded entirely on a right alleged to have been created by the Circular No. 112 of the Judicial Commissioner. It is to be remarked that the Plaintiffs do not claim merely the value of the property mortgaged; for, in the 7th article of their written statement, they say:—"The Defendant is liable to the full amount of claim, though it may exceed the value of the property mortgaged, or to return the same to them."

It was, in consequence, contended by the Respondent's Counsel with great force that the claimant must be held to the claims actually made by him, and that unless he could succeed in showing that the Circular had given him the right alleged, his claim must necessarily be dismissed. Having regard, however, to the written statement of the Defendant, to the issues raised, and the mode in which those issues were disposed of in the Courts in *India*, their Lordships have in this case thought it right to consider the whole matter, as it was presented to those Courts and at their Lordships' bar.

It must be taken upon the evidence that the late King was, at the time of the confiscation, indebted to the Plaintiffs upon the bonds set forth in the plaint; and that, either by the terms of the bonds, or by his letters to Sir *Thomas Theophilus Metcalfe*, the Resident at the Court of *Delhi*, the King had, so far as he lawfully could, assigned and appropriated to the discharge of the bond debts certain amounts, which the Resident was requested to pay yearly out of the revenues of certain of the royal *tayul* villages. It is admitted, in the 1st and 2nd articles of the Defendant's written statement, that the property, so alleged to have been mortgaged to the Plaintiffs, was, together with all rights and interests in and in respect of it, seized and appropriated on behalf of the British Crown. Several defences were set up in the written statement of the Defendant, but for the purpose of this appeal it is not necessary to consider any of them except the 1st, 2nd, 5th, and 6th. The 2nd, which relied upon s. 20, Act IX. of 1859, and the 3rd, which set up that the Defendant was, by Act XXXIV. of 1860, indemnified from all liability of every kind in respect of seizure and appropriation of the property alleged to have been mortgaged, were abandoned by the learned Counsel for the Defendant upon the argument of this appeal.

The first ground of defence was that the property alleged to have been mortgaged to the Plaintiffs was, together with all rights and interest in and in respect of it, seized and appropriated by the Defendant on behalf of the British Crown, on political grounds, as an act of State; and that, consequently, no claim against the Defendant as having thus taken possession of the said property was cognizable in the Court in which the suit was instituted, or in any other Municipal Court.

The 2nd was similar to the 1st, with the addition that the seizure was "during the continuance and in the prosecution of war."

The 5th and 6th were as follows:—(*reads them, ante*, p. 196.)

Several issues were raised; of these the only important ones to be considered are the 1st, 4th, 5th, and 6th. They are as follows:—(*reads them, ante*, p. 196.)

The case was tried by Mr. *Coldstream*, the Assistant Commissioner of *Delhi*, who, in a very elaborate and well-considered judgment, found those issues for the Defendant, and gave judgment in his favor. A regular appeal was preferred from that judgment to the Commissioner of *Delhi*, who upheld the decision of the Assistant Commissioner.

A special appeal was then presented to the Chief Court of the *Punjab*. That appeal was dismissed, upon the ground that the suit was not cognizable in a Municipal Court. The appeal to Her Majesty in Council is expressed to be against the judgment of the Chief Court of the *Punjab* and the several judgments of the Commissioner and Assistant Commissioner of *Delhi*. There is no dispute, however, as to the facts, and the questions now to be considered are, whether the seizure or confiscation of the property of

the late King was an act in respect of which the Municipal Courts have jurisdiction? Whether the Circular Order of the Judicial Commissioner, No. 112, vested a right of action in the Plaintiffs which can be enforced against the Government by a Court of law? And whether the Plaintiffs had a right or interest in the property, which was not affected by the confiscation of the King's domains. The last was the proposition mainly relied on by the Appellant's Counsel before their Lordships.

The Commissioner of *Delhi* remarked in his judgment "that in the use of the words 'confiscation' and 'seizure' and 'appropriation,' the Court did not perceive any material distinction or difference;" and one of the grounds of appeal to the Chief Court was that the ruling of the Commissioner as to the meaning of those words was erroneous. The Appellants say, in the second ground of their appeal, "the King of *Delhi's* property was confiscated, and the Appellants do not dispute the right of Government to confiscate it; but the King had only a right to that which remained after satisfying the Appellants' claim, and to this alone is the Defendant entitled by virtue of confiscation. The Appellants' property was not confiscated." Mr. *Kay*, in his argument, treated the word "confiscated" as if it were used in the sense of forfeited for a crime, and he cited cases to show the distinction between "forefeiture" and "escheat." The former, he urged, did not affect *bonâ fide* incumbrances created by the offender before forfeiture. He admitted that the confiscation was an act of State, but he denied that it affected the rights which the Plaintiffs had derived from the King by virtue of the mortgages. His argument as regards the effect of a forfeiture upon a regular conviction for a crime would have been correct, if he could have shown that the confiscation of the King's property was an act in the assertion of a right conferred by the law of forfeiture. But such was not the case. Neither was the law of forfeiture in force in the case of natives of *India* convicted of crimes beyond the limits of the Supreme Court, whatever might have been the case within those limits (as to which it is not necessary to express an opinion), nor did the Government affect or purport to act under any such law. The word "confiscation" as used by the Commissioner of *Delhi*, in his proceeding of the 3rd of October 1857, does not import that the appropriation to the public use was for a crime. He says the confiscation of all the Crown villages, &c., having been deemed proper, &c., it is ordered, &c., that *perwannas* be issued to the *tehlisdars*, &c., to confiscate all the villages, &c. In other words, the revenues were to be brought into the public treasury. The word "confication" does not, *per se*, necessarily import that the appropriation is to be made as a penalty for a crime; and even when used in that sense, it does not necessarily imply that the forfeiture has accrued upon conviction, but may also be properly used as applicable to appropriations by Government as an act of State of the property of a public enemy, or of a subdued or deposed ruler.

The Assistant Commissioner found as a fact, that which is well known as a matter of history, that the King was not tried by a regular Court, and that his trial by a Court under a special commission did not take place for some months after the attachment had taken place.

Boulnois, J., in his judgment says:—"After the mutiny in 1857, on the 18th of September in that year, the King of *Delhi* was captured by the British Government, and made a prisoner of war, having been for some time the nominal head of the insurgents in *Delhi*. On the 3rd October in that year, the Commissioner of *Delhi*, on behalf of the Government, attached and took possession of the ex-King's lands. This appropriation accompanied the extinction of the political existence of the representative of the *Delhi* line of kings. It did not affect to justify itself on any ground of Municipal law; and it seems to have been (considering the person who had owned the property seized) an act of power on the part of the British Government exercised in a matter of State. There is, however, additional evidence to show that the authority of Government in that character, which

renders it superior to positive law, was brought to bear in this act, for the seizure of the King's lands was an appropriation of an enemy's property, *flagrante bello.*"

It is not necessary to express an opinion as to what is the effect of the seizure of property of a subject by a Government in the exercise of the powers of war in putting down an insurrection, especially in those cases in which the subject has not joined in the insurrection: nor is it necessary to deal with the cases which have been cited from the American Reports in regard to acts which took place during the late war in that country. The case of the Plaintiffs, who claim under grants from the King, is very different from that of a subject deriving title under an ordinary tenure.

It is necessary to consider under what circumstances the late King of *Delhi* acquired a title to the property charged with the payment of the bond debts, if, indeed, he can be held to have had any legal title whatever to the same, beyond the mere will of the British Government. As to this point, it appears that, after the Emperor *Shah Alum*, the grandfather of the late King, had been rescued from the power of *Dowlut Rao Scindia*, and placed under the protection of the British Government, it became a matter of political expediency to determine the nature and extent of the provision to be assigned for the support of His Majesty and of the royal household. The subject was fully discussed in the Notes of Instructions transmitted by Mr. *Edmonstone*, the Secretary to Government, to Colonel *Ochterlony*, the Resident at *Delhi*, in a letter dated the 17th November 1804 (4 *Wellesley* Despatches, p. 237), of which notes a copy was also dispatched to his Excellency the Commander-in-Chief. Subsequently, on the 23rd May 1805, the final determination of the Governor-General in Council upon the subject was communicated to the Resident at *Delhi*, by letter from the Secretary to Government of that date (see same vol., p. 542).

That arrangement was as much an act of State as if it had been carried into effect by formal treaty signed by the British Government.

Municipal Courts have no jurisdiction to enforce engagements between sovereigns founded upon treaties—*The East India Company* v. *Syed Ally* (1) and *The Nabab of the Carnatic* v. *The East India Company* (2). The Government, when they deposed and confiscated the property of the late King, as between them and the King, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations: nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property.

If, shortly after the arrangement had been made, the British Government had found it necessary as a matter of political expediency to alter, without the consent of *Shah Alum*, the arrangements introduced into the assigned territory, it is impossible to conceive that a Court of Law would have had jurisdiction to enforce the arrangement in a suit brought by His Majesty, either by granting a specific performance, or by awarding damages for the breach of it.

The King of *Delhi* having joined in hostilities against the British Government, having renounced their protection, and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support, was for a time suspended. *Delhi* fell before the British arms, the territories were recaptured, the power of the British Government was restored, and the King of *Delhi* was taken as a prisoner of war. The revenues and territories which in 1804 were, by an act of State, assigned for the maintenance of *Shah Alum* and his household, were in 1857, also by an act of State, resumed and confiscated.

The seizure and confiscation were acts of absolute power, and were not acts done under color of any legal right, of which a Municipal Court could take cognizance.

The status of *Shah Alum* (3) was that of a king. He was treated and recog-

(1) 7 Moore's I. A., 555; 1 P. C. J., 867.
(2) 2 Ves., Jun., 56.
(3) *Sic*; probably a printer's mistake for Mahomed Bahadur.

nized by the British Government as a king, and not merely as a *jagirdar* holding under an ordinary grant from the British Government. He was the grandson of *Shah Alum*, and neither he nor any of his ancestors had ever been deposed by his own subjects, or by the British Government, or by any other power. *Shah Alum* was described, by Lord *Wellesley* in his Despatches, sometimes as the "unfortunate representative of the house of *Timour*," sometimes as "the Mogul" and, again, as "the Emperor." It is unnecessary here to refer more particularly to the extracts from the Despatches which have been pointed out in the exhaustive arguments in the lower Courts. If further arguments were necessary, with reference to the status of the late King, and of his grandfather *Shah Alum*, the Despatch of Lord *Wellesley* to the Secret Committee of the Court of Directors of the East *India* Company of the 18th July 1804 (4 *Wellesley* Despatches, p. 132), might be referred to.

The status of the King of *Delhi* and that of the *Begum Sumroo* were very different. The latter was held not to be a sovereign princess, but a mere *jaidadar* under *Scindia*; and this fact distinguishes the present case from that of *Forester* v. *The Secretary of State for India* (1), in which the judgment of the Judicial Committee was pronounced on the 13th of May last. In that case it was also held that the act of Government was not the seizure by arbitrary power of territories, which up to that time had belonged to another sovereign State; but that it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. It was said:—"The possession was taken under color of a legal title, that title being the undoubted right of the sovereign power to resume, and retain, or assess to the public revenue, all lands within its territories upon the determination of the tenure under which they may have been exceptionally held free. If by means of the continuance of the tenure, or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any arising between the Government and its subjects, would, *primâ facie*, be cognizable by the Municipal Courts of *India*." The seizure of the royal *tayul* villages, for the reasons above given, does not fall within the ruling of *Forester* v. *The Secretary of State for India* (1), but is governed by the principles laid down in *The Secretary of State in Council* v. *Kamachee Boye Sahaba* (2) and *The East India Company* v. *Syed Ali* (3), and in other cases in which the same principle is affirmed. But it is contended that these considerations do not necessarily determine the right of the mortgagees, who are British subjects, to what they claim. It is argued that the British authorities had given *Shah Alum* estates in British territory to be dealt with at his free will and pleasure, so that the charges *bonâ fide* created by him while in possession, *de facto* and *de jure*, as owner, survived his deposition. But their Lordships are clearly of opinion that no such ownership, or power of disposition, was conferred upon *Shah Alum* or his successors. The territories were assigned to him for the support of his royal dignity, and the due maintenance of himself and family in their high position. If he had died or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself

Their Lordships are further clearly of opinion that the Circular Order No. 112 does not amount to a law. It was not enacted as a law, nor did it purport to be a law; and it does not fall within the meaning of the 24 & 25 Vict., c. 67. The Circular was merely a Circular from the Judicial Commissioner, forwarding, for the information and guidance of the Commissioners of the several divisions of the *Punjab*, a copy of correspondence between the Government of the *Punjab* and the

(1) 12 B. L. R., 120; *Ante*, p. 1.

(1) 12 B. L. R., 120; *Ante*, p. 1.
(2) 7 Moore's I. A., 476; 1 P. C. J., 684.
(3) 7 Moore's I. A., 555; 1 P. C. J., 867.

Government of *India*, on the question of the liability of Government, for the debts of rebels whose estates had been confiscated for rebellion. It is clear from the whole tenor of the correspondence which originated out of certain questions referred by the Judicial Commissioner of the *Punjab* for the decisions of Lieutenant-Governor of the province that the Government did not intend to lay down any rule of law, for the breach of which redress might be obtained in a Court of Law, or to use the words of Lord *Kingsdown* in *The East India Company* v. *Syed Ali* (1) "to submit the conduct of its officers, in the execution of a political measure, to the judgment of a legal tribunal." They intended only to declare the course which a sense of justice and equity would induce them, in their discretion and as an act of favor, to adopt. The correspondence in Circular No. 112 did not apply to the Appellants' case. That was treated of in the Circular of the 12th January 1861, in continuation of Circular No. 112. In that Circular of the 12th January 1861, the correspondence on the subject of the Appellants' claim was forwarded, and amongst other letters one from the Officiating Secretary to the Government of *India* to the Secretary of the Government of the *Punjab*, dated 28th December 1860. *(After reading the 6th and 7th paragraphs of the letter which is set out, ante, pp.* 194 *and* 195, *their Lordships continued.)* Even if the prior Circular, on which the Appellants rely, could on any fair principles of legal construction be held to be a legislative recognition of the rights of the creditors of the deposed sovereign to be paid out of the revenues of the deposing Government (the only way in which it could avail the Plaintiffs), the last Circular is an act of like character, of equal validity, and equally binding on the Courts of law.

Their Lordships think it desirable to make a few observations on the case of *Lalla Narain Doss* v. *The Estate of the ex-King of Delhi* (2), in which this Board came to a conclusion in favor of a claimant under the Circulars in question. The title of the cause itself, in which the estate was named as a party, shows how it came to be a matter of judicial cognizance. The Plaintiff there was admitted to claim against the estate. But he was put to prove that he was such a creditor as he alleged himself to be,—that he was one of the creditors intended to be protected by the Circulars. That issue having been raised, and having been, by the act of the Government itself, put in a train of judicial investigation by the legal tribunals, had to be determined in the same manner and on the same principles as any other issue legally raised in any ordinary litigation, and the determination was that the Plaintiff had established his claims under the Circular, as alleged, and that the objections to it had failed. That case has no application to the present, in which the Appellants were peremptorily excluded from the benefit of the Circular.

Their Lordships are of opinion that the judgments from which this appeal was preferred were correct, and they will humbly report to Her Majesty that, in their opinion, those judgments ought to be affirmed, and this appeal dismissed with costs.

(1) 7 Moore's I. A., 555; 1 P. C. J., 867.

(2) 11 Moore's I. A., 277; 2 P. C. J., 297.

5th & 6th November, 1872, and 15th January, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SREENARAIN MITTER, (Defendant)* ... } *Appellant,*

versus

SREEMUTTY KISHEN SOONDERY DASSEE, (Plaintiff) ... } *Respondent.*

Act VIII. of 1859, s. 15—Declaratory Decree—Defendant—Guardian—Minor—Adoption—Sudras.

A declaratory decree cannot be made, unless the Plaintiff would be entitled to consequential relief if he asked for it. It is discretionary with a Court to grant a declaratory decree, and the Courts in *India* ought to be most careful in exercising such discretion.

A, widow of a Hindu, sued *B* as father and guardian of *C* to have it declared that the deeds executed by *A* and *B*, one of giving *C* in adoption, the other of receiving him in adoption, were null and void, on the ground that they were agreements to give and take in adoption, and that *B* did not give his son according to agreement. *Held* (reversing the decision of the Courts below) that such suit was not maintainable.

Quære.—Whether religious ceremonies are necessary to make an adoption valid among *Sudras?*

THIS was an appeal from a decision of the High Court (*Norman* and *E. Jackson*, JJ.), dated the 5th March 1869 (1).

The suit was brought by the Respondent against the Appellant "for himself and as guardian of his minor son *Noggendro Chunder Mitter*," to "set aside two deeds for the adoption of a child executed on the 30th *Jaishta* 1271 (11th June 1864) by both parties, and to throw off the burden which was on the Plaintiff in consequence of those deeds."

The Respondent was the wife of one *Dwarkanath Ghose*, a *Sudra*. He had no male issue, and before his death he gave the Respondent permission to adopt a son to him. The Appellant had a son named *Noggendro Chunder Mitter*, and towards the end of *Jaishta* 1271 (June 1864), he went with his son to *Bhaugulpore*, where the Respondent resided.

On the 30th *Jaishta* 1271 (11th June 1864) at *Bhaugulpore*, the Appellant executed a deed of *danpatra*, or giving in adoption, and the Respondent executed a deed of *grahanpatra*, or taking in adoption, of the said *Noggendro Chunder Mitter*. Both documents were registered, and were taken from the Registration office to one *Luchmeenarain Singh*, who thenceforth kept them on behalf of the Appellant until they were filed on behalf of the Respondent in this suit.

The material portion of the deed of *danpatra* was as follows:—

"I have willingly given in adoption my second son *Noggendro Chunder Mitter* by my third wife *Sreemutty Monmohinee* under the altered name of *Shoshee Nauth Ghose*. The said male child with whom henceforth I have no right at all according to *shastras*, and who has thus become divested of *gotra* (lineage) appertaining to my family, and being equal to the son of your body, has thus become vested with the family rights and *gotra* appertaining to your husband's family under the name of *Shoshee Nauth Ghose*, will discharge or perform all the secular as well as all the religious duties of your husband's family, and will be the owner himself and his heirs for ever of all your husband's property, namely, his *zemindari*, and all immoveable as well as moveable property, and lands paying rent or rent free, which stand in his own name or in *benami*, and which exist at present, or may hereafter be acquired. For this effect, I have executed the deed whereby the child is given in adoption with the following respectable witnesses, that it will prove efficacious in future."

* 11 B. L. R., p. 171, Cowell's Sup. Vol., 149.
(1) 2 B. L. R., A. C., 279.

The deed of *grahanpatra* executed by the Respondent was as follows:—

"This is a deed of adoption. My husband, the late *Dwarkanath Ghose*, died without issue, leaving me his heiress on the 30th June 1863, corresponding to the 17th *Asar* of the year 1270. My husband, in consideration of his having no issue in his life-time, gave me permission to adopt a son for the due performance of the funeral rites of himself and of his ancestors, paternal and maternal, and of myself, and for the due observance and continuation of the religious ceremonies and other ancestral duties, and other rites and ceremonies peculiar to his family, and fitted to his social position, and for the care of his property, &c., and for the preservation of his name and honor, had expressed his desire that the son so adopted might be the exclusive proprietor of all his property and *zemindaries*, and that none else might have any right or title to his property. At present, in obedience to the aforesaid injunction, and with the unanimous consideration and opinion of myself and my near relations and members of the family, knowing you to be my sincere and faithful friend, and believing that by means of your respectable family, the objects aimed at by myself and my husband will be realized, I do, with the prescribed rites and ceremonies, adopt as my son, *Noggendro Chunder Mitter*, your second son by your third wife, *Sreemutty Monmohinee*. The said *Noggendro Chunder Mitter* has thus become divested of all the rights and *gotra* appertaining to your family, and has become vested for ever with the rights and *gotra* of my husband's family under the name of *Shoshee Nauth Ghose*. By virtue of which he, having become equal to the son of my body, is become the owner himself and his heirs of all my husband's ancestral and self-acquired property which stands in his own name, or *benami*, namely, *zemindari* and lands, rent-paying, as well as rent-free, and gardens, &c., and all the moveable and immoveable property, &c. He will henceforth perform in the manner described above, the funeral rites, &c., of myself and my husband and of his (my husband's) paternal and maternal ancestors, and shall also perform the religious and family rites and other duties for ever. During his minority, I, his mother, shall take care of all his property."

It appeared from the evidence that the child *Noggendro Chunder Mitter* was present at the Respondent's house at the time when the documents were being drawn up, and remained there four days, and then went away; and from a letter addressed to the Appellant by *Soorjonarain Singh*, the brother and manager of the Respondent, under date of the 6th *Aswin* 1271 (21st September 1864), it appeared that the child (therein described by his adoptive name) had been sent again to the Respondent's house at *Bhaugulpore*, and was to be put to school there.

Several letters passed between the Appellant and *Soorjonarain Singh*, who wrote as manager on behalf of the Respondent, from which it appeared that there was a difficulty in getting the adopted child to go again to the Respondent's house, inasmuch as he preferred staying with the Appellant, his natural father. In particular, the said *Soojonarain Singh* wrote a letter to the Appellant, dated the 15th *Aghran* 1271 (29th November 1864), from which the following is an extract:—

"Because *Noggendro Chunder* did not go along with cousins *Gopendro Chunder Mitter*, &c., the females have been displeased; but on a consideration of the following circumstances, you will do as you think proper. All the members of the family here think that, if an adopted son does not acquire a due affection for the place where he is brought by the adopting party, it is all the same whether he is adopted or not; and if during infancy, an adopted son frequently goes and comes, he cannot imbibe such affection for the adopting parties. Under such circumstances, going and coming frustrates the main object of adoption; and in future it is likely that disorder and discord might happen. I do not think that the inference of the people here is utterly groundless, for when I went home, some leading men of that part of the country praised your affectionate conduct, and had expressed the same opinion in respect of going. I see that, if he does not go ac-

cording to your wishes, you may be displeased. Both are difficulties to me; if you are mortified, it is painful and sinful to me, and if matters do not proceed according to the wishes of the people here, I shall have to bear shame and reproach in the same way; and if, on account of going, or for any other cause, the cousin were not to contract affection, and were in future to do an unpleasant act, then there will be no end of censure both to you and me. It cannot be said whether we shall be living by that time; but whether we live or not, if such conduct were to take place, we will be held up as examples. I consider you in the light of a father, therefore on consideration that in future there may be no room for blame attaching to me or you, you will settle what should be done. The people here blame me, and will do so for repeatedly urging to go; and if he does not go, you will be displeased. The aforesaid cousin is at present in peace of mind here. There is no likelihood of his being disconsolate. Therefore, if he does not go frequently, then he will not be aggrieved. It is true that by remaining here, your mind and that of the family will be uneasy; but if you don't bear this, everything else will not be in harmony; and if you do not agree to this, then you will consider what is proper in every way. In this respect the uneasiness I am under cannot be described by me in writing. I have placed you in this dilemma by falling into a gross error. Settle what is proper and expedient in every respect."

On the 16th *Magh* 1271 (28th January 1865), the Appellant wrote to the said *Soorjonarain Singh* a letter, from which the following is an extract:—

"The reason why *Sreeman Babajee* (the beloved and fortunate one) feared going there and clearly declined proceeding at present will be told you verbally. When a child becomes obstinate what can be done; therefore do what is good in prospect of the future."

Again, on the 13th *Chaitra* 1271 (25th March 1865), the Appellant wrote as follows:—

"PROSPEROUS AND AFFECTIONATE.—*Noggendro Chunder Mitter* is weak, and is therefore constantly uneasy. He is entirely unwilling to go there. In this I have no power, as I have already stated in my former letter. I now positively inform you that you will, relinquishing that hope, in consideration of the future, certainly make *dattakgrahan* (or take a son into adoption), or any other arrangement you think proper for the preservation of the estate."

It appeared that the Appellant subsequently was advised that the instruments of the 30th *Jaishta* 1271 (11th June 1864) did amount under the circumstances to a complete adoption, for under date the 10th *Chaitra* 1272 (22nd March 1866), he wrote to *Soorjonarain Singh* as follows:—

"I have no power to cancel the adoption of the son who has been already adopted, and I need not talk any thing about it, therefore I must remain silent."

On the 27th April 1866, the Respondent through *Soorjonarain Singh* caused the following letter to be written to the Appellant:—

"SIR,—Under instructions from *Baboo Soorjonarain Singh*, agent on behalf of *Sreemutty Kishen Soondery Dassee*, widow of the late *Mohashoy Dwarkanath Ghose*, of *Chowkee Nyamutpore*, in the *Pergunna* and *Zilla Bhaugulpore*, I do hereby give you notice that on the 30th *Jaishta* 1271 B. S. (11th June 1864), you entered into a contract in writing, agreeing thereby to give your son *Noggendro Chunder Mitter* in adoption to the said *Sreemutty Kishen Soondery Dassee*, and she, in return by a similar instrument of the same date, promised to take your boy in adoption, but the ceremonies necessary to complete it were not performed. On the 30th of *Chaitra* you refused to fulfil your contract by a letter addressed to *Baboo Soorjonarain Singh*, as also you manifested similar feelings in other letters and in conversations held between yourself and her agents.

"In consequence of your unwillingness to complete the adoption, my client called upon you to execute another instrument, cancelling the aforesaid mutual agreements, both verbally and by letters, to which you replied orally, as well as in writing, that you would act in a manner that would suit the

purposes of my client. Now that repeated applications have been made to you on behalf of my client either for the fulfilment of the original written agreements, or for the execution of another instrument in supersession of the former ones, and not having adopted either of the courses required of you, I hereby give you notice that my client is prepared to institute such legal proceedings against you as she may be advised."

Except the letter of the 10th *Chaitra* 1271 (22nd March 1866), no letter, such as alluded to in that communication, was put in evidence.

The Respondent filed her plaint on the 31st May 1866, in which she treated instruments of the 30th *Jaishta* 1271 (11th June 1864) as only agreements to give and take in adoption, and she alleged that the Appellant did not give his son, and that the current form of adoption had not been complied with, and she went on to say that, as she deemed it proper before making an adoption as a necessary precaution to have the permission of the Court, in respect of her right of adoption of another son in cancellation of the agreement, therefore the suit was preferred.

The Appellant, by his written statement, contended that the permission (meaning the declaration of right), which the Respondent asked in the suit could not be obtained, and in substance contended that his son had been adopted by the Respondent after the completion of the necessary rites and ceremonies. The Appellant also denied that he had ever made any promise to the Respondent with a view to set aside the *dattakpatra grahannama* of 30th *Jaishta* 1271 (11th June 1864), and he alleged that the child did sometimes live in the house of his adopted father.

The following were the principal issues settled by the Principal *Sudder Ameen*:—

2*nd*.—Can there be a suit for a declaration of a right to adopt?

3*rd*.—Was the adoption of the child complete or not, that is, whether the requirements of the Hindu law were carried out, or the gift was not complete, and the child not made over?

"4*th*.—Whether the Defendant refused to make over the child to the Plaintiff or not?

"5*th*.—Is mere agreement to make and receive a child in adoption sufficient to preclude one from adopting another child, when the child agreed to be adopted is not made over?"

The Principal *Sudder Ameen* held that the suit was not a merely declaratory suit and was maintainable; that the performance of ceremonies was essential to constitute a valid adoption; that no such ceremonies had been performed in this case; that there was neither gift or acceptance of the boy in adoption; and that it had "been established that the deeds were void for want of due delivery." He therefore gave a decree for the Plaintiff. The following portions of his judgment and the terms of the decree which are referred to in the judgment of the Lords of the Judicial Committee were as follows:—

"It is true that the language of the instruments conveys the idea that there was gift and acceptance, as well as completion of ceremonies; but as the Plaintiff denies them in *toto*, a judicial determination on these points becomes necessary. It has been already established that the ceremonies were not performed; therefore, it remains to be seen whether there was formal gift and acceptance of the boy, as well as due delivery of deeds. If the witnesses of the Plaintiff are to be believed, and I see no reason to doubt their veracity, from their respectable position, neither was there gift or acceptance of the boy, nor due delivery of the deeds. The witnesses for the defence have broken down as already observed; therefore I place no reliance upon what they have said.

"Summing up, therefore, what has been stated above, it is clear that there has not been a due performance of the ceremonies, and the effect of the deeds was that it was agreed that the child should be made over for adoption, but the Defendant has not done what he was required to do, namely, to hand over the child to the Plaintiff; it is, therefore, ordered that the suit of the Plaintiff be decreed, and she be declared to be not bound by the deeds dated the 30th *Jaishta* 1271 (12th June 1864), which are also declared cancelled and inopera-

tive. The costs of the Plaintiff to be paid by the Defendant."

The terms of the decree were as follows:—

"It is ordered that this case be decreed, that the female Plaintiff may not be required to observe the documents of 30th *Jaishta* 1271 (11th June 1864), which have been declared null and void, and that the costs of the female Plaintiff be paid by the Defendant."

Among the grounds of appeal which were filed by the Defendant (now Appellant) in the Court of the Judge of *Bhaugulpore* from the last-mentioned judgment were the two following:—

"4. That in consideration of the nature of the Plaintiff's case, that is, when the Plaintiff brings the suit after admitting the execution of the two absolute and unconditional deeds of gift and acceptance, *viz.*, *dattakgrahanpatra* and *dattakdanpatra*, which prove clearly the completion of the adoption in question, the entire *onus* of proof is on the Plaintiff to establish satisfactorily her own allegations, and to rebut the effect of those documents; but from the lower Court's judgment, it is quite evident that it has taken a wrong or an opposite view of the case, and in consequence justice has miscarried.

"6. That according to Hindu law, the Court below is wrong in supposing that more ceremonies than the actual giving and receiving of the child are necessary and essential for the completion of a *Sudra* adoption. The non-observance of any other ceremony does not invalidate a *Sudra* adoption, as will be borne out by Hindu law and decisions."

"7. That, from the judgment of the Court below, it is clear that it has considered adoption in general, and not a *Sudra* adoption only, which was the sole point for contention in this suit.

"14. That the Court below was wrong in deciding that the delivery of the child, and of the two primary documents, were not proved, inasmuch as there was sufficient satisfactory evidence in the case to establish the same."

The Additional Judge dismissed the appeal with costs. The following are the material portions of his judgment which are referred to in the judgment of the Lords of the Judicial Committee:—

"The subject of this suit is not the declaration of right to adopt, but the cancelment of two documents, and a declaration that they are void, owing to the non-performance of certain ceremonies. The Court is quite clear that such a suit can lie. English Equity Courts frequently cancel, rescind, or order delivery up of instruments which have answered the end for which they were created, or of instruments which are voidable, though apparently valid. This is done upon the principle of, as it is technically called, *quia timet*, that is, for fear that such instruments may be vexatiously or injuriously used when the evidence to impeach may be lost or diminished, or for fear that they may throw a cloud or suspicion over the Plaintiff's title and interests. That the Court of this country have a similar power, there cannot be a doubt.

"*Secondly.*—It has been urged for Appellant that Respondent's claim should have been dismissed, because the plaint wrongly describes as promises to adopt absolute deeds of adoption. But this Court is clear that the said misdescription, inasmuch as it does not alter the cause of action (as described above), but rather strengthens it, cannot cause the suit to abate. We now come to the merits of the case. The first point to be noticed is that the issue in this case has been unnecessarily widened. Appellant contended that ceremonies had been performed, and brought forward witnesses, who distinctly swear that not only the giving and taking but a number of other religious rites were performed. It was, therefore, quite unnecessary on the part of the lower Court to enter into the question of what rites are or are not essential to a Hindu adoption. If the Defendant's (Appellant's) witnesses are to be believed, not only essential, but admittedly non-essential rites were performed. Defendant (Appellant) must abide by the evidence which he adduces, and stand or fall with it. His virtual plea is that all or many of the ceremonies were performed. He cannot in the same breath urge that one only

(that of giving and taking) was performed, and that one only is necessary to the validity of a *Sudra* adoption.

"If the above view is correct, the simple issue in this case is, whether the ceremonies of adoption have been performed (as alleged by Appellants) or have not been performed.

"The lower Court has found, after a careful inquiry and weighing of evidence, documentary and verbal, on either side, that no religious ceremonies of any sort were performed, and on the numerous grounds recorded in its judgment has expressed an opinion that the Defendant's witnesses are not to be believed, whilst the Plaintiff's (Respondent's) witnesses are stating the truth when they say that no ceremonies have ever been performed. The lower Court also lays great weight on certain expressions used in a letter from the Appellant, dated 13th *Chaitra* 1271 (25th March 1865), which contains, in the lower Court's opinion, expressions justifying the inference that, by the Defendant's own admission, no religious ceremonies had been performed, and consequently no valid adoption had taken place. The question before this Court is whether the finding of the lower Court on the above question of fact is correct or not. If it is, the Plaintiff's (Respondent's) claim for cancelment of documents must be decreed, for it is admitted on all hands that an adoption deed is void in the absence of a religious ceremony or ceremonies.

"After a careful consideration of the evidence, both verbal and documentary adduced on either side, the conduct of the parties, and the various probabilities and improbabilities which have been brought to the notice of the Court by the Counsel on either side, this Court has come to the conclusion that there is no valid reason for disturbing the finding of the lower Court to the effect, that no ceremonies were performed, and that consequently the deeds of adoption filed in the case are null and void.

"The appeal is, therefore, dismissed with costs."

The Defendant then preferred to the High Court a special appeal on the following grounds:—

"1*st*.—If the suit is to be regarded as one for a declaration of the Plaintiff's right to adopt, or to adopt a child other than the Defendant's son, it is one disclosing no cause of action. If it is to be regarded as a suit to set aside a contract, it was wholly unnecessary, as the plaint shows that the alleged contract had already been rescinded by the Defendant.

"2*nd*.—There is no allegation of any threat or intention on the Defendant's part of enforcing his rights under the contract, but merely a statement amounting to this, that having once refused to carry out the contract and thereby rescinded it, the Defendant did not rescind it again.

"3*rd*.—The plaint proceeds on the allegation of an original binding contract to give and take a child. Such a contract amounted to an actual gift and acceptance as do the two documents relied on by the Plaintiff, and among *Sudras* nothing more was necessary than the gift and acceptance.

"4*th*.—If any ceremonies were essential, the legal effect and weight of the evidence showed that such had been performed, and such evidence could not be affected by the failure of the Defendant's witnesses to prove the performance of other non-essential ceremonies.

"5*th*.—If the Defendant has lost his right to enforce the contract, the Plaintiff's rights are unaffected by it. If he had not lost his right to enforce the contract, the Plaintiff could not sue to set it aside.

"6*th*.—Letters alleged to have been written by the Defendant are admitted without legal proof.

"7*th*.—It is a mistake on the part of the Court below to suppose that it is admitted on all hands that an adoption deed is void in the absence of a religious ceremony or ceremonies."

The High Court (*Norman* and *E. Jackson*, JJ.), dismissed the appeal (1).

The Defendant appealed to Her Majesty in Council.

Mr. *Cowie* and Mr. *Bell* appeared for the Appellant.—No such suit will lie. The

(1) 2 B. L. R., A. C., 270.

suit is against the father, and although he is sued as guardian, he was not guardian, his son never having been made a party. If it is attempted to be made out that a declaratory decree can be made, it is clear this is not so. To entitle a party to such decree, the Plaintiff must be entitled to consequential relief if he asks for it—*Jackson* v. *Turnley* (1), *Rooke* v. *Lord Kensington* (2), *Kenaram Chuckerbutty* v. *Dinonath Panda* (3), *Puree Jan Khatoon* v. *Bykunt Chunder Chuckerbutty* (4), *Rani Anandkumari* v. *The Government* (5), *and Rajcoomaree Dossee* v. *Nobocoomar Mullick* (6). What consequential relief could be got here? If the deeds were declared cancelled, that could not set aside the adoption. An action might lie for damages against the father for not delivering over his son, but such a suit as this could never lie. The parties are *Sudras*, and the adoption was perfect by gift and acceptance. The deeds do not effect, but are evidence of, the adoption. The boy was fully and irrevocably taken over, and lived with the adopting mother. They cited *Menu's* Inst., p. 210, s. 168; *Strange's* Hindu Law, p. 83; *Veerapermal Pillay* v. *Narrain Pillay* (7), *Sreemutty Joymoney Dossee* v. *Sreemutty Sibosoonderee Dossee* (8), and *Perkash Chunder Roy* v. *Dhunmonee Dossee* (9).

Mr. *Forsyth*, Q. C., Mr. *Leith*, Q. C., and Mr. *Doyne* for the Respondent.—It is quite a mistake to suppose that the adoption was complete so as to be irrevocable; it was not so in fact or in law: all the ceremonies which should be performed in the house of the adoptor have been performed in that of the natural father. None of the benefits which would have accrued to the Respondent and her husband have accrued, and this in consequence of the conduct of the Appellant. While those deeds remain uncancelled, the Respondent is bound by them, and she is entitled to both active relief and a declaratory decree—*Thakoor Deen Tewaree* v. *Nowab Syud Ali Hossein Khan* (1).

Mr. *Cowie* in reply.

THEIR LORDSHIPS gave the following judgment:—

The Appellant was the Defendant, and the Respondent the Plaintiff in the suit below. The suit was brought against the Defendant for himself and as guardian of his minor son called in the plaint *Noggendro Chunder Mitter*, to set aside two deeds dated 30th *Jaishta* 1271 (11th June 1864), relating to the adoption of the minor above-mentioned.

The Plaintiff was the widow of *Dwarkanath Ghose*, deceased, who died childless. There was no dispute as to the fact of her having received permission from her deceased husband to adopt a son. The Plaintiff, in her plaint, described the deeds; the one, as a deed by which the Defendant agreed to give the said *Noggendro Chunder Mitter*, his minor son, to her for adoption in the *dattaka* form; and the other, as a deed by which she agreed to take the said child into adoption. The case of the Plaintiff was that, notwithstanding the deeds, the Defendant refused to give the child, and that therefore the form of adoption had not been complied with. The case of the Defendant (see his written statement) was, that the deeds were not mere agreements, but that the deed executed by the Plaintiff was a deed of adoption, and the deed executed by the Defendant, a deed by which he actually gave his son in adoption, and that the Plaintiff actually took the child, after the completion of the necessary rites and ceremonies. He stated that the Plaintiff could not recede from the deed of adoption, and that he, the Defendant, could not act contrary thereto. He proceeded:—"Now, when the said son, by virtue of his having been adopted, has obtained for himself and his heirs the legal proprietorship of the immoveable and moveable property, and has become the undisputed *malik* of the

(1) 22 L. J., Ch., 949.
(2) 25 L. J., Ch., 795.
(3) 9 W. R., 325.
(4) *Id.*, 381.
(5) 9 B. L. R., 16, (note.)
(6) 1 Boul. Rep., 137.
(7) Notes of Cas. at Madras, 78.
(8) Fult. Rep., 75.
(9) S. D. A., 1853, 90.

(1) 8 W. R., 341.

estate (referring to the estate of the Plaintiff's deceased husband) for ever, according to the precepts of the *shastras*, in that case the Plaintiff has no power to ignore the adopted son's rights; for the giving and taking when completed cannot be revoked, and the Plaintiff has no right to undo that which she has done in obedience to the command of her husband, and the Court cannot interfere in that which the Plaintiff has already done." Further, he contended that, from the terms of the deed executed by the Plaintiff, it was clear that the child had been adopted, and that the necessary rites enjoined by the *shastras* had been performed, that the child had ceased to belong to his the Defendant's *gotra* or family, and had been enrolled in the *gotra* of the Plaintiff, and that the name and family name of the child had been changed from *Mitter* to *Ghose* after the family name of his adoptive father.

The deeds in form are certainly not mere agreements to give and take in adoption.

The deed of gift addressed to the Plaintiff commences:—"This is a deed whereby the child is given in adoption." Then, after reciting that the Plaintiff's deceased husband, in consequence of his having no issue, had during his life given permission to the Plaintiff to adopt a male child, and that the Plaintiff had asked the Defendant for a child to compensate for the said defect and perform the funeral rites of the Plaintiff and her husband, &c., proceeded in the operative part of the deed as follows:—(*reads ante*, page 203).

The deed executed by the Plaintiff addressed to the Defendant, commences:—(*reads ante*, page 204).

The deed having been executed and attested were both registered and made over to the Plaintiff's *mooktear*.

The case was tried before the Principal *Sudder Ameen*, and amongst others the following issues were laid down:—whether the adoption of the child was complete or not: that is, whether the requirements of the Hindu law were carried out, or the gift was not complete, and the child not made over. Whether the Defendant refused to make over the child to the Plaintiff or not. Witnesses were examined on both sides and several letters which passed between the Defendant and *Soorjo Narayan Singh*, the brother of the Plaintiff, were put in evidence. The Principal *Sudder Ameen* found that no religious ceremonies were performed; he also tried as a distinct issue, whether there was a formal delivery and acceptance of the child, and found that issue in the negative in favor of the Plaintiff. He said:—(*reads* from "*It is true*" to "*nor due delivery of the deeds*," *ante*, page 206).

It is not very clear what the Principal *Sudder Ameen* meant by the latter words, "nor due delivery of the deeds," or by the words used in another part of his judgment in which he says:—"It has been established that the deeds are void for want of delivery." It is clear that he did not use the word "delivery" in the technical sense in which that word is used in *England* when applied to the execution of a deed. He probably meant that the deeds were not interchanged; but that was not necessary or important, if the deeds were deeds of gift and adoption, and not mere agreements to give and adopt. The deed executed by the Defendant was delivered to the Plaintiff. The fact that the deed executed by the Plaintiff was retained by her, and not handed over to the Defendant, would rather tend to show that at that time it was considered that the child had been adopted. For, if the child was adopted, the Plaintiff became his mother and guardian, and would naturally keep the deeds of gift and adoption on behalf of the child as evidence of the adoption, and as part of the muniments of her child's title to his adoptive father's estates. Be this as it may, however, it is clear that the deeds were executed. They are admitted by the Plaintiff in his plaint, and by the Defendant in his written statement. Indeed, if they were not executed, the suit was useless and must fail.

In concluding his judgment the Principal *Sudder Ameen* said:—(*reads* from "*Summing up*" to "*by the Defendant*," *ante*, page 206).

Upon that judgment the following decree was drawn up:—(*reads decree of the Principal Sudder Ameen*, *ante*, page 207).

The Defendant appealed to the Judge

upon the following, amongst other, grounds:—(*reads 6th, 7th, & 14th grounds of appeal to the Judge of Bhaugulpore, ante*, page 207).

The appeal was transferred by the Judge to the Additional Judge. The latter did not try the issue, whether there was an actual or formal delivery of the child, or not. He said:—(*reads* from "*We now come to the merits*" to "*dismissed with costs*," *ante*, pages 207 and 208).

The Defendant appealed specially to the High Court. The fourth ground of appeal was:—(*reads ante*, page 208).

That ground of appeal was clearly directed to that part of the judgment of the Additional Judge, in which, after saying that, "if the Defendant's witnesses were to be believed, not only essential, but non-essential rites were performed," he says "he could not in the same breath say that one only—that of giving and taking—was performed." It appears to their Lordships that the view taken by the Additional Judge was not correct. The question to be determined was not, whether the child was legally adopted or not, but whether there was sufficient ground for setting aside the deeds, or declaring them to be void. If the Defendant gave the child, or was willing to give the child, the Plaintiff had no right to sue him in order to have a declaratory decree that the deeds were null and void because certain religious ceremonies necessary to constitute a valid adoption had not been performed. If the Defendant executed the deed of gift, which was admitted, and formally delivered the boy, it was the Plaintiff's own fault if she did not formally accept the child and cause the religious ceremonies to be performed. If she chose to execute a deed, declaring that the child had been adopted by her with the prescribed rites and ceremonies, when in fact the child had not been even given, it was her own fault.

The most important issue in the cause was whether there was a formal gift of the child, or, in other words, whether there was an actual delivery of the child in addition to the execution of the deeds. That issue was not tried by the Additional Judge.

The Defendant appealed specially to the High Court, and that Court held that it was not necessary to determine whether or not a *Sudra* can be adopted without the performance of religious ceremonies, and dismissed the appeal upon the ground that there was no actual giving and receiving of the child. They said:—

"We see no necessity to go into the question whether or not a *Sudra* can be adopted without the performance of religious ceremonies, namely, the offering of the burnt sacrifice, &c.

"The contention of the special Appellant is that, by the execution of two deeds, the one purporting to be a gift, and the other an acceptance of the child by the several parties respectively executing the deeds, there was a valid giving and receiving of the child, so as to make him the adopted son of the person who by these deeds appears to have accepted him as a son.

"We think there is no foundation for the argument of the special Appellant. It appears to us that the giving and receiving of a son in order to constitute a valid adoption, must be an actual giving and actual receiving of the child."

The High Court appears to their Lordships to have been in error in considering merely whether there was any valid adoption or not, instead of considering whether, if there was no adoption it was owing to the fault of the Defendant or to the fault of the Plaintiff herself. They also appear to have been wrong in holding on special appeal that there had been no actual giving of the child when the Additional Judge had not tried that issue. They say:—

"By the grounds of special appeal filed, the Appellant does not suggest that there has been any actual giving and taking of the child, but only a constructive giving and taking by the execution of the deeds. We think that, assuming the facts relied upon as regards such giving and receiving to be established, it is not shown that there was in this case any valid adoption. The change of name, supposed to be evidenced by the deeds, is not a sufficient overt act to show that the child was given and received."

With reference to that statement it appears to their Lordships that the fourth ground of appeal to the High Court referred to that part of the decision of the Additional Judge in which he held, that the Defendant could not rely upon the giving and taking alone, and that the only issue was, whether the religious ceremonies had been performed. The word "ceremonies" in the fourth ground of appeal to the High Court was clearly intended to include the actual giving and taking, or delivery and acceptance of the child, for the Judge treated this giving and taking as a ceremony, but as one upon which alone the Defendant could not rely. The judgment of the Judge is far from clear, arising from the use of the words "ceremonies" and "religious ceremonies." He treats the giving and taking as a ceremony, but whether as a religious ceremony is not clear. He finds that the decision of the Principal *Sudder Ameen* that no religious ceremonies were performed was correct and afterwards speaks of the same finding as one to the effect that no ceremonies were performed. Looking to the fact that the finding of the Principal *Sudder Ameen*, that there was no formal giving and taking, was distinct, and, in addition to his finding, that no religious ceremonies were performed, their Lordships think that the Additional Judge did not try or determine the issue whether there was a formal giving and taking notwithstanding the fourteenth ground of appeal to the Judge. This being so, it appears to their Lordships that the High Court were in error in deciding the case upon the ground that there was no actual giving and actual receiving of the child. In the case of *Sreemutty Joymoney Dossee* v. *Sreemutty Sibosoonderee Dossee* (1), it was held by the Supreme Court in *Calcutta* that amongst *Sudras* no religious ceremony, except in the case of marriage, is necessary. If the Judges of the High Court considered that this suit was maintainable if there was no valid adoption, they ought to have determined whether, in the case of *Sudras*, any religious ceremonies were necessary to render an adoption valid, and, if they considered that religious ceremonies were not necessary, they ought to have directed the Judge to try whether there was a formal delivery of the child, or whether the Defendant refused to deliver him, an issue upon which the Defendant had appealed to the Judge from the finding of the Principal *Sudder Ameen*. If their Lordships thought that this suit could be maintained, they would now do what they consider the High Court ought to have done, but their Lordships do not consider that this suit is under any circumstances maintainable.

The suit is not to set aside the adoption, or to declare that there was no valid adoption, and thus to remove a doubt as to the child's title to the estates. It is merely to set aside the deeds. They were not actually necessary to render the adoption valid, and if they be set aside the Defendant or the child may prove the adoption *aliunde*.

It was stated by the Principal *Sudder Ameen* that the estates of the Plaintiff's deceased husband were of considerable value, paying a rental of Rs. 40,000 a year. The suit was valued at only Rs. 1,500. The appeal to Her Majesty in Council was allowed upon the ground that the suit indirectly involved a claim to property of not less value than Rs. 10,000. The Defendant pleaded that the suit was undervalued, but the Principal *Sudder Ameen* held that, as the pleader of the Defendant had not argued the point, it might be presumed to have been given up. It would have been difficult for the Defendant to contend that the suit, to have the deeds declared void or set aside, was of greater value than Rs. 1,500. The case was accordingly tried as a suit of that value. The consequence was that the regular appeal went to the Judge, and only a special appeal to the High Court. If the suit had been valued at Rs. 5,000, the appeal to the High Court would have been a regular appeal in which they, and upon appeal from them, this tribunal, could have examined the evidence and determined the issues in fact. If a decree be made declaring that the deeds are invalid, a suit may still be brought by the infant to try his title to the estates, and in that suit the evidence may have to be weighed by the

(1) Fulk. Rep., 75.

High Court, and afterwards by the Judicial Committee of the Privy Council. It would be very unsatisfactory if the deeds should be declared void in the present suit, and the adoption should afterwards be upheld in a suit by the infant against the widow, or any other child who, upon the faith of a declaratory decree in this suit, may be given to the Plaintiff in adoption, and be adopted by her.

No fraud on the part of the Defendant has been alleged or proved; all that has been charged against him is that he refused to give the child, or to execute a deed in cancellation of the former deeds.

If the instruments operated merely as agreements to give and accept the child in adoption, as contended by the Plaintiff, the breach by the Defendant of his agreement to give would not render the deeds null and void. The breach of an agreement by one of the parties thereto is a good ground for an action for damages, or for a specific performance, but it does not render the contract void or constitute any ground for setting it aside, or for declaring it to be null and void (1). The cause of suit is stated in the plaint to have arisen on the 10th *Chaitra* 1272 (22nd March 1866), when the Defendant "denied executing," meaning "refused to execute," an *ikrarnamah* in cancellation of the *ikrarnamahs* aforesaid. One of the Plaintiff's objects, as stated in her plaint, in having the documents set aside, was to throw off the burthen which was on her in consequence of the deeds. The High Court says:—

"There was no adoption. The natural father of the child now refuses to carry out his intention to give his child for the purpose of adoption. But the deeds are capable of being at any time used by him or his son to prove that there was an adoption. Under such circumstances, it is clear that the Plaintiff has a right to come to the Court to ask for relief and pray to have the deeds declared void. We interfere for the protection of her right to her husband's property over which those deeds would cast a cloud, which it is necessary for the Plaintiff's security to remove."

(1) See *Ranee Bhobosoondary Dasseah* v. *Issenchunder Dutt*, 11 B. L. R., p. 36.

Their Lordships have already alluded to the absence of any allegation or proof of fraud on the part of the Defendant, and also to the absence of any finding by the Judge upon the issue whether the Defendant formally gave the child, or refused to deliver him. If the child was lawfully adopted, the estates of the Plaintiff's deceased husband vested in him as son and heir, and the Plaintiff ceased to have the estate of a Hindu widow therein; she also ceased to have any power to adopt another son during the life of the child.

It has been held that under the 15 & 16 Vict., c. 86, s. 50, a declaratory decree cannot be made unless the Plaintiff would be entitled to consequential relief if he asked for it—*Rooke* v. *Lord Kensington* (1). The 15th Section, Act VIII. of 1859, is in similar terms. The Plaintiff, upon the facts found, is not entitled to any relief against the Defendant. It has been shown that, treating the documents as mere agreements between the Plaintiff and the father of the child, the Plaintiff could have no right to maintain the present suit. Treating the instruments as deeds of gift and adoption, which their Lordships consider them to be, there is no consequential relief to which the Plaintiff would be entitled against the Defendant if the deeds be declared void. Though deeds of gift and acceptance are not actually necessary for the validity of an adoption, they are still evidence in support of the child's title as an adopted son, and of his rights consequent upon the adoption. In a case of conflicting evidence, in a suit brought on behalf of the child against an adopting mother in respect of her deceased husband's estate, a declaration by her, whether by deed or word of mouth, that she had adopted the child with all necessary ceremonies, would be strong corroborative evidence in the child's favor. In the present case there was conflicting evidence as to the fact of a formal giving and taking, as well as to the fact of the performance of the necessary religious ceremonies, and even upon the evidence of the Plaintiff's own witnesses,

(1) 2 K. & J., 753; S. C., 25 L. J., Ch., 795.

notwithstanding the allegation in the plaint that the child has remained in the house of his natural father, it appears that the child, whether adopted or not, did reside for some time in the house of the Plaintiff. There are also expressions in the letters from the Plaintiff's brother from which it might be inferred that the child had been adopted, and that the Plaintiff was desirous to have the adoption cancelled. Their Lordships express no opinion upon the evidence, with reference to the fact of adoption, as the case is now before them merely upon appeal from a decision of the High Court upon special appeal.

It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in *India* than here of harassing and vexatious litigation, that the Courts in *India* ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

The child is no party to the present suit, and any declaration made in it with regard to the validity or invalidity of the deeds, will not be binding upon him if a suit be hereafter brought on his behalf against the present Plaintiff respecting the estate of her deceased husband; nor would it be binding in any suit between the child and the reversionary heirs of the deceased husband after the death of the Plaintiff; or between the child and any other child who, upon the faith of a declaratory decree in this suit, may hereafter be given in adoption or adopted by the widow, or between the child and his natural brothers, or any other person who may hereafter claim to exclude him from the heritage of his natural father's property upon the ground that he has been adopted into another family. It appears to their Lordships that, under these circumstances, it would not be exercising a sound discretion even if it could be done, to order the deeds to be cancelled or to set them aside, or to declare them void. The Defendant takes no interest under the deed of adoption; a declaration binding upon him only, and not upon the child, would be worse than useless, for it would not protect the Plaintiff, or any child whom she may adopt, from any claims on behalf of the Defendant's son to the estates; and it might induce some other person to give his son to the Plaintiff in adoption and also induce the Plaintiff to adopt another child when the declaration in the decree could not be of any possible use to them.

If the Defendant's son was adopted, the Defendant had no power to cancel the deed of adoption, or to give the Plaintiff permission to adopt another son. Nor would his refusal to send back to the Plaintiff her adopted son, or the fact of his harbouring him in his original home, invalidate the adoption. Whether the child was adopted or not, the Defendant was not bound to execute a deed in cancellation of the former documents, and his refusal to execute such a deed could not give the Plaintiff a cause of action as alleged in her plaint, or rightly subject the Defendant to the costs of the suit which have been awarded against him.

It was suggested that a suit against the father, in his own right and as guardian of his minor son, was tantamount to a suit against the father and the son. But that is not correct. If the son had been made a co-Defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. In a suit by the Plaintiff to set aside the deeds upon the ground that there had been no adoption, the Plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the Plaintiff the guardian of the child, if he had sued her for a declaration that the child had been validly adopted. This is not a mere technical objection. If the father really refused to give the child in adoption, because he did not desire to have him adopted, he was not a proper person to protect the child's interest, or likely to make the best case on behalf in a suit to declare the adoption in-

valid. In making these remarks, their Lordships do not desire to impute to the father, in the present case, any neglect of his son's interests, for he appears to have desired to establish the adoption, and to have acted properly in refusing to execute a deed of cancellation when under the belief, whether right or wrong, that the adoption was complete. The law is clear upon the subject of guardianship of male minors. By Act No. XL. of 1858, passed before this suit was instituted, it was enacted that the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court; and by s. 3 it is enacted that, where the property is of small value, the Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf. In other cases certificate of administration is necessary.

The suit must be treated as one against the Defendant, the father, alone; and for the reasons above given, their Lordships will humbly advise Her Majesty that the decree of the High Court, and the decrees of both the lower Courts, be reversed, and that the suit be dismissed, and that the Plaintiff (the Respondent) do pay to the Defendant (the Appellant) the costs of this appeal and the costs in all the lower Courts.

It is hardly necessary to add that this decision will be no bar to the trial of the question whether the child was or was not duly adopted in any suit properly framed for that purpose.

20th November, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DULI CHAND (Plaintiff)* ... *Appellant,*

versus

MEHER CHAND SAHU and others (Defendants) } *Respondents.*

Suit for Cancellation of Lease—Forfeiture—Act X. of 1859, s. 23, cl. 5, and s. 78.

Where in a perpetual lease there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void: *Held* that in a suit under cl. 5, s. 23 of Act X. of 1859, for cancellation of the lease on account of a breach of the condition, the lessee was entitled to the benefit of s. 78, even though the defence set up was false in fact.

APPEAL from a decision of the High Court (*Norman* and *Seton-Karr*, JJ.), dated the 10th May 1867, modifying a decision of the Deputy Collector of *Patna*. The suit was brought in June 1866, under s. 23 of Act X. of 1859, to recover arrears of rent and for cancellation of a *mukarrari* lease dated August 1848, on account of a breach of a condition therein, that the lease should be void if six instalments of rent were allowed to fall into arrear. The Plaintiff alleged that seventeen instalments were due under the lease.

The Defendants set up in defence that they had paid the greater portion of the arrears, and that only a small sum remained unpaid, and that they had been turned out of possession by a third person to whom they had mortgaged their interest in the property in respect of which rent was sought in the present suit, and who had foreclosed.

* 12 B. L. R, p. 439.

The Collector was of opinion that this defence was a false one, and gave the Plaintiff a decree for arrears of rent, but he considered the claim to cancel the lease barred by limitation.

The High Court on appeal confirmed the decision of the lower Court, as far as it gave a decree to the Plaintiff for the arrears of rent, but held that the claim of the Plaintiff to cancel the lease was not barred by the law of limitation. The Court was proceeding to give the Plaintiff the whole relief sought, but an application appears to have been made on behalf of the Defendants claiming the benefit of s. 78 of Act X. of 1859, which entitled them, on paying the amount decreed within fifteen days, to be continued in possession of the *mukarrari* tenure. After hearing argument on the point, the Court held that the Defendants were entitled to the benefit of s. 78 (1), and made the following decree:—

"It is ordered and decreed that this appeal be decreed, subject to the proviso under the terms of s. 78 of Act X. of 1859, in favor of the Defendants (Respondents), that is to say, that the said Defendants (Respondents) be entitled to continue in possession of the *mukarrari* tenure, the subject of the suit, upon their paying into Court within fifteen days from this date the amount decreed."

From this decision the Plaintiff appealed to Her Majesty in Council on the ground that the High Court was wrong in holding that s. 78, Act X. of 1859, was applicable.

Mr. *Cowie* and Mr *J. D. Bell*, for the Appellant, contended that the suit being brought to cancel the lease under the 5th clause of s. 23 of Act X. of 1859, on account of breach of a condition of the lease, and not under any power given by the Act, the 78th section could not apply. It was not a case in which the Defendant could seek aid on equitable ground, their defence being wholly false. The 78th section was only intended to allow a defaulting tenant against whom a decree for rent has passed to apply within fifteen days after decree on payment of arrears with interest to the date of payment and costs, to stay execution of that part of the decree which ordered the cancelment of the lease; that section would not apply to a case where the Court had passed a conditional decree like the present one, which in fact gave the Respondents fifteen days after decree without interest.

Mr. *Leith*, Q. C., and Mr. *W. C. Mozoomdar* for the Respondents were not called upon.

Their LORDSHIPS gave the following judgment:—

This was a suit by the Appellant against the Respondents, who held under a *mukarrari* lease, for the purpose of recovering arrears of rent, and for the cancellation of the lease in consequence of non-payment, in pursuance of an agreement contained in the lease itself to that effect. The Court below decided in favor of the Plaintiff upon the first point, and decreed the arrears of rent; but on the second point decided against the Plaintiff on the ground that the suit for the cancellation of the lease was barred by the Statute of Limitations.

Upon appeal to the High Court, that Court confirmed so much of the decision of the lower Court as gave the Plaintiff his arrears of rent; but disaffirmed the decision so far as it declared that the Statute of Limitations applied to the claim of the Plaintiff to cancel the lease; the Court went on in their judgment to say that in their opinion s. 78 of Act X. applied, the latter portion of which is in these terms:—"In all cases of suits for the ejectment of a *ryot*, or the cancelment of a lease, the decree shall specify the amount of the arrears, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed." From this latter part of the judgment, the Plaintiff appeals on the ground that he was entitled to a decree declaring the lease to be unconditionally cancelled.

It has been contended that the words of this section, which *primâ facie* certainly would apply to this case, and indeed to all cases of cancellation of leases, were limited

(1) 8 W. R., 188.

in operation by previous sections of the Act, more especially s. 22, which refers to cases where arrears of rent may be "adjudged to be due from any farmer or other leaseholder not having a permanent or transferable interest in the land," and which enacts that "the lease of such leaseholder shall be liable to be cancelled, and the leaseholder to be ejected." It was contended that the latter part of s. 78 only applied to cases where the statutory power was given by this Act to cancel leases, and not to cases where the right to cancellation accrued in consequence of covenants in the lease itself. But their Lordships are of opinion that that would be placing too narrow a construction upon an Act which may be termed, upon the whole, a remedial one, and they see no sufficient reason for limiting what is the *primâ facie* and natural meaning of its terms to the extent contended for.

Their Lordships are, therefore, of opinion that the High Court was right in its determination on the point in question.

But it has been suggested that the decree of the High Court is ambiguous in its terms. There can be no doubt, their Lordships apprehend, as to what the intention of the High Court was, namely, to give effect to the terms of this Statute, and to declare that the lease should be cancelled unless within fifteen days the rent was paid.

The terms of the judgment are these:—"It is ordered and decreed that this appeal be decreed, subject to the proviso under the terms of s. 78 of Act X. of 1859, in favor of the Defendants, Respondents, that is to say, that the said Defendants, Respondents, be entitled to continue in possession of the *mukarrari* tenure, the subject of this suit, upon their paying into Court within fifteen days from this date the amount decreed, namely, the sum of ——," and so on.

It appears to their Lordships that this decree, in effect, orders that the lease is to be cancelled upon the non-payment of rent within the time specified.

That is the interpretation which their Lordships put upon this decree. Should the parties think it necessary to make any application to the Court for the purpose of making the words more clear, that application can, of course, be made, and the Court will exercise their judgment as to whether it be desirable to amend the decree or not.

Their Lordships will advise Her Majesty that this appeal be dismissed with costs.

30th November, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, N. W. Provinces, Agra.

GOPEE LOLL, Manager of the Estate of Gowsawmy Girdhareejee, (Plaintiff)* ... } *Appellant,*

versus

MUSSAMUT SREE CHUNDRAOLEE BUHOOJEE, Widow of Sree Luchmunjee, (Defendant) } *Respondent.*

Hindu Law—Adoption—Inheritance—Practice—Case on the Pleadings.

A second adoption cannot take place in the lifetime of the first adopted son.

Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted son, *held*, the Plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor.

THIS was an appeal from a decree of the High Court at *Agra*, dated 11th April 1868, overruling a decree of the Principal *Sudder Ameen* of *Agra* of 24th December 1867.

* 11 B. L. R., p. 391; Cowell's Sup. Vol., 131.

The suit was brought by *Girdhareejee*, claiming as heir of one *Luchmunjee*, to recover from the Respondent, as widow of *Luchmunjee*, temples and personal property belonging thereto, which he contended she had forfeited her right to on account of her having committed waste.

The case as stated in the plaint was, that one *Damoodurjee* was the owner of the property in dispute, and died leaving two widows, to whom he gave power to adopt sons; that one widow, *Luchmee*, adopted *Gobindjee*, the father of the Plaintiff, and that the other, *Charmuttee*, subsequently adopted *Luchmunjee*, the husband of the Respondent.

It is unnecessary for the purposes of this appeal to detail the defences set up by the Respondent as to the Plaintiff not having been duly adopted, and as to the property not having come to *Luchmunjee* by inheritance from his father: all that it is necessary to state is the title set up by the Plaintiff's pleadings in which he claimed the right to succeed to the exclusion of the Respondent (as a widow committing waste) on the ground that he, as the son of the first adopted son, was entitled as heir of *Luchmunjee*, as also an adopted son.

The father *Damoodurjee* died in 1825, and *Luchmunjee*, whatever his title was, had held possession for many years.

The High Court, without going into the question of the Defendant's title, held that the Plaintiff established no right of inheritance to *Luchmunjee*, as there could not be two adopted sons. They also considered the questions of fact raised as to the adoption of the Plaintiff; but their findings on these points are irrelevant to the present case.

The Plaintiff appealed to Her Majesty in Council.

Mr. *Forsyth*, Q. C., and Mr. *Pontifex* for the Appellant contended (in addition to arguing as to other points which are not alluded to by the Judicial Committee, and could not arise under their finding on the points of law) that the double adoption was good, and that all the history of the family showed that *Luchmunjee's* adoption had been recognized as valid, and that the widow, who had relied upon her husband having been duly adopted, could not be heard to dispute the adoption. They also contended that, as the property had belonged to *Damoodurjee*, then, if *Luchmunjee* had not been properly adopted, the Appellant, as *Damoodurjee's* heir, was entitled.

Mr. *Leith*, Mr. *Cowie*, and Mr. *Campbell* for the Respondent contended that the question as to invalidity of a double adoption was concluded by *Rungama* v. *Atchama* (1); and if a second adoption by *Damoodurjee* would have been bad during the life of another adopted son, a second adoption by his widow, who in fact derived authority solely from the husband, would be equally bad. There was here no estoppel; there was a claim that *Luchmunjee* was legally adopted; but if so, the Plaintiff's father could not have been. All statements as to the adoption of *Luchmunjee* were accompanied by assertions as to the Plaintiff's father having no claim. The whole case for the Plaintiff on the pleadings being founded on a claim to succession to *Luchmunjee*, he was not now entitled to change his position and deny *Luchmunjee* being in as of right, and to claim as heir of *Damoodurjee*.

Mr. *Forsyth* in reply.—Even if the case be not put so high as estoppel, there have been such admissions, and the defence taken has been such, as to entitle the Plaintiff to substantial relief, and whether he claims as heir of *Damoodurjee* or not, the Defendant could not be prejudiced, as no further evidence would have been required if the case had been originally framed for that relief.

THEIR LORDSHIPS delivered the following judgment:—

This was a suit brought to recover possession of a temple and certain jewels and valuables held therewith. The Plaintiff claimed as heir of one *Luchmunjee*. He endeavoured to prove his heirship in this way. He asserted that his grandfather *Damoodurjee* had two wives, *Luchmee* and

(1) 4 Moore's I. A., 1; 1 P. C. J., 313.

Charmuttee; that, shortly before his death, he gave a power to his wives to adopt two sons; that, after his death, his first widow *Luchmee* adopted *Gobindjee*, the father of the Plaintiff; that some four years afterwards, the second widow *Charmuttee* adopted *Luchmunjee*, through whom the Plaintiff claims. The Plaintiff asserts that, on the death of *Luchmunjee*, who, according to his case, was his uncle, he became the heir to *Luchmunjee*, who was in possession of the property. He admits that the Defendant, the widow of *Luchmunjee*, had a life-interest in the property, but he alleges that she had forfeited that life-interest by committing waste.

The Principal *Sudder Ameen* found in effect that the Plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal *Sudder Ameen*: they expressed themselves by no means satisfied that the Defendant had forfeited the property by committing waste; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the Plaintiff had failed to prove his heirship to *Luchmunjee*. They were by no means satisfied that the Plaintiff proved all the facts on which he relied: but they came to the conclusion that assuming all those facts to be proved, as the Plaintiff alleged them, still in point of law his case failed for this reason, that, according to Hindu law, there cannot be two valid successive adoptions, and that the first widow having adopted a son *Gobindjee*, the second widow could not, while *Gobindjee* was alive, make another valid adoption.

The question of successive adoptions was argued very elaborately, and very carefully considered in the case of *Rungama* v. *Atchama* (1) and since the decision of that case, whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordships' opinion it follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his life-time; and that inasmuch as he, *Damoodurjee*, could not, one adopted son being living, adopt another, his second widow *Charmuttee* could not, by virtue of any authority delegated from him, adopt a son while an adopted son was still living.

Their Lordships therefore concur with the judgment of the High Court, which amounts to this, that, assuming all the Plaintiff's facts, as he alleges them in his own favor, still that in point of law the second adoption was invalid, and that consequently there was no relationship between him and the second adopted son *Luchmunjee* under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts on which the Plaintiff relies have been substantiated or not. Assuming them to have been substantiated, his case in point of law fails.

It has been argued on the part of the Appellant that the Defendant in this case is estopped from setting up the true facts of the case, or even asserting the law in her favor, inasmuch as she has represented in former suits and in various ways, by letters and by her actions, that *Luchmunjee* was the adopted son of *Damoodurjee* adopted by *Damoodurjee's* widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of *Luchmunjee*, or the Defendant, on any matter of fact. She is alleged to have represented that *Luchmunjee* was adopted. The Plaintiff's case is that *Luchmunjee* was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties.

It may further be observed that, if *Luchmunjee's* statement is to be taken, it must be taken as a whole; and what he asserts is that he was validly adopted. But if he was validly adopted, it follows that the Plaintiff was invalidly adopted; and therefore in this view of the case it appears to

(1) 4 Moore's I. A., 1; 1 P. C. J., 313.

their Lordships that no reliance can be placed upon this question of estoppel.

It has indeed been further argued that, even putting it not so high as estoppel, still the Plaintiff has been misled, by various representations made by the Defendant, into framing his suit as it is now framed. If that were so, it would not empower their Lordships to depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs. It would not enable their Lordships to allow (as the Appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of *Luchmunjee*, and treating *Luchmunjee* as a mere trespasser, still the Plaintiff could recover by proof of his title from *Damoodurjee*. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the Plaintiffs had failed to prove the title on which they sued, that the Principal *Sudder Ameen's* decree ought therefore to be reversed, and the suit dismissed with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal *Sudder Ameen* reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal *Sudder Ameen* be reversed, and the suit dismissed with costs in both Courts; and their Lordships will humbly advise Her Majesty to this effect. The Appellants must pay the costs of this appeal.

21st December, 1872.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MUSSAMUT MULLEEKA, (Defendant)* ... } *Appellant,*

versus

MUSSAMUT JUMEELA and others, (Plaintiffs), ... } *Respondents.*

Muhomedan Law—Dower—Amount—Limitation—Regulation III. of 1793, s. 14—Practice—Form of Decree—Costs—Act VIII. of 1859, s. 98—Compromise.

Where dower is "prompt," limitation does not begin to run until the dower is demanded, or the marriage is dissolved by death or otherwise.

The amount claimed, viz., Rs. 16,25,000, not having been disputed in the Court of original jurisdiction, was allowed.

Quære.—Whether, in the case of a divorce, a cause of action accrues in respect of deferred dower, before the repudiation has become irrevocable, or the dower has been demanded.

THIS was an appeal from two decrees of the High Court, dated 31st May 1864 (1) *Norman* and *Loch*, JJ.) and 10th January 1866 (2) (*Bayley* and *Pundit*, JJ.), the latter being given after a remand.

The suit was by the first Respondent, *Mussamut Jumeela*, as widow of one *Syud Mahomed*, and by the other Respondents, as purchasers of shares in her claim, to recover a *denmohur* of 90,000 gold

* 11 B. L. R., p. 375; Cowell's Sup. Vol., 135.
(1) W. R., Jan. to July 1864, 252.
(2) 5 W. R., 23.

mohurs and *Sicca* Rupees 90,000, making a total of Co.'s Rs. 16,32,000, settled on her by her husband *Syud Mahomed*, since deceased, the Defendants to the suit being another widow (now Appellant) and his heir *Syud Mahomed Hossein*.

The following were the steps taken in the suit:—The plaint was filed in September 1860: in March 1862 the Principal *Sudder Ameen* held the suit barred by the law of limitation, he considering the dower to be "prompt" and due on the marriage: *King*, one of the Plaintiffs, who had purchased a share in the claim, did not appeal, but the other two Plaintiffs, and another purchaser of a share (*Lokenath Misser*), did so; and, on the 31st May 1864, the High Court held that the dower need not have been sued for during the husband's life, and remanded the case for an enquiry as to the amount of the dower.

The Defendant, *Mussamut Mulleeka*, and *Syud Mahomed Hossein* both appealed against that decree to Her Majesty in Council, but in the meantime the trial under the remand went on, and the Principal *Sudder Ameen* decreed the suit for the amount claimed in favor of the widow and *King* and *Summunt Koonwaree*. *Mussamut Mulleeka* and *Syud Mahomed Hossein* both appealed to the High Court, but before the appeal came on, the latter, so far as he was concerned, compromised, all matters in difference in the suit. On the 10th January 1866, the High Court having dismissed the appeal, *Mussamut Mulleeka* appealed to Her Majesty in Council against that decree also.

The facts of the case were shortly these:—The Respondent *Jumeela* was married in 1833 to *Syud Mahomed*, who was said to be *dewan* to the *Maharajah* of *Koruckpore*; but as to this there was some doubt.

Disputes arose between the husband and wife about three years after the marriage, and from that time they lived separately until his death in February 1854. On his death the Appellant obtained possession of his property, and it was not until the 3rd April 1860 that the present suit was begun.

The defences set up were that there had been a divorce, and that the dower was "prompt," and therefore that it was barred by the law of limitation: there was then no specific case set up as to the amount claimed.

The evidence was conflicting as to whether the dower was "prompt" or "deferred," and the Principal *Sudder Ameen* decided that nothing having been fixed as to the time of payment it was "prompt," and ought to have been sued for in twelve years from the marriage, and therefore that the suit was barred by the law of limitation.

As to the question of divorce the evidence was conflicting, it appearing that proceedings had taken place before the Magistrate in which the wife had herself alleged that she had been divorced; while, on the other hand, it was alleged that the husband had filed petitions claiming her as his wife. Mutual charges of forgery as to these petitions were adduced at the trial.

The decision of the Principal *Sudder Ameen* on the law of limitation was reversed by the High Court on the authority of *Ameeroonissa* v. *Mooradoonissa* (1), and they, holding that there was no divorce, remanded the case for trial as to the amount of dower.

The Principal *Sudder Ameen*, as abovementioned, found for the whole amount claimed, and the High Court on appeal affirmed that decision. The two appeals now came on for hearing.

Mr. *Doyne* for the Appellant.—The case is not to be governed by the decision in *Ameeroonissa* v. *Mooradoonissa* (1). In that case the Plaintiff was the heir-at-law, and he did not raise the question of limitation by his plaint. The Defendant was the widow, who had remained for several years, after her husband's death, in possession of the estate, over which she claimed a lien for her dower, and she had lived on terms of amity with her husband. But here is a case where, if there was not a divorce, there was a separation, a denial of the wife's rights, and she is simply a creditor seeking to recover a debt due at the time of the marriage; she is

(1) 6 Moore's I. A., 211; 1 P. C. J., 533.

barred by Regulation III. of 1793, s. 14. See *Hedaya*, Vol. I., p. 150; *Baillie's* Mahomedan Law, p. 91. There was no demand necessary, for the dower was "prompt," so *Simpson* v. *Routh* (1) would not apply—see *Meer Nujiboolah* v. *Mussamut Doorduna Khatoon* (2) and *Noorunissa Begum* v. *Nowab Syud Ali Khan* (3). The learned Counsel then proceeded to argue as to there having been a divorce, and as to the amount claimed being too large. As to the form of decree, *King's* share must be excluded, as he never appealed against the first finding of the Principal *Sudder Ameen*, and his rights are therefore not before the Court—*Mussamut Jaraitoolbutool* v. *Mussamut Hosseinee Begum* (4).

Mr. *Leith* and Mr. *C. W. Arathoon* for the Respondent (after arguing as to the amount and as to the divorce). The principle is clear if there was no divorce, even if the dower be "prompt," limitation runs from the date of demand, or from the death of the husband—*Nawab Jung Bahadoor Khan* v. *Mussamut Uzeez Begum* (5); *Baillie's* Mahomedan Law, p. 125; *Ameeroonissa* v. *Mooradoonissa* (6). The point is concluded by this authority.

Mr. *Doyne* in reply.

THEIR LORDSHIPS gave the following judgment:—

The Appellant was one of the Defendants in the Court below. The suit was brought to recover a very large sum of money—*viz.*, Rs. 16,25,000, upwards of 160,000*l.*, as the balance due on account of *denmohur*, or dower, alleged to have been settled upon the Plaintiff *Jumeela* by her late husband *Syud Mahomed*.

The suit was instituted by *Jumeela* and two other persons, *viz.*, Mr. *H. O. King*, a *mooktear*, and *Mussamut Summunt Koonwaree*, Mr. *H. O. King* being a purchaseer for the sum of Rs. 5,000 of one-fourth part of the amount alleged to be due to the Plaintiff *Jumeela*, and also of one-fourth of her share in the landed estate of her deceased husband; and the Plaintiff, *Mussamnt Summunt Koonwaree*, being also a purchaser of another fourth part of *Jumeela's denmohur* and of her share of her deceased husband's estate for a like sum of Rs. 5,000.

The dower was described in the plaint as *denmohur mudjil*, or dower payable at a future period, on divorce or death of the husband.

The Defendants pleaded limitation, upon the ground that the Plaintiff had been divorced by her husband more than twelve years before the commencement of the suit.

Three issues were laid down:—

1. Whether *Syud Mahomed* actually divorced the Plaintiff, *Mussamut Jumeela*, his wife?

2. How much of the *denmohur* was payable immediately? and how much deferred?

3. Whether, with reference to the determination of the first and second issues, the suit was barred by limitation?

With reference to the last issue, it should be stated that the suit was commenced on the 3rd of September 1860, and that the period of limitation was that fixed by Regulation III. of 1793, s. 14, *viz.*, twelve years. The marriage took place more than twelve years before the commencement of the suit. *Syud Mahomed* died on the 21st February 1854—more than six years, and less than twelve years, before the commencement of the suit.

The case was tried by the Principal *Sudder Ameen* of *Bhaugulpore* upon the second issue in the first instance. He found that the *denmohur* was prompt, and with advertence to that finding, he held that the twelve years ought to be calculated from the date of the marriage, and that, consequently, the suit was barred by lapse of time. He did not consider it necessary to try the first issue, whether the Plaintiff had been divorced or not, but dismissed the suit with costs on the ground of limitation.

The case was appealed to the High Court for a 12-anna share of the sum

(1) 2 B. & C., 682
(2) 1 Sel. Rep., 103.
(3) 7 Sel. Rep., 40.
(4) 11 Moore's I. A., 194; 2 P. C. J., 243.
(5) S. D., N. W. P., 1845, 180.
(6) 6 Moore's I. A., 211; 1 P. C. J., 533.

claimed on account of *denmohur*, exclusive of the one-fourth share of Mr. *H. O. King*, who did not join in the appeal. The petitioners in the appeal were *Jumeela* and *Summunt Koonwaree*, and also one *Lokenath Misser*, who, pending the suit, *viz.*, on the 31st March 1862, purchased from *Jumeela*, for the sum of Rs. 400, a 2-anna share of her *denmohur*.

The appeal was heard by a Division Court. They found that the divorce was not proved, and held that the suit was not barred by limitation. They reversed the decision of the Principal *Sudder Ameen*, and remanded the case to him to try what was the amount of the dower. That was on the 31st of May 1864.

The Defendants, on the 23rd June 1864, appealed to Her Majesty in Council against that decision.

The case having gone back upon remand under the decision of the High Court, the then Principal *Sudder Ameen*, a Mahomedan, proceeded to try what was the amount of the dower. Many witnesses were examined on both sides, and he found that the *denmohur* was settled at one lakh and eighty thousand, one moiety rupees, and the other gold mohurs, and he gave a decree for the Plaintiffs for the amount claimed, *viz.*, Rs. 16,25,000, with costs and interest. He came to that conclusion not only upon the evidence of witnesses who spoke to what actually took place, but upon the evidence of other witnesses, to whom he gave credit, that the custom prevailing in the Plaintiff's family and also in most of the other respectable families in *Bhaugulpore*, was in accordance with the amount which the other witnesses proved to have been actually settled in their presence.

On the 13th February 1865, an appeal was preferred by the Defendants to the High Court against that decision. The case was heard before a Division Bench of the High Court, and the appeal was dismissed with costs.

The Defendant, *Mussamut Mulleeka* alone, on the 5th July 1866, appealed to Her Majesty in Council against the last-mentioned decree of the High Court, the other Defendant having compromised the claim against him.

We have, therefore, under the two appeals before us to consider whether the judgment of the High Court overruling the plea of limitation, and remanding the case, and the decision as to amount of dower, are correct or not. Their Lordships are of opinion that a divorce was not proved. In this respect they concur in the finding of the High Court upon a question of fact. They intimated that opinion in the course of the argument.

It is now to be considered whether the suit was barred by limitation. In the first place we will consider whether it was barred if the dower was prompt.

The Principal *Sudder Ameen* on the first trial held that, as the dower was settled without any specification as to the time at which it was to be payable, it must, according to the Mahomedan law, be considered to be *denmohur muájjil*, to be paid, to use his own words, "on demand, or immediately on demand by the wife." The High Court upon the first appeal considered the Mahomedan law to be precise, that, if nothing is said at the time, the dower is to be considered exigible; but they held upon the authority of *Ameeroonissa* v. *Mooradoonissa* (1) that, although the dower was exigible, the Plaintiff *Jumeela* was not bound to sue for it during the life of her husband. Their Lordships are of opinion that the Principal *Sudder Ameen* who first tried the case, and who considered that the dower was payable on demand, was not correct in holding that the cause of action accrued to the wife before dissolution of the marriage without demand. There are no doubt conflicting decisions as to the period at which a cause of action accrues to a wife in respect of prompt dower. Prompt dower is said to be exigible immediately. *Macnaghten* in his Principles of Mahomedan Law, p. 59, says:—"Where it has not been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." The word "exigible" implies that it may, not that it must, be exacted, and therefore it would seem that a cause of action in res-

(1) 6 Moore's I. A., 211; 1 P. C. J., p. 533.

pect of it does not accrue so long as the marriage exists, until the wife does something to show that she requires it to be paid. According to the Mahomedan law, a woman may refuse herself to her husband as a means of obtaining so much of her dower as it prompt—*Baillie's* Digest of Mahomedan Law, p. 125. That is a mode of exacting it. But she is not obliged to adopt it. It is optional with her either to insist upon the payment of her prompt dower during her husband's lifetime, or to wait until the dissolution of the marriage. In *Meer Nujiboolah* v. *Mussamut Doorduna Khatoon* (1), it was held that the right to prompt dower was barred by limitation in consequence of the period which had elapsed since the date of the settlement, although, at the time of the commencement of the suit, twelve years had not elapsed since the husband's death. That decision was followed in *Noorunissa Begum* v. *Nawab Syud Ali Khan* (2). In the case of *Nawab Jung Bahadoor Khan* v. *Mussamut Uzeez Begum* (3), the Court pointed out the distinction between a contract to pay on a stipulated date, and a contract to pay on demand, and said that, in the former case, should the obligor fail to pay on the stipulated day, a cause of action would then accrue for the recovery of the sum due, but that in the case of an obligation to pay on demand (which they considered an obligation to pay exigible dower to be), there was no infraction of the obligation, and, consequently, no legal cause of action before demand. From the case of *Ameeroonissa* v. *Mooradoonissa* (4), it would seem that the Lords of the Judicial Committee were of opinion that limitation, in respect of prompt dower, did not run from the time of the marriage, but from the death of the husband. In that case there was a settlement by which the husband agreed to pay dower when demanded by his wife. The wife was not suing for her dower, but was in possession of her deceased husband's property, and set up her right of dower in answer to the husband's heir, who sued to recover possession of the estate. In that case the Lord Justice *Knight Bruce* expressed the opinion of the Judicial Committee that a wife was not obliged to sue her husband immediately or in his life-time; and that limitation did not apply as a bar to her claim for dower. If the principle of that decision be followed in the present case, the Plaintiff is not barred by limitation. In the case of *Simpson* v. *Routh* (1), which was referred to in the last-mentioned case, Lord *Tenterden* said:—"In this, as in other cases where a demand is necessary to give a right of action, the commencement of the action is not of itself a demand." In *Macnaghten's* Precedents of Mahomedan Law, p. 275, it is said:—"The dower becomes due on the consummation of the marriage, or the death of either of the parties, or on divorce. Should the wife not claim the payment of it during the life-time of her husband, it must be paid to her out of the property left by him on his decease." Their Lordships are of opinion that the case of *Nawab Jung Bahadoor Khan* v. *Mussamut Uzeez Begum* (2), above cited, was rightly decided, and that, in respect of prompt dower payable under the Mahomedan law, limitation does not begin to run before the dower is demanded, or the marriage is dissolved by death, or otherwise.

In the present case, as a divorce was not proved, it is unnecessary to consider whether, even in the case of a divorce, a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded. Their Lordships having determined that there was no divorce, and that the suit was not barred by limitation if the dower was prompt, it becomes unnecessary to determine whether it was prompt or deferred; for the suit having been commenced within twelve years from the time of the death of *Syud Mahomed*, it was clearly not barred if the dower was deferred.

The question as to the amount of dower was one of fact, as to which their Lordships see no reason to interfere with the

(1) 1 Sel. Rep., 103.
(2) 7 Sel. Rep., 40.
(3) S. D., N. W. P., 1845, 180.
(4) 6 Moore's I. A., 239; 1 P. C. J., p. 535.

(1) 2 B. & C., 682.
(2) S. D., N. W. P., 1845, 180.

decision of the Principal *Sudder Ameen*, which was affirmed on appeal by the High Court. Their Lordships concur in the remark of the High Court:—"It may be true that the sum claimed and deposed to as agreed upon and customary is a very large sum; but the Mahomedan law-books, the decided cases, and the experience of the country, show that it is a fact that sums so apparently beyond the means of the parties are fixed as dower amongst Mahomedans from the highest to the lowest." There is nothing in the Mahomedan law to limit the amount fixable for dower, see 1 *Macnaghten's* Select Cases, p. 275, and *id.*, p. 48, in which the amount fixed was 3,00,000 gold *mohurs;* see also the same vol., p. 206. The above cases, it should be remarked, were decided upon the authority of *fatwas* obtained from the Mahomedan law officers. In *Macnaghten's* Precedents of Mahomedan Law, p. 181, there is the opinion of Mahomedan law officers that a dower exceeding 1,50,000 gold *mohurs*, which absorbed the whole estate of the husband, took precedence of claims by inheritance. No defence was set up in the Court of original jurisdiction upon the ground that the amount fixed was a mere sham, and that neither of the parties intended that it was to be acted upon, and it is not for a Court of Appeal to suggest or give effect to such a defence when it was never raised in the Court of original jurisdiction, which, if the question had been there raised, might have laid down a distinct issue, and taken evidence upon the subject. In *Macnaghten's* Principles of Mahomedan Law, case 35, p. 288, a very large amount of dower was upheld on a question put to ascertain whether the deed of dower was a mere device to prevent divorce.

The judgment of the Principal *Sudder Ameen* upon the trial after the remand was "that a decree should pass in favor of all the Plaintiffs, *viz.*, '*Mussamut Jumeela, Sammunt Koonwaree*, and Mr. *King*,' to this effect that they, the Plaintiffs, do recover the amount in suit with interest and costs from the Defendants in possession of the property left by *Syud Mahomed*, in proportion to their appropriations, as well as from the property left by the said deceased." No decree appears to have been drawn up upon that judgment, as it ought to have been. The High Court dismissed the appeal from that decision with costs. The judgment accordingly stands. It appears to their Lordships that the judgment was not correct. Mr. *King*, not having appealed from the first decision, *viz.*, that of the Principal *Sudder Ameen* of the 8th March 1862, was not entitled to the benefit of the reversal of that judgment—*Mussamut Jaraitoolbutool* v. *Mussamut Hosseinee Begum* (1), and the judgment under the remand ought not to have been in his favor, but ought to have been limited to the 12-anna share, to which alone the appeal related. Further, their Lordships are of opinion that the decree is erroneous in awarding the demand against the Defendants in proportion to their appropriations, and in rendering them personally liable to that extent in addition to the charge upon the assets. The Defendants were not liable except as representatives of the deceased. As representatives they were liable for the whole debt to the extent of the assets received, and not duly administered by them respectively. It is not because an executor or heir has only three-fourths of the assets that he is liable only to three-fourths of the debt. He is liable to pay the whole debt so far as the assets in his hands will go. Whatever the amount of assets, the proper form of decree against the two Defendants, sued jointly as representatives, is that the Plaintiff do recover the whole amount against the Defendants as representatives of the deceased to be paid out of the property of the deceased. Each of the Defendants would then be liable for the whole debt to the extent of the assets received by him, and the decree would be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of both or either of the Defendants; and if no such property could be found, and the Defendants should fail to satisfy the Court that they had duly applied such property of the deceased as should be proved to have come into their

(1) 11 Moore's I. A., 207; 2 P. C. J., p. 243.

several possessions, the decree might be executed against the Defendants respectively to the extent of the property not duly applied by them, in the same manner as if the decree had been obtained against them personally, or, in other words, by the attachment and sale of their own private properties (Act VIII. of 1859, s. 203). If, however, the decree were against one of the Defendants for three-fourths of the debt, and against the other Defendant for one-fourth, and the Defendant against whom the decree for one-fourth was given should prove, under the execution, that he had duly applied the whole of the one-fourth of the assets which had come to his hands in payment of other just debts due from the deceased, the decree-holders could not levy more than three-fourths of the debt upon the other Defendant, notwithstanding the assets in his hands might be sufficient to pay the whole debt, and thus they would be deprived of one-fourth of their demand, notwithstanding the rule of Mahomedan law that all the assets must be applied in payment of debts in preference to claims by inheritance.

If matters had remained as they were when the Principal *Sudder Ameen* gave judgment upon the trial after the remand, the decree might be set right by declaring that the Plaintiffs, *Jumeela* and *Summunt Koonwaree*, do recover three-fourths of the amount of dower from the Defendants as representatives of the deceased, to be paid out of the assets of the deceased. But it appears that one of the Defendants, *viz.*, *Syud Mahomed Hossein*, after the decree of the Principal *Sudder Ameen* under the remand and before the decree of the High Court upon the appeal against that decree, compromised the claim against him. The *solenama*, or deed of compromise, was made between the Plaintiff, *Jumeela*, and *Kassim Ally Khan*, described as purchaser of the share of *Beeboo Jumeela*, the Plaintiff *Summunt Koonwaree*, *Lokenath Misser*, and the Defendant *Syud Mahomed Hossein*. After reciting that certain suits were depending between them, each of the parties renounced and relinquished every sort of claim, and declared that there remained no claim one against another. By paragraph 1, it was declared that, out of the 16 annas of the property of the late *Syud Mahomed*, 12 annas had come into the possession of the Defendant *Syud Mahomed Hossein*, and of purchasers from him, of which 5 annas and 9 pie came to the Defendant *Mahomed Hossein* as his share, and the remainder, 6 annas and 3 pie, came to the Plaintiff *Mussamut Jumeela* and others as their share, (meaning that, by the terms of the compromise, they were to have a 6-anna 3-pie share). By paragraph 2 it was declared that, out of the 6-anna share (meaning, no doubt, the 6-anna 3-pie share), the Plaintiff *Jumeela*, and at the then present moment *Kassim Ally Khan*, who was stated to be the purchaser of her share, had accepted 2 annas; the Plaintiff *Mussamut Summunt Koonwaree*, in lieu of the entire properties (that is, the shares of *Jumeela's* dower purchased by her), accepted a 3-anna 6-pie share; and *Lokenath Misser*, in lieu of his purchase, accepted a 9-pie share. These shares constituted the whole of the 6-anna 3-pie share of the estate of the deceased, which was given by the Defendant *Mahomed Hossein* in satisfaction of the claim against him. By the 9th paragraph it was declared that all differences existing between the parties to the compromise having been cleared up, thereafter no manner of claim whatever remained to be instituted one against another either regarding the payment of *denmohur* or the expenses of the suits therein mentioned, or for the recovery of *wasilat* (mesne profits) and each of the declarants renounced and relinquished the total expenses of all suits from the beginning up to the then present moment. By paragraph 10 the parties agreed to file petitions of agreement in the cases of appeal to *England* and to the High Court, and the *Zillah* Courts, and *Mahomed Hossein* relinquished the security-bond in the case in appeal to the Privy Council. Paragraph 11 was as follows:—

"Since the conditions of this *solenama* are in accordance with the aforementioned detail regarding the 12 annas share, and the 4 annas share of the property left by *Syud Mahomed* has come into the possession of *Mussamut Mulleeka*, the same has

no concern with *Hajee Mahomed Hossein* and others. It has, therefore, been settled between *Mussamut Jumeela, Kassim Ally Khan, Summunt Koonwaree,* and *Lokenath Misser,* that the whole or any portion of the 4 annas which may be acquired by the compromise, or in execution of the decree for the *denmohur,* or by means of the institution of a suit for *Mussamut Mulleeka,* shall be partitioned into sixteen shares, out of which *Mussamut Summunt Koonwaree* shall take ten shares, and five shares *Mussamut Jumeela* and *Kassim Ally Khan,* and one share *Lokenath Misser.*"

In pursuance of the agreement in paragraph 10, the *solenama* was sent up to the High Court, and was recorded, and forms part of the record before us.

The suit ought, according to the provisions of s. 98, Act VIII. of 1859, to have been disposed of in accordance with the terms of the compromise. The decree of the High Court, after referring in express terms to the compromise, dismissed the appeal, and thereby in substance upheld the decision of the Principal *Sudder Ameen* of the 28th September 1864. It was certainly not in accordance with the compromise, for the decree of the Principal *Sudder Ameen* ordered the Defendant *Mahomed Hossein* to pay a proportion of the debt and costs; and the decree of the High Court ordered him to pay the costs of the appeal, though the Plaintiffs had expressly renounced all costs.

It is important to remark that the 6-anna 3-pie share of the estate which was given by the Defendant *Mahomed Hossein,* in satisfaction of the claim against him, consisted of immoveable estate. Their Lordships know nothing as regards the value of the whole of the estate, or of the 6-anna 3-pie share accepted by the Plaintiffs in satisfaction of their claim against the last-named Defendant.

It appears to their Lordships that the effect of the compromise was to release the Defendant *Mahomed Hossein* and the 12-anna share, or three-fourths of the assets which came to his hands, and consequently to release the other heirs and the remaining one-fourth of the assets, from that portion of the debt which, as between the several heirs, ought to be borne by the three-fourths of the assets released, or, in other words, from three-fourths of the amount claimed. That is the construction which the High Court, by their decree, appear to have put upon the compromise. If the whole debt should be decreed to be levied out of the remaining one-fourth of the assets, the Plaintiffs, having received a 6-anna 3-pie share of the whole estate, might still levy the whole debt, and thus obtain more than they are entitled to; and if the debt should be levied out of the remaining one-fourth of the assets, the Defendant *Mahomed Hossein* would, as between him and the other heirs, be liable to contribute three-fourths of the amount so levied, notwithstanding the compromise by which he gave a 6-anna 3-pie share of the estate in discharge of the liability of the 12-anna share of the assets which came into his possession, and to enable him to retain, as against the Plaintiffs, the other 5-anna 9-pie share of the assets. Their Lordships therefore think that, in consequence of the compromise, the remaining one-fourth of the assets is liable for only one-fourth of the debt.

The shares of heirs cannot be ascertained until all debts have been satisfied. It is only the balance after paying all debts that, according to the Mahomedan law, is divisible amongst them. A compromise operates for the benefit of all those amongst whom the estate is divisible, and the balance is divisible amongst them (see *Baillie* on the Mahomedan Law of Inheritance, p. 108). If the compromise made by *Mahomed Hossein* by giving up to the Plaintiff a 6-anna 3-pie share of the estate operated for his benefit alone, and to release the three-quarter share of the assets which he took by inheritance, the result would be that he might retain a 5-anna 3-pie share of the estate out of the 12-anna share which came to his hands, whilst the other fourth of the estate in the hands of *Mulleeka* might be seized and sold for payment of the remainder of the debt, and thus be wholly absorbed. By these means *Mahomed Hossein,* as one of the heirs, would obtain a 5-anna 9-pie share of the estate, whilst the other heirs would get nothing, which would be contrary to the

principles of the Mahomedan Law of Inheritance.

It may be, and probably is, the fact that even one-fourth of the debt will absorb the whole of the remaining one-fourth of the assets, and if that be the case, the heirs of *Mahomed Hossein* may be called upon by the other heirs for contribution out of the 5-anna 9-pie share, which he retained under the compromise. If such should be the effect of the decree against *Mulleeka* for one-fourth of the debt, it will be because the compromise did not intend to release more than three-fourths of the assets. This is clear from the 11th paragraph of the compromise.

The Defendant *Mahomed Hossein* jointly with Defendant *Mulleeka* appealed to the High Court, but having compromised the claim against him, he has not joined in the appeal to Her Majesty in Council. The consequence is that the decree of the High Court will stand against him, and he must avail himself of the compromise in such manner as he may be advised, should the Plaintiffs endeavour to execute the decree against him. If he had appealed, he would have been entitled to have the suit disposed of in accordance with the compromise according to the provisions of s. 98 of Act VIII. of 1859. In that case the decree must have been modified as against the Defendant *Mulleeka*, and she cannot be deprived of the benefit of the compromise in consequence of *Mahomed Hossein's* not having appealed.

The decree of the Principal *Sudder Ameen* of the 28th September 1864, upon the trial after the remand, and the decree of the High Court of the 10th January 1866, by which that decree was upheld, ought to be reversed. Mr. *King's* share of the amount claimed has already been disposed of in consequence of his not having appealed against the first decision of the Principal *Sudder Ameen* of the 8th day of March 1862. Their Lordships are of opinion that the Plaintiffs *Jumeela* and *Summunt Koonwaree* are not entitled to recover from the Defendant *Mulleeka* more than three-fourths of the one-fourth of the demand which has not been satisfied by the compromise, or, in other words, three-sixteenths of the whole amount claimed, but that they are entitled to a decree against her as representative of the said *Syud Mahomed*, deceased, for three-sixteenths of the amount sued for, and three-sixteenths of the costs incurred in the lower Courts prior to the appeal to the High Court, of the 13th February 1865, to be paid out of the property of the said *Syud Mahomed*, deceased, other than the 12-anna share, or three-fourths thereof, to which the said compromise related, and that the decree of the High Court, of the 31st day of May 1864, ought to be affirmed, but that, in consequence of the compromise, it should be modified as to the costs.

Considering also the mode in which so large an amount of dower was settled by the deceased without any writing, and the uncertainty which existed as to whether payment of it would amount to a due administration of assets, we think that the Defendant *Mulleeka* was justified in resisting the suit and taking the opinion of the Court, and that she ought to be at liberty to retain her costs incurred in the several proceedings in this suit, and in the appeals to Her Majesty in Council, out of any assets of the said *Syud Mahomed* in her hands after satisfaction of the sums awarded against her in this suit; and that such costs take priority of all claims by inheritance to any portion of such assets.

Upon the whole their Lordships will humbly advise Her Majesty that the decree of the High Court of the 31st of May 1864 be affirmed, except so far as the Defendant *Mulleeka* is thereby ordered to pay costs and interest thereon, and that the Plaintiffs *Jumeela* and *Summunt Koonwaree* do recover against the Defendant *Mulleeka*, as representative of the late *Syud Mahomed*, deceased, three-sixteenths of the costs and interest awarded by the said last-mentioned decree, to be paid out of the assets of the late *Syud Mahomed*, deceased, other than that portion thereof to which the said compromise relates; that the judgment of the Principal *Sudder Ameen* of the 28th day of September 1864, and the judgment and decree of the High Court of the 10th of January 1866, so far as they relate to the Defendant *Mulleeka*, be reversed with

costs of the appeal to the High Court of the 13th of February 1865, and that it be decreed that the Plaintiffs *Jumeela* and *Summunt Koonwaree* do recover against the Defendant *Mulleeka* as representative of the late *Syud Mahomed*, deceased, three-sixteenths of the whole amount claimed in the suit, and three-sixteenths of the costs incurred by the Plaintiffs in the lower Court prior to the appeal to the High Court of the 13th of February 1865, the said portions of the amount claimed, and of the said costs, to be paid out of the property of the late *Syud Mahomed*, deceased, other than that portion thereof to which the said compromise relates, and that such decree be without prejudice to the rights, if any, which the Defendant *Mulleeka*, or any of the heirs of the late *Syud Mahomed*, may have against the said Defendant *Mahomed Hossein*, in consequence of the execution or satisfaction of the said decree, and that the Defendant *Mulleeka* be at liberty to retain her costs of all the proceedings in this suit, and also of the appeals to Her Majesty in Council, out of any assets of the said *Syud Mahomed*, deceased, in her hands, after satisfaction of the sums awarded against her in this suit in preference to all claims by inheritance to such assets.

And their Lordships order that each of the Plaintiffs *Jumeela* and *Summunt Koonwaree*, and the Defendant *Mulleeka*, do bear her own costs of the above-mentioned appeals to Her Majesty in Council.

22nd and 23rd January, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SADUT ALI KHAN (Defendant)* ... *Appellant,*

versus

KHAJEH ABDOOL GUNNEY (Plaintiff) ... *Respondent;*

and

KHAJEH ABDOOL GUNNEY (Plaintiff) ... *Appellant,*

versus

MUSSAMUT ZAHOOR-UDOONISSA KHANUM (Defendant) ... *Respondent.*

Act VIII. of 1859, s. 15—Declaratory Decree—Limitation—Payment—Act X. of 1859—Enhancement.

A declaratory decree may be made only where the declaration of right may be the foundation of relief to be got somewhere. Thus, a suit to establish a title to land, with a view to taking proceedings in the Collector's Court under Act X. of 1859 to enhance the rent, is one in which a declaratory decree may be made.

The Judicial Committee will not on light grounds interfere with the exercise by a High Court of its discretion in granting a declaratory decree, the suit being one in which a declaratory decree may be made.

THEIR LORDSHIPS gave the following judgment in both appeals:—

In delivering judgment upon these appeals, their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahomedan *Zemindar*, in the district of *Mymensing*, died on the

* 11 B. L. R., p. 203.

16th of December 1824, leaving two widows and a son. The son is the Appellant in the first, and the husband of the Respondent in the second, appeal. The widows were *Shumsoonissa* and *Reazoon*, who was the mother of the Appellant *Sadut Ali Khan*. *Fyz Ali Khan*, upon the occasion of his marriage with *Shumsoonissa Begum*, had contracted to give her a certain dower, of which one-third was to be prompt; and it appears to have been agreed on the same occasion that he should, in satisfaction of that portion of the dower which was prompt, make over to her, as he accordingly did make over by a *kabinama*, 22 villages forming part of his *zemindari*. A partition was then in the course of being made between him and his co-sharers in the larger *zemindari* of which that property which, for the purposes of this suit, may be called his *zemindari*, was part; on that partition three of the villages comprised in the *kabinama* fell to the lot of one of his co-sharers; and it is contended on the part of *Sadut Ali* that thereupon an *ikrarnama* was, a year after the marriage, executed by *Fyz Ali*, by which he substituted three other villages forming part of his *zemindari* in the place of those three villages, and created a sub-tenure or dependent *talook* out of the 22 villages, as then constituted, under the name of *Russoolpore*, on which he received a gross rent of Rs. 49.

In the second suit a considerable contest has been raised as to the genuineness of the *ikrarnama*, but it is perfectly certain that, by some means or another, the substitution of the three new villages for the three former villages did take place; and that whereas the *kabinama* was silent as to the reservation of any rent, the 22 villages were afterwards held upon the terms of paying a rent of Rs. 49. It will be more convenient, since it is necessary to keep the two appeals in some measure distinct, to consider the objections made to the genuineness of the *ikrarnama* when their Lordships come to consider that suit, and to assume that, either by the *ikrarnama* or some other means, the 22 villages really did become a sub-tenure paying one rent of Rs. 49.

Immediately upon the death of *Fyz Ali*, there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate which one would fain hope is singular even in *India*. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to show the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by *Reazoon Begum*, on her own behalf and as guardian of her infant son *Sadut Ali*, against *Shumsoonissa Begum*, who had got into possession of the whole estate; and had called in question the marriage of *Reazoon* with *Fyz Ali*, and the legitimacy of *Sadut Ali*, in order to establish the right of herself and her son to share in the estate. That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844 Her Majesty made a final order affirming the decisions of the Indian Courts, which were in favor of the rights claimed by the Plaintiffs.

Pending that litigation, *Khajeh Azim Oolah*, the father of the party who is the Respondent in the first appeal, and the Appellant in the second appeal, had made advances to *Reazoon* for the purpose of enabling her to carry on her suit; and, as is usual in *India*, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by *Sadut Ali Khan* upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present *Khajeh*, who has succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments which have been addressed to their Lordships at the bar, to observe that, although the agreement was originally for one moiety, which would be 7½ annas of the 15 annas which were finally decreed to the mother and her son, the *Khajeh*, upon a representation founded on the existence of the sub-tenure and the poverty of *Reazoon* and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he

should take only 7 of the 15 annas. It is therefore clear that the ultimate contract between the parties was made with a full knowledge of the existence of the sub-tenure. And if matters had remained as they then were, the rights of the parties would have stood thus:—*Reazoon Begum* would have been entitled to 1 anna of the *zemindari* right; *Shumsoonissa Begum* would have been entitled to another anna of the *zemindari* right and also to the *talookdari* interest in the villages; *Sadut Ali Khan* would have been entitled to 7 annas of the *zemindari* right; and *Khajeh Abdool* would have been entitled to 7 annas of the *zemindari* right.

It had been expressly provided by the original decree of the *Sudder* Court, which was affirmed by Her Majesty in Council, that the villages which formed the sub-tenure were to be taken as separated from the *corpus* of the estate, subject of course to any rent which might be payable in respect of them to the *Zemindars*; and the division of the assets of the *zemindari* between *Reazoon* and her son on the one side, and *Shumsoonissa* on the other, was accordingly made on that footing. The position of the parties, however, was afterwards changed. *Shumsoonissa Begum* had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother *Hedaet Oolah*; and he having failed to pay, pursuant to the order in Council, the costs of the appeal, her interest in *Fyz Ali's* estate which had descended to him, and of which he was then in possession, was attached and put up to sale. It was brought by *Sadut Ali*, who afterwards transferred the sub-tenure, and possibly the whole of what he bought, to his wife, who is the Respondent in the second appeal.

There is some evidence that in the first instance the *Khajeh* was put into some kind of constructive possession of the 7 annas of the *zemindari* which had been assigned to him; disputes afterwards took place between the parties, and he found it necessary to bring a suit in order to enforce his rights under the purchase. In that suit a final decree was made in his favor in 1853. Thereupon the rights and position of the parties seem to have been as follows:—The wife of *Sadut Ali Khan*, *Zamoorudoonissa*, as the holder of the sub-tenure, was entitled to the beneficial interest therein; but whatever rent was payable by her to the *zemindari* was divisible between those entitled to the *zemindari* according to their respective shares; the Appellant being entitled to 7 annas of that rent, whatever it might be. As soon as the decree had been made in his favor, he seems to have conceived the notion that he was entitled as *Zemindar* to enhance that rent; and he took proceedings on two occasions, before he brought the suit which has given rise to the first appeal, in order to establish his right to enhance. He was unsuccessful upon both occasions; and upon the last doubt was thrown upon his title to claim a *zemindari* right in respect of the villages included in the sub-tenure. Thereupon he instituted the suit out of which the first appeal has arisen.

The Defendants in that suit, *Sadut Ali Khan* and his wife, although, as will presently be shown, they had on a former occasion admitted the Plaintiff's right to share in the rent reserved on the 22 villages, saw fit to contest that right, and alleged that no *zemindari* right in respect of the village had passed under the purchase to *Khajeh Azim Oolah*. They also contended that, if any had passed, the Plaintiff had never received any rents, and that by reason of his non-reception of any share of the rent for a period of more than 12 years, his suit was barred by limitation. Formal issues were settled to raise these defences, and the cause was tried upon them. These were the real points upon which the case was fought in the Courts below; and it has now been admitted at the bar by Mr. *Leith* that he cannot support the first of them. It is then conceded that, by reason of the transfer to the *Khajeh* of the 7-anna share in the *zemindari*, he became entitled to a proportionate share of the Rs. 49 reserved upon the 22 villages. It was however contended and fully argued by Mr. *Doyne* that the suit was barred by the statute of limitations. Their Lordships have fully considered the able argument that was addressed to them upon that point, and they are not satisfied

that the statute of limitations was a bar to the suit. The circumstance which was chiefly relied upon by the High Court as made the principal ground of their judgment, was that in the course of the suit which the *Khajeh* brought to enforce his rights under the agreement for purchase, a large sum for mesne profits became due from *Sadut Ali Khan* to him; that ultimately there was a compromise between them which fixed the amount to be paid at, I think, Rs. 70,000, which sum was actually paid to him within the 12 years. It was argued, however, by Mr. *Doyne* that the last item of the rent of the villages which could have entered into the sum for which that compromise was made must have been rent which had accrued more than 12 years before the commencement of the suit. Their Lordships are nevertheless not disposed to dispute the view of the High Court that the payment of the sum taken to include the arrears of that rent within the 12 years was evidence of a recognition of the title of the *Khajeh* to the rent, which is sufficient to exclude the notion of an adverse possession for more than 12 years before the institution of this suit. The case, however, of the Respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call blowing hot and cold; and it certainly appears that in the first of the proceedings which were taken anterior to the suit for the purpose of enhancing the rent, the contention of the Defendants was this:—"True, you are entitled as *Zemindar* to a proportionate share of the existing rent of this *talook*, but you are not entitled to enhance that rent." Therefore, it appears to their Lordships that this is not a case to which the statute of limitations could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in *India*. It was, however, strenuously argued that the suit ought to fail, because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the bar was two-fold: first, that no such suit would lie unless some consequential relief could be granted as ancillary to it; and, secondly, that to entertain such a suit is a matter of discretion in the Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that, if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion. Nor assuming that there was a discretion to entertain the suit, do their Lordships think that in this case it was unsoundly exercised? The Respondent in his last suit for enhancement had been turned round on the ground that he had not any *zemindari* right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs. 49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in *India* on this article of the Code, and in the Court of Chancery upon the analogous provision of the English statute is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the *zemindari* title.

Therefore upon both grounds it appeared to their Lordships yesterday on the close of the Appellant's case that he had failed to show any reason for disturbing the decision of the High Court in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now it is not unimportant with reference to the second appeal to see what that decree was. It is in these words:—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the lower Court be reversed. And it is declared that the 22 villages in the suit comprise a tenure situated within, and being part of, and paying a rent of Rs. 49 to the proprietors of the *zemindari* No. 10 on the *tauji* of the Collector of *Mymensing* comprising As. 5-1-1-1 of *Pergunna Atteeah*. And it is further declared that Plaintiff is a proprietor of 7 annas out of 15 annas of that *zemindari*, and that as proprietor he is entitled to a share of the rent of this tenure in proportion to his interest in the estate." It seems to their Lordships impossible for the Appellant who was the Plaintiff in the second suit to go behind that decree, and to say that the 22 villages did not constitute a tenure within the *zemindari*, on which a gross rent of Rs. 49 was reserved to the *Zemindars*.

Having got this decree the *Khajeh* proceeded to bring his suit for enhancement against *Zamoorudoonissa Begum*, as the holder of the tenure. Among the issues settled in that suit, there were these:—1st. Whether the notice had specified the particulars required by law to be specified, and whether it had been duly served? And the 2nd, which was the material one, is in these words:—"Are the villages in question liable to enhancement of rent as stated by the Plaintiff, or fit to be exempted from increased assessment, being held by Defendant at a fixed rate in perpetuity under a *likhan* granted by the former *Zemindar*." The notice, it was admitted, was a notice which was necessarily given under the 13th section of Act X. of 1859. In the view their Lordships have taken of the second issue it is not necessary for them to consider whether that notice was sufficient. The Deputy Collector, who tried the case in the first instance, considered that it was sufficient. Some doubt was thrown upon that by *Phear*, J., in the High Court. He seems to have considered it insufficient; but their Lordships think it will be far more satisfactory to decide this case upon its merits, and the question raised by the second issue, *viz.*, whether the rent is enhanceable or not, in a suit regularly framed.

The foundation of the tenant's title was the *kabinama*; and the transaction upon the face of the *kabinama* was a transfer of the 22 villages included in it to *Shumsoonissa* in satisfaction of the one-third of her agreed dower. It did not reserve any rent whatever. It did not make any mention of or provision for the payment of the Government revenue payable in respect of those particular villages; and though it did not contain any words of inheritance in the strict sense of the term, it did not contain any express direction that the enjoyment of the villages granted should be limited to any particular time. The nature of the transaction affords strong ground for the conclusion that the villages were intended to be made over absolutely, and for all time; because the woman was entitled to the third of her dower absolutely. She might have disposed of that as she pleased; and when, in lieu of that she took a grant of the villages, the presumption is that she was intended to take an absolute interest. Again, the hereditary nature of her interest seems to be almost put beyond a doubt by the decree in the first suit, which is the foundation of the *Khajeh's* title, because when she died, her heir, who was appointed to carry on the suit in her place, did so, and the decree contains a direction concerning these villages, notwithstanding her demise, which implies the existence of the tenure. Nor does the hereditary character of the tenure seem to have been disputed up to the present time. It may seem strange that no provision was made expressly in the instrument for the payment of the Government revenue. But the *Zemindar* may have been willing to take the whole of the Government revenue upon himself; and his doing this may have been an element in the settlement of the terms upon which

the third of the dower was to be given up. Of course, such a transaction might be impeached by a purchaser of the *zemindari* for arrears of Government revenue. But it is nevertheless good against all who claim title under *Fyz Ali Khan*. Nor can the fact that the instrument is silent concerning the payment of the Government revenue affect the questions raised by this appeal; because, even if the grant be taken to be a grant of the villages subject to the payment of the Government revenue, and the *Zemindar* may have paid the Government revenue on account of the tenant, his right to recover what he has so paid could not enter into a suit for enhancement of rent, but would be a matter for which he must seek his remedy in a Civil Court.

The question of the *ikrarnama* is now to be considered. Their Lordships find that the validity of this instrument has been affirmed by the concurrent judgment of both the Indian Courts. They do not deny that there may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The Plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the *kabinama*; or that the 22 villages were not afterwards held as a sub-tenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the Defendant, and he fails to show by what means other than the *ikrarnama* the substitution of the villages and the creation of the tenure took place. Therefore, it seems to their Lordships that they must accept the *ikrarnama* as established, and act upon it accordingly. If they do that, it appears to them that, inasmuch as the *ikrarnama* declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal with costs.

24th January, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NUFFERCHUNDER PAUL CHOWDRY and another (Heirs of Plaintiff)* ... } *Appellants*,

versus

JONATHAN POULSON (Defendant) ... } *Respondent*.

Res-judicata—Enhancement of Rent—Declaratory Decree.

Where, in a suit for enhancement of rent, the Plaintiff failed to prove notice of enhancement, but the Court enquired into, and gave a declaratory decree as to, his right to enhance, such decree is decisive of the right in a subsequent suit for enhancement of the rent of the same tenure founded on a valid notice.

The decision in *Rakhal Doss Bose* v. *Sheikh Golam Surwar* (1) approved of.

THEIR LORDSHIPS gave the following judgment:—

THIS was a suit for enhancement of rent, to which the defence in substance was that the land, with reference to which the question arose, had been held at a uniform rent from the decennial settlement, and the Defendant sought to avail himself of ss. 15 and 16 of Act X. of 1859. The Deputy Collector gave his decision

* 12 B. L. R., p. 53.

(1) 2 W. R., Act X. Rul., 69.

for the Plaintiff, and determined upon a certain enhanced rent in pursuance of inquiries which he had made. This decision was reversed by the High Court, who held that the Plaintiff was not entitled to enhance.

The question has been reduced to one of comparatively small dimensions. The Defendant, as has been stated, relies upon ss. 15 and 16 of Act X. of 1859. Those sections are in these terms:—S. 15 says:—"No dependent *talookdar*, or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the *ryots*," which is this case, "who in the provinces of *Bengal*, *Behar*, *Orissa*, and *Benares*, holds his *talook* or tenure (otherwise than under a terminable lease) at a fixed rent, which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in s. 51, Regulation VIII. of 1793, or in any other law to the contrary notwithstanding." Then s. 16 goes on to say:—"Whenever, in any suit under this Act, it shall be proved that the rent at which a *talook* or other tenure is held in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such *talook* or tenure has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

In their Lordships' opinion, the Defendant did establish that the rent at which the *talook* was held had not been changed for a period of twenty years before the commencement of this suit, and that he thereby cast upon the Plaintiff the burden of showing "the contrary" (in the words of the Act), or that the rent had been fixed at some later period; and their Lordships are of opinion that the Plaintiff has succeeded in proving that which was cast upon him to prove. His proof consisted mainly in this:—That in 1860 a suit was brought, which was decided in 1863 by the High Court, by the Plaintiff, or his predecessor in title, against the Defendant's father, under whom the Defendant claims, for enhancement of rent. The case of the Defendant was then this:—In the first place he said that no sufficient notice had been proved; secondly, he said that the *talook* had been granted to him, or his predecessor in title, in the year 1824, by various *pottas*, and that they fixed a uniform *mokurari* rent which could not subsequently be changed. But he did not set up any title previous to those *pottas*. He did not set up that which was open to him to set up, namely, that he had held at a fixed rent from the permanent settlement, or, indeed, twelve years before it, which at that time would have been an answer to the case. It should be stated that this suit was decided before Act X. to which previous reference has been made, came into operation. The state of the law then was, that he could defend himself by showing an ancient tenure going back twelve years before the decennial settlement; but he made no case of the kind. He made a case of *mokurari* tenure, established by *pottas* in 1824. Upon that case the Court below gave a decree to the Plaintiff on both points, on the ground that the notice was sufficient, the *pottas* not being established, and that the power to enhance had been proved. The High Court upon appeal disagreed with the lower Court upon the first point. They held that the notice was not sufficient, but they proceeded to decide that the Plaintiff had a right to enhance.

It has been said that this declaration on their part that the Plaintiff had a right to enhance, although he had given no sufficient notice, was *ultra vires*; that upon failure of proof of notice, the Court had no right to make any such declaration, and, consequently, that such declaration is of no effect. But their Lordships upon this point entirely adopt the decision in the case of *Gumani Kazi* v. *Harihar Mookerjee* (1) heard before Sir *Barnes Peacock*, and *Meer*, *Norman*, *Kemp*, and *Seton-Karr*, JJ., which is precisely in point upon this question. It is there stated that "in a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a

(1) 1 Marsh., 523; S. C., B. L. R., Sup. Vol., 15.

decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved." In this case the question of the right to enhancement was tried, as well as the question of notice, and the Court gave a declaratory decree as to the right to enhance.

That being so, their Lordships are of opinion that this decree of the Court in 1863 does amount to proof sufficient to rebut the presumption referred to in s. 16 of Act X. of 1859, arising from twenty years' uniform payment of rent, that that uniform payment had extended to the time of the decennial settlement. It also amounts to proof that the rent was fixed at some later period.

On this ground, therefore, their Lordships are of opinion that the Plaintiff has satisfied the burden of proof which was thrown upon him. This decision of their Lordships is very much in accordance with a case in the High Court, on the 15th February 1865, of *Rakhal Doss Bose* v. *Sheikh Golam Surwar* (1), which is thus described in the marginal note:—"The bringing of a suit by a landlord to recover arrears of rent at enhanced rates, under Act X. of 1859, cannot annul the former decree of a competent Court, declaring the *ryot's* holding to be liable to enhancement, by entitling the *ryot* (on proof of payment of uniform rent for twenty years) to claim the benefit of the presumption under s. 4." It is to be observed that s. 16 is almost in the same words as s. 4, the one referring to *ryots*, and the other to under-tenants or *talookdars*.

With respect to the question of the *pottas*, which were put in evidence by the Defendant in the former suit which has been referred to, but which were not believed to be genuine at that time, either by the Court of first instance, or the Court of Appeal, it appears that these *pottas* were rejected also in the present suit, both by the Court of first instance and the Court of Appeal. Their Lordships are not prepared to say that that rejection was wrong; but even if they had been received in evidence, their Lordships are of opinion, upon referring to them, that they would not have established the contention of the Defendant in this suit, that he had held by a uniform tenure, commencing, at all events, as early as the decennial settlement. The effect of those grants does not appear to be to show a mere continuance of possession, but according to their Lordships' view, they rather point to the creation of a new title.

For these reasons, their Lordships are of opinion that the decision of the High Court should be reversed; that the appeal of the Respondent from the Court of the Assistant Collector to the High Court should be dismissed with costs; and that the last-mentioned judgment of the Assistant Collector should be confirmed. Their Lordships will humbly advise Her Majesty to this effect. The Respondents will pay the costs of this appeal.

(1) 2 W. R., Act X. Rul., 69.

12th February, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Justice James, the Right Hon. Sir Barnes Peacock, the Right Hon. the Lord Justice Mellish, the Right Hon. Sir M. E. Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

J. S. ELLIOTT and others (Plaintiffs)* ... } *Appellants*,

versus

BHOODUN MOHUN BONNERJEE and others (Defendants) ... } *Respondents*.

Prescription—Light and Air—User.

The law of prescription applicable to *India* is the English law previous to the passing of the Prescription Act, 2 & 3 Will. IV., c. 71. In order to establish a right to light and air, an uninterrupted user of at least twenty years, with the acquiescence

* Cowell's Sup. Vol. 175; 12 B. L. R., 400.

of the owner of the servient tenement, must be shown (1).

In a suit to restrain the Defendants from obstructing the light and air through certain windows of a house belonging to the Plaintiffs, it was shown that the enjoyment of the alleged right began on 14th April 1850, the windows then being in a sufficiently finished state to create the right. In March 1870 the Plaintiffs received notice from the Defendants of their intention to erect a building which would have the effect of obstructing the passage of light and air through the Plaintiff's windows. The building was actually commenced on 23rd March 1870, but it was not actually raised to such a height as to amount to an obstruction until some days after the twenty years had elapsed. *Held* that there was not an enjoyment for twenty years with the acquiescence of the Defendants such as entitled the Plaintiffs to maintain the suit.

Quære.—Whether proof of constructive knowledge on the part of the Defendants would not be sufficient to show their acquiescence?

THEIR LORDSHIPS gave the following judgment:—

THIS was a suit for an injunction praying that the Defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing light which the Plaintiffs alleged they were entitled to have through their windows. It would appear that the windows in respect to which the right to the light is claimed were so far completed on the 14th April 1850 that the origin of the right would then accrue; that is the finding of *Norman*, J., the Judge of first instance,—a finding in which their Lordships concur.

The suit was commenced on the 18th of May 1870, rather more than a month beyond the expiration of twenty years from the former date of April 14th, 1850.

It is admitted that the Prescription Act, the 2nd and 3rd William IV, c. 71, does not apply, and that we must have resort to the English law which prevailed before its passing. So far as this would seem to be clear, that the Plaintiffs, in order to establish their title, would have to show an uninterrupted user of at least twenty years, with the acquiescence of the Defendant, the owner of the servient tenement. But some questions of nicety have been raised as to what would or would not amount to acquiescence, and it was discussed whether actual knowledge was necessary to be shown on the part of the Defendants. That proof of such actual knowledge was necessary appears to have been the view of the Court above which reversed the decision of *Norman*, J., the Judge of first instance, and found, as a fact, that actual knowledge was not shown to have existed on the part of Defendants. If the decision of the case rested upon this point their Lordships would have desired to hear further argument, because they are by no means satisfied that knowledge on the part of the agent, who acted for the *Rajah*, the owner of the property in 1850 (from whom the Defendants purchased), who collected his rents, and, further, was entrusted with the authority of fixing their amount, would not be constructive knowledge on the part of the *Rajah*, sufficient to satisfy the exigence of proof on the part of the Plaintiffs.

Another question arose in the case as to whether the fact of the premises being let to tenants at, as it would appear, a monthly rent, on the commencement of the accruing of this right, namely, in 1850, would have had any bearing upon the rights of the parties. But their Lordships do not think it necessary to enter into a discussion of these questions, because they have come to the conclusion, independently of them, that the Plaintiffs have not established an uninterrupted user of these lights for the space of twenty years, with the acquiescence of the Defendants. It must be taken that the enjoyment commenced on the 14th April 1850. It would appear that in March 1870 the Plaintiffs received a notice from the Defendants, or, at all events, they were informed by the Defendants that it was their intention to erect a building of twenty-four feet or more in height on the north of the premises of the building in question, which would have the effect undoubtedly of obstructing their lights. It appears that that building was actually commenced on the 23rd March 1870, and its construction was continued. It is true that it was not raised to such a height as to actually amount to an obstruction until some days after the twenty years had elapsed; but it was commenced,

(1) But see now Act IX. of 1871, Part iv.

and commenced with the manifest intention of being erected as an obstruction before the expiration of the twenty years.

Under these circumstances it appears to their Lordships that it is quite impossible to presume enjoyment for twenty years with the acquiescence of the owner of the servient tenement, when, before the expiration of those twenty years, the owner not merely gave notice of his intention to interfere with that enjoyment and to raise an obstruction, but in pursuance of that notice actually commenced the erection of that obstruction which was completed a few days after the expiration of the time in question.

Under these circumstances their Lordships have come to the conclusion that there was not an enjoyment for twenty years on the part of the Plaintiffs with the acquiescence of the Defendant such as to entitle them to maintain this suit.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Appellate Court, the High Court of Calcutta, be affirmed, and this appeal dismissed with costs.

13th and 14th March, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH LEELANAND SINGH BAHADOOR and others (Plaintiffs)* ... — *Appellants,*

versus

THAKOOR MUNOORUNJUN SINGH and another (Defendants) ... — *Respondents;*

and

RAJAH LEELANAND SINGH BAHADOOR and others (Plaintiffs) ... — *Appellants,*

versus

THAKOOR MUNOORUNJUN SINGH and another (Defendants) ... — *Respondents;*

and

THAKOOR MUNOORUNJUN SINGH and another (Claimants) ... — *Appellants,*

versus

RAJAH LEELANAND SINGH BAHADOOR (one of the Defendants), and THE GOVERNMENT (Plaintiff) ... — *Respondents.*

Ghatwal—Resumption—Mukarrari Istimrari—Auction-Purchaser—Regulation XLIV. of 1793—Enhancement—Refund of Government Revenue.

Where, prior to the permanent settlement, grants of land had been made on *ghatwali* tenure at a fixed rent and the Government subsequently dispensed with

* Cowell's Sup. Vol., 181; 13 B. L. R., p. 124.

the performance of the *ghatwali* services on the part of the *Zemindar*,—*Held*, in a suit by the *Zemindar* to resume the lands, that as long as the *ghatwals* were willing and able to perform the services, the *Zemindar* had no right to put an end to the tenure on the ground that the services were no longer required.

Quære.—Whether, in the absence of any usage, the words "*mukarrari istimrari*" mean, permanent during the life of the grantee, or permanent as regards hereditary descent?

A purchaser at a sale for arrears of Government revenue is not entitled under Reg. XLIV. of 1793 to cancel a *ghatwali* tenure created subsequently to the permanent settlement.

Quære.—Whether he would be entitled to enhance the rent?

Where lands granted on *ghatwali* tenure were, in accordance with a decision of the Special Commissioner, resumed by Government, who made a settlement with the *ghatwals*, under which the latter continued to pay to the Government half the sum assessed as revenue, reserving the other half to themselves, and the resumption proceedings were subsequently reversed by the Privy Council,—*Held* that the *ghatwals* were entitled to a refund of the sum paid by them to Government, less the sum which the *Zemindar* ought to have received from them for rent during the time they had paid to Government.

13th March, 1873; 1st Appeal.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The Plaintiffs in this suit, *Rajah Leelanand Singh* and others, brought a suit to recover possession of *Talook Khukwara* in the *zemindari* of *Khuruckpore*. The Plaintiffs were purchasers under a sale for arrears of revenue against *Kadir Ali*, the former *Zemindar* of the *zemindari*; but their Lordships are of opinion that as auction-purchasers they have no greater rights, so far as this case is concerned, than they would have had as original *Zemindars*. Indeed, that point has been admitted by the learned Counsel who argued this case on behalf of the Appellants. The other Plaintiffs are merely lessees of the *Zemindar*; and the case may be treated as a suit by the *Zemindars* of *Khuruckpore* against the Defendants, to recover possession of the *Talook*, *Khukwara*.

The question is, whether they are entitled to recover possession of that *talook*. Their contention is that it was held as a *ghatwali* tenure, and that they have a right, when the *ghatwali* services are dispensed with and not required, to take possession of the lands which were held subject to those services.

The earliest *sunnud* that we find is one granted by Captain *Brown* in the year 1776 to *Rankoo Singh* and *Bhyro Singh*, who were the ancestors of the present Defendants. By that grant the *talook* in question was granted at a rent of Rs. 245. 12 *as.* to *Rankoo Singh* and *Bhyro Singh* by Captain *James Brown*, who must be assumed now to have had power to make the grant. A subsequent *sunnud* of *Kadir Ali*, who was the ancestor of the *Zemindar* against whom the *zemindari* was sold for arrears of revenue, was also made in the year 1779 at the same rent. That grant was a *ghatwali* grant, and it was made more than twelve years prior to the permanent settlement. The question is, whether the *Zemindar*, by dispensing with the *ghatwali* services, has a right to recover possession of the lands? It was held in the case of the same *Rajah, Leelanand Singh* v. *The Government of Bengal* (1) that the Government was not entitled to resume this *talook* as police lands. That was upon the ground that the *talook* had been assessed to revenue, and was a portion of the *mâl* lands of the *zemindari*. But although the lands were not resumable, that is to say, although the Government could not re-assess the *talook* with revenue, it did not dispense with the services upon which the lands were held at the time of the permanent settlement. The lands therefore remained liable to the *ghatwali* services.

It is contended that the *sunnuds*, in effect, merely gave certain lands as wages to hired servants, and that the *Zemindar*, whenever he chose, provided the Government dispensed with the *ghatwali* services, might put an end to the tenure and take back the lands, which were allotted in lieu of wages. It appears to their Lordships that that contention is not a correct one; that these *sunnuds* were grants of the land subject to certain services, namely, the service of paying a small rent of Rs. 245. 12 *as.*, and also of performing the *ghatwali*

(1) 6 Moore's I. A., 101; 1 P. C. J., 505.

duties. They were not therefore the hiring of a servant, giving him certain land by way of wages, but grants of land upon the condition of certain services.

A similar case was argued in the High Court—*Kooldeep Narain Singh* v. *Mahadev Singh* (1). It was there held that, "where a *ghatwali* tenure was granted more than 100 years ago, under a valid *sunnud* from a person representing the then Government, and had been allowed during that period to change hands by descent or purchase without question, the *Zemindar* was incompetent, of his mere motion, without the assent and against the will of the Government, to put an end to the *ghatwali* services, to deprive the *ghatwals* of their lands, and to treat them as trespassers." It is unnecessary to go particularly into the reasons for that decision. They are very fully pointed out in the decision itself, and that decision was, on the 18th of July, 1871, affirmed upon appeal by the Judicial Committee, who also gave their reasons for affirming the decision (2).

It may therefore be assumed upon the principle of those decisions, that the *Zemindar* had no right to turn the tenants out of possession by dispensing with their services unless the Government had dispensed with those services, as between the Government and the *Zemindar*. The only question then is, whether the fact of the Government's having consented to dispense with those services as regards the *Zemindar*, and the *Zemindar's* having agreed with the Government to pay an additional revenue of Rs. 10,000 in consideration of the Government having absolved them from the services, makes such a distinction in this case that the *Zemindar*, as between him and the *ghatwals*, is entitled to treat them as trespassers, and turn them out of possession. In the cases which have been cited it was stated that even if the Government had not dispensed with the services it appeared to their Lordships that the *Zemindar* would have had no right to treat the *ghatwali* holders as trespassers, and their Lordships see no distinction between those cases and the present. The lands were held upon a grant, subject to certain services, and as long as the holders of those grants were willing and able to perform the services the *Zemindar* had no right to put an end to the tenure, whether the services were required or not.

Some documents were referred to from which it appeared that certain *ghatwals* had been dismissed by the *Zemindar*, but it does not appear that that was merely because the *Zemindar* did not require their services. They may have been dismissed for incompetence or because they did not properly perform the services to which their tenures were subject. In such a case they might be dismissed, but the *Zemindar* has no right to put an end to the tenure so long as the holders of the tenure were willing and able to perform the services.

The words *mukarrari istimrari* are used, and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted or permanent as regards hereditary descent, their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary.

Under these circumstances, it appears to their Lordships that the decision of the High Court was correct, and they will humbly advise Her Majesty to affirm the decision, with costs.

13th March, 1873; 2nd Appeal.

In this case the Plaintiff seeks to recover possession of certain lands, and not merely to enhance the rent of those lands. It appears to their Lordships that there is no distinction between this case and the case which has just been determined, except that in this case the *sunnud* was not granted prior to the date of the permanent settlement, whereas in the former case it was granted prior to that settlement.

In this case the *sunnud* which was produced was dated in 1794, and was subsequent to the date of the permanent settle-

(1) Sath. W. R., 199.
(2) 14 Moore's I. A., 237; 11 B. L. R., 71.

But it appears to their Lordships, looking to the terms of the *sunnud*, that it was not an original *sunnud*, but that it treated the lands included in it as old *ghatwali* lands. It is unnecessary, however, to determine whether the tenure was created by that *sunnud* of 1794, or existed from an earlier date, for, whether it was created in 1794 or not, it appears to their Lordships that the Plaintiff is not entitled to maintain this suit, and to turn the Defendant out of possession. Upon the principle of the case just decided, the Plaintiff is not entitled to turn the Defendant out of possession upon the ground that he has dispensed with his services. He is not entitled as a purchaser at a sale for arrears of revenue to turn the Defendant out of possession upon the ground that the grant under which the Defendant claimed was created subsequently to the time of the permanent settlement. At the date of the purchase at the sale for arrears of revenue Act XI. of 1822 was the law which governed such sales; but that regulation had been repealed before this suit was commenced, and, unless the regulation of 1793 is still in existence, there is no law which would entitle the Plaintiff to avail himself of the fact of his being a purchaser at an auction sale. Their Lordships had some doubt in the case which has been cited of *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (1), whether the regulation of 1793 was in existence or not; but they held that, assuming it to be still in force, it did not authorize a purchaser at a sale for arrears of Government revenue to treat the *Pottahs* mentioned in section 5 of that regulation as absolutely void for the purpose of turning the holder out of possession, but that the purchaser was only entitled to enhance the rent. That section enacted: "Whenever the whole or a portion of the lands of any *Zemindar*, independent *talookdar*, or other actual proprietor of land shall be disposed of at a public sale for the discharge of arrears of the public assessment, all engagements which such proprietor shall have contracted with dependent *talookdars*, whose *talooks* may be situated in the lands sold, as also all leases to underfarmers and *pottahs* to *ryots* for the cultivation of the whole or any part of such lands (with the exception of the engagements, *pottahs*, and leases specified in sections 7 and 8) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent *talookdars*, and from the *ryots* or cultivators of the lands let in farm, and the lands not farmed whatever the former proprietor would have been entitled to demand according to the established usages and rights of the *pergunnah* or district in which such lands may be situated, had the engagements so cancelled never existed." In the case to which I have just referred their Lordships held that the meaning of the words "shall stand cancelled from the day of sale," was not that they should be absolutely cancelled for the purpose of enabling the purchaser to recover possession of the lands, but that they were to stand cancelled from the day of sale so far as to enable the purchaser to exercise the power given of enhancing the rent to the *pergunnah* rates. Therefore, assuming that the *ghatwali* tenure in question was created subsequently to the date of the permanent settlement, namely, in the year 1794, their Lordships are of opinion that the Plaintiff would not as an auction purchaser be entitled to turn the Defendant out of possession, but that his only right, if any, would be to enhance the rent. The decision in the case of *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (1) was upheld in the case of the *Rajah Suttosurrun Ghosal* v. *Moheshchunder Mitter and others* (2).

Their Lordships are of opinion that in any view of this case, the Plaintiff is not entitled to maintain this suit and to turn the Defendant out of possession. Their Lordships express no opinion as to whether the Plaintiff would be entitled to enhance the rent. Whether the circumstances of the case would enable him to enhance the rent, or whether a suit to enhance would be barred by the *Statute of Limitations*,

(1) 10 Moore's I. A. 123; 2 P. C. J., 60.

(1) 10 Moore's I. A. 123; 2 P. C. J., 60.

(2) 12 Moore's I. A 263; 2 P. C. J., 420.

are questions which are not at present before their Lordships, and as to which they wish to express no opinion.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the decision of the High Court, and to dismiss the appeal, with costs.

14th March 1873.

Thakoor Munoorunjun Singh and another *v.* Rajah Leelanund Singh and another.

In this case *Thakoor Munoorunjun Singh* and *Tekaet Lokenauth Singh* are the Appellants, and *Rajah Leelanund Singh* and the Government are the Respondents. The appeal is from a judgment of the High Court, acting as Special Commissioners, dated the 25th of August, 1868.

The case, as stated by the Judges in delivering their decision, arises out of the proceedings of Government to resume certain *ghatwali* lands in *Khuruckpore*.

They say:—"On the appeal of *Rajah Leelanund Singh* and the Government, Her Majesty, in a council held on the 25th of July, 1855, held that the *ghatwali* lands in the *zemindary* of *Khuruckpore* were not liable to resumption and reassessment under the provisions of clause 4, section 8, regulation I of 1793, which related to simple police establishments, and they set aside the resumption and gave a decree for mesne profits in favour of the *Rajah*, Appellant. The mesne profits which Government had to refund consisted of the rent or revenue paid by the *ghatwals*, whose lands were resumed, and with whom a settlement had been made at half *jumma*, which settlement was in force so long as the resumption decrees were not set aside. On the strength of the decrees which he had obtained in the Privy Council in July, 1855, *Rajah Leelanund Singh* applied for a review of judgment in all the other cases in which *ghatwali* lands in the *zemindary* of *Khuruckpore* had been resumed; and the review was admitted and a decree passed in 1860 by three Judges of the late *Sudder* Court, sitting as Special Commissioners, who reversed the order for resumption, but declined to determine to question as to mesne profits which had been realised by Government." From that judgment an appeal was presented by *Rajah Leelanund Singh* to Her Majesty in Council, and on the 4th of February, 1864, the Judicial Committee held that, "The Judges who made the decree of 1860 ought not, in their Lordships' view of the matter, to have been silent as to the title to the money, but ought to have declared and acted on it, if able to do so, from the materials and parties before them, and if not so able to have directed an inquiry to ascertain the person or persons entitled." Upon that the case was remitted to the High Court, and the decision now under appeal was passed by the learned Judges. They held that, according to the theory of the *ghatwali* tenures, the lands were assigned to the *ghatwalis* for maintenance in return for and in payment of police duties performed by them. The profits of the *ghatwali* lands, they said, might therefore be said to represent the wages which, if paid in money, would have been paid to the *ghatwals* for their services; and they proceeded to say that it appeared to them that the *ghatwals* had, on the half rates which they pocketed during the existence of the settlement, been amply compensated for any loss which they had sustained ("though they did not appear to have sustained any") during the period when, owing to particular circumstances, they did not and could not perform their police duties. They said, "It has been suggested to us that the value of the services of the *ghatwals* might be computed by ascertaining the numerical strength of each post and assigning to the sirdar and each of the *ghatwals* a salary suitable to the position; but, on the view we have taken above, such computation appears to be unnecessary, for if we are correct in looking upon the whole profits of the *ghatwali* lands as equivalent to the wages which the *ghatwals* would otherwise have received, it is apparent that when they did no service and retained one half of the profits for their own benefit they cannot claim the other half paid by them to Government in the shape of re-

venue." They said, "The whole of the money paid by the *ghatwals* to the Government in the shape of revenue should be paid over to the *Zemindar Rajah Leelanund Singh*, partly as the quitrent due to him, and the remainder as compensation for the loss of the services of the *ghatwals* during the period the settlement with the *ghatwals* continued in force. The sums to be refunded will, as provided for by the decree of the Privy Council, carry interest to the date of liquidation."

Now, the status of the *ghatwals* has been determined in the cases which were before their Lordships yesterday, and it was then held that the *ghatwals* held the lands in question upon a tenure, by which they were liable to a certain rent and also to certain *ghatwali* services, and that, notwithstanding the arrangement which had been come to between the *Zemindar* and the Government, by which the Government had increased the revenue of the *zemindary* to the extent of Rs. 10,000 a year, in consideration of the dispensation by Government of the services, the *ghatwals* were still entitled to hold their lands upon the tenure upon which they had been granted, and were entitled to hold the land and to receive the rents and profits thereof, paying to the *Zemindar* the rent reserved upon the tenure.

Now, applying that principle to the present case, it appears that when the Government received half of the profits of the land for revenue, and left only one half the profits of the land in the receipt of the *ghatwals*, the Government were receiving a portion of the profits of the land which ought to have gone to the *ghatwals*. They were receiving also a portion of the profits of the land which ought to have gone to the *Zemindar*: in other words, the Government were bound to return the one half of the profits of the land which they received as revenue, by paying to the *Zemindar* the rent which was due to him under the tenure, and returning to the *ghatwals* the remainder of the money.

Under these circumstances, their Lordships are of opinion that the judgment and decree of the High Court should be varied, and they will humbly recommend to Her Majesty that the judgment and decree of the High Court, acting as Special Commissioners, be varied, and that it be decreed,—That out of the moneys received by the Government of *Bengal* in respect of the lands included in the tenure of the Appellants the *Zemindar* do receive the amount of the money rent payable under the *ghatwali* tenure during the period in respect of which the moneys in the hands of the Government were received as revenue, that the remainder be paid to the Appellants, and that the case be remitted to the High Court as Special Commissioners, who are, if necessary, to determine the amounts to be repaid to the parties respectively, according to the principle above laid down, the moneys so to be paid to carry interest as directed by the lower Court.

Looking to all the circumstances of the case, their Lordships will humbly recommend to Her Majesty that each party be directed to pay his own costs incurred in *India* subsequently to the Order of Her Majesty in Council of the 1st of March 1864, that is the date of the Order in Council which was passed in pursuance of the decision of the Judicial Committee of February, 1864. It does not appear at present—for we have not the decree of the High Court before us—whether the High Court awarded any and what costs by that decree; but if any costs have been paid by either party under the decree now under appeal such costs are to be refunded, and each party will bear his own costs of this appeal. In regard to the Government, their Lordships think that the Government ought to bear its own costs of this appeal.

20th March, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

~~*On Appeal from the Judicial Commissioner of Oudh.*~~

NEWAB MULKA JEHAN SAHIBA and Others (Plaintiffs)* ... } *Appellants*,

versus

MAHOMED USHKURREE KHAN and another, (Defendants) ... } *Respondents*.

Mahomedan Law—Sheeahs—Marriage—Assent of the Wife after Puberty—Inheritance.

A ceremony of marriage was performed between Mahomedan minors in the Fazolee (nominal) form; the girl's father being dead and the marriage being contracted by her paternal grandmother. Thereafter the girl died, having attained the age of puberty, without ever meeting or communicating with her husband, and without ever expressing in any way assent to or dissent from the marriage:—

Held, that by the law of the *Sheeah* sect which governed the case, the marriage, since the assent of the girl after attaining puberty was not shown, was imperfect from the want of the necessary ratification, and could n t create any rights or obligations.

Though by the law of the *Soonnees* the option of dissent must be declared by the girl as soon as puberty is developed; yet by the doctrine of the *Sheeahs* the matter ought to be propounded to her so that she may advisedly give or withhold her assent.

Held, further, that under such circumstances the paternal grandmother of the girl was not entitled to inherit her estate; that the mother as her surviving parent was entitled to a third share thereof, and that the Appellants, her half-brothers, and sisters were entitled (without prejudice to any claims by third parties) to the residue.

THE JUDGMENT of their Lordships was delivered by

THE RIGHT SIR MONTAGUE E. SMITH:—

THIS was a suit brought by the Appellants in the Civil Court of the Judge of *Lucknow* under section 15 of Act VIII., 1859, to obtain a declaration of their right to inherit the property of *Sooltan Ara Begum* deceased.

The Appellants are members of the Royal Family of *Oudh*; *Newab Mulka Jehan* is the grandmother, and the other Appellants are the half brothers and sisters of *Sooltan Ara Begum*; her father was the late *Humayoon Bukht*, son of *Mahomed Ally Shah*, late King of *Oudh*, and *Newab Mulka Jehan*; and her mother is the Respondent, *Pearee Khanum*.

The Respondent *Ushkurree Khan*, claiming to be the husband of *Sooltan Ara Begum*, and her mother *Pearee Khanum* opposed the Appellants' claim. The Civil Judge dismissed the suit, and his judgment has been affirmed by the officiating Judicial Commissioner.

The questions are, first, whether the marriage of *Ara Begum* with the first Respondent was perfect at her death so as to confer a right on him, as her husband, to inherit; and second, whether her mother, *Pearee Khanum*, is entitled to a share of her property.

The ceremony of a marriage between *Ara Begum* and *Ushkurree Khan* was performed on the 16th of October, 1859, in the *Fazolee* (translated, nominal) form. Both were then minors, and were so treated; there is evidence that she was eight years and some months old; he about nine. *Ara Begum's* father was then dead, and the marriage was contracted by *Mulka Jehan*, her grandmother. It was celebrated with great pomp in the presence of the grandmother and the relatives of the girl. *Pearee Khanum* (the mother) says, "I was associated in the marriage; I was not directly consulted, but I was quite agreeable." Soon after the marriage *Mulka Jehan* took *Ara Begum* to *Arabia* to visit the holy places, and the girl died there without, as far as it appears, having met or communicated with her husband, since the marriage. There is a discrepancy in the evidence as to her age when she died; the Appellants asserting she was eleven years of age only, her mother that she was thirteen. It seems probable, from the evidence, that she was nearer

* Cowell's Sup. Vol. p. 192.

the former age than the latter; but it is not material, since according to the evidence of the High Priests in the absence of evidence to the contrary, the presumption of the Mahomedan law is that a girl attains puberty when she reaches the age of nine years. In this case then, it may be taken, there being no evidence to the contrary, that *Ara Begum* had attained the age of puberty before her death; but there is no evidence that, after attaining it, the subject of the marriage was ever presented to her, or that she expressed in any way assent to or dissent from it.

The first question arising from these facts is, whether the marriage was inchoate only and in suspense, until ratified by the assent of the girl on her reaching the age of puberty, or whether it was complete and valid, unless dissented from and rejected by her on her attaining that age; and upon the decision of it, the rights of the parties depend. If the latter be the law, as the girl died without any expression of dissent, the marriage cannot now be avoided, whereas if the former be the true doctrine, the marriage, unless ratified (which will be hereafter discussed) remains imperfect, and can confer no rights. The determination of the question must be governed by Mahomedan law and the doctrines of the *Sheeah* sect, to which the Royal Family of *Oudh* and the husband's family belonged.

Authorities were cited to shew that the two great Mahomedan sects differ on the point upon which the case hinges. It is said that the *Soonnees* hold marriages like the present to be voidable only, *i. e.*, complete unless avoided by dissent; the *Sheeahs*, on the other hand, that they are *Fazolee* only, and incomplete until ratified by assent. And there certainly seems to be ground for the opinion that this distinction exists, and that the latter is the doctrine of the *Sheeahs*.

The evidence of the High Priests of *Lucknow*, given in the suit, appears to be clear upon the point, and upon the rights of the parties in cases like the present. They declare the law to be that the marriage of a minor contracted by the father or grandfather is binding and irrevocable, they having the legal right to contract for the minor; but that this irrevocable power of contract does not belong to guardians of a lower degree, as the mother or grandmother, who can only contract a *Fazolee* marriage, that is, one incomplete for want of sufficient authority. They declare that, according to the *Sheeah* doctrine, a *Fazolee* marriage requires the assent of the minor, after attaining puberty and mature understanding, to perfect it, and that, in the event of death intervening before such assent is given, the marriage remains incomplete.

It was proved that, in accordance with the law thus laid down, the ceremony of the marriage in this case was in the *Fazolee* form.

In *Wilson's* Glossary the word "*Fuzuli*" is thus defined: "In Mahomedan law, an unaccredited agent, one who acts for another without authority, and whose transactions are invalid unless confirmed by the principal." The word appears also from the Glossary to be used as an adjective, to denote contracts requiring such confirmation.

Their Lordships see no reason to disparage the learning or fairness of the High Priests who were examined upon the law, and they have observed with regret the strong animadversions made by the officiating Judicial Commissioner upon their evidence, which, in so far as it states the law, appears to be in accordance with the written authorities.

Part II. of Mr. *Baillie's* Digest of Mahomedan Law (as stated by the author in the introduction), is intended to exhibit the doctrines of the *Sheeah* sect, and to be composed entirely of translations from *Sharaya-ool-Islam*, a work, he says, of the highest authority in that sect.

The following are extracts from chap. i. sect. 2, p. 9:—

"The contract of marriage may, according to the most approved doctrine, remain in suspense, as already mentioned, for the sanction of the person having authority in the matter; and if a young girl is contracted in marriage by any other person than her father or paternal grandfather, whether the person be nearly or remotely related to her, the contract cannot pass or be operative, unless subsequently allowed or

approved by herself, even though the person were her brother or paternal uncle. In the case of a virgin this permission or assent may be inferred from her silence when the matter is propounded to her; but a woman who is not a virgin must be put to the trouble of giving expression by actual speech to her permission or assent."

Ibid., p. 10. "When the fathers of two young children have contracted them to each other in marriage, the contract is binding on them both; and if one of them should happen to die, the other would be entitled to share in the deceased's inheritance. If any other than the fathers of the children should contract them in marriage, and one of them should happen to die before arriving at puberty, the contract would be void, and both dower and the right of inheritance would fail."

Another passage states the law still more distinctly: chap. iv. p. 294. "When a girl under puberty has been married by her father or paternal grandfather, her husband inherits from her, and she from him. So also, if two young children are married to each other by their fathers or paternal grandfathers, they have mutual rights of inheritance. But if they should be contracted in marriage by any other than their fathers or paternal grandfathers, the contract remains in suspense till assented to by the spouses themselves, after arriving at puberty and discretion; and if one of them should die before such assent has been given, the contract would be void, and there would be no right of inheritance. And the same would be the result though one of them should attain to puberty and assent to the marriage, if the other should die before puberty."

The extracts cited in the judgments below from the works of *Macnaghten* and *Baillie* relate, as their Lordships understand, to the doctrine of the *Soonnees*. These, and still more distinctly some passages in the *Hedaya*, certainly seem to indicate that by that Law, a marriage between minors of the kind now in question requires dissent to annul it; and that in the event of one of the minors dying, the marriage remains in force, and the incidents of inheritance and of dower attach, as upon a marriage between persons of full age: *Hedaya*, book ii. chap. ii. vol. i. pp. 102-6.

It is not, however, necessary to decide what would be the rights of the parties according to the *Soonnee* Law; but their Lordships are led, by the evidence of the High Priests and the authorities above cited, to the conclusion that, by the law of the *Sheeah* school, the present marriage, unless the assent of the girl after attaining puberty can be shewn, was imperfect, and could, if she died before such assent, create no rights or obligations.

It must, therefore, be ascertained whether such assent has been shewn, or ought to be presumed.

It seems to be clear, according to the *Sheeah* doctrine, that the girl must have arrived at puberty, and also be of mature understanding when her assent is given. There is no evidence of the state of *Ara Begum's* understanding, but assuming her to have been by age and understanding capable of assenting, their Lordships think there is not sufficient evidence of the fact of her assent to satisfy the requirements of the law.

The law of the *Soonnees* appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the *Sheeahs* seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage when it is brought to her notice, and is present to her understanding.

It appears by the extracts from *Baillie*, Part II., before cited, that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman who is not must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the *Sheeah* school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must

in all cases, be shown that the question of the marriage was distinctly propounded to the girl. They have no doubt that assent may, in some cases, be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognised and ratified, although no distinct assent could be proved. But in this case there is neither evidence of express assent nor of facts from which it may be presumed. The girl was taken to *Arabia*, far from her betrothed husband, and there is no proof that the marriage was ever brought to her attention, or that she by word or conduct in any way recognised or ratified it.

An attempt was made to prove a usage in the royal and noble families of *Oudh* that a girl married, as a minor could not reject the marriage, although her guardians, who had assented to it, might be of a lower degree than her father or grandfather; but the evidence entirely failed to prove a usage having the force of law. The utmost that the Mahomedan gentlemen who were examined proved was, that it would be unusual and unbecoming for a girl to reject such a marriage. But the question is not what *Sooltan Ara Begum* would have done, as a matter of propriety, if she had lived, and the question had been propounded to her, but what by law she had the power to do, if she chose to exercise it. All these witnesses acknowledged that they must be governed by the law as expounded by the High Priests; and their evidence almost involved the assumption that the girl would have had a right by law to disaffirm the marriage, but that it would be unbecoming in her to avail herself of it.

For these reasons their Lordships, guided by what they conceive to be the doctrine of the *Sheeah* school, are of opinion that the evidence fails to shew that the *Fazolee* marriage had become perfect before *Ara Begum's* death, and consequently that the claim of *Ushkurree Khan* to inherit as her husband has not been estabished.

The Judges below rested their judgments principally upon passages cited from *Macnaghten* and *Baillie*, relating to *Soonnee* doctrines, and relied on these authorities in preference to that of the High Priests of the *Sheeah* school. This reliance, and their assumption that the Appellants had contended that the marriage was illegal, explain the grounds of their decision. But their Lordships do not understand that the Appellants so contended, or that the High Priests so declared the law. The marriage was perfectly legal as far as it went, but did not become effectual from the want of the necessary ratification.

It now becomes necessary to consider the claim made by *Pearee Khanum* as the mother of *Ara Begum*. It appears that she at first filed a petition in the suit, disclaiming any right in herself, and confessing the Appellants to be the heirs of her daughter, but she afterwards withdrew it, asserting in another petition that the disclaimer had been wrongfully obtained from her, whilst living in *Mulka Jehan's* house, and that she was entitled to inherit a share of her daughter's property.

Their Lordships agree with the Judicial Commissioner that she ought to be allowed to withdraw her first petition. The Civil Judge, after deciding in favour of the validity of the marriage, dismissed (to use his words) "the suit to cancel the marriage," and referred *Pearee Khanum* to a separate suit to prove her rights. The Judicial Commissioner, in his judgment dismissing the appeal, stated that in his opinion the objection to the mother's claim arising from her being a slave could not prevail, as her slavery ceased on the annexation of *Oudh* by the British Government, and that any transfer of her legal rights of inheritance ought, by the Mahomedan law, to be made by gift or sale.

The Appellants appear to be the only parties interested in disputing the mother's claim. They have in fact brought this suit for the purpose of having their rights declared against her, as well as against the alleged husband; and it was their duty to have brought forward a complete case in support of the declaration of right they sought to obtain in their own favour, especially as the suit was directed to impeach two decisions of the Chief Com-

missioner, by which he had ordered a *Waseekah* pension of Rs.32. 11*a*. 8*p*. per mensem, granted to *Ara Begum*, to be paid to her and the husband. The Appellant, *Mulka Jehan*, had applied to reverse these orders, but the Commissioner refused to reconsider them, adding, that she might apply to the Civil Courts for a declaratory judgment. His words are:—"As to the two points she raises, 1st, as to the legality or otherwise of *Ushkurree Khan's* title; and, 2nd as to the legality or otherwise of *Pearee Khanum's* title, she (*Mulka Jehan*) may prove her case in the Civil Courts; and should she obtain a declaratory judgment, she may apply for a reversal of former orders."

The objection made to the title of the mother to inherit is, that she was a slave of *Mulka Jehan*, when her daughter *Ara Begum* was begotten. Now, although this is asserted, there really is no evidence whatever of it in the record; and therefore the *status* of slavery which, it was contended, would by the Mahomedan law exclude her from inheriting, has not been in fact established.

It is not directly proved, and the circumstances rather repel than support the presumption, that this disqualifying *status* existed. It is admitted, on all hands, that *Ara Begum* was not treated as the spurious offspring of *Mirza Humayoon Bukht*, but as his lawful daughter, and such entitled to inherit a share of his property.

This treatment of the daughter by the Appellants affords a strong presumption in favour of the right of her mother to inherit from her.

It appears to be clear Mahomedan law that, if a man has a child by his own slave, the child, without marriage, is deemed to be lawfully begotten, and is entitled to inherit as a co-sharer with children born in marriage—the mother in such case becoming *oom-i-walad* and entitled to emancipation on the death of her master. These consequences however, according to some authorities, occur only in the case of a master having a child by his own slave, for it is said to be unlawful for a man to have connection with the slave of another, especially with his mother's slave, and that the parentage of a child born of such connection, although begotten in error, cannot be established to belong to him. (See *Macnaghten's* Precedents, Case VII., p. 322; *Hedaya*, vol. i. p. 384, vol. ii.. p. 20.)

It should be observed that the authorities just cited are of the *Soonnee* school, and that there is some authority for the proposition that among the *Sheeahs* a child begotten of a slave-girl, of whom the true owner had parted with the usufruct to the father of the child, stands on the same footing as the child of a man by his own slave. (See *Baillie's Imamea*, pp. 53, 56.) But, however this may be, the Appellants have wholly failed to prove the *status* of *Pearee Khanum*, or that if she was the slave of *Mulka Jehan*, that the latter gave her over, for a time, to the embraces of her son. All that is proved with certainty is, that *Ara Begum* was treated as the legitimate child and one of the coheirs of her father, and that *Pearee Khanum* is her mother, and therefore presumably entitled to inherit to her. The disinclination of the Mahomedan law to bastardize children has sanctioned the presumption from slight evidence of marriage or lawful consort. (See *Macnaghten*, Preliminary Remarks, pp. 23, 24, cited with approval by this tribunal in *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1).) There is no doubt an absence of direct evidence in the present suit to support the presumption, but the admission of the legitimacy of the daughter by the Appellants, to be implied from their conduct, is amply sufficient, after the deaths of the child and her father, for the purpose, and stands in the place of proof against them. It is to be observed that there would be no insurmountable obstacle to such a presumption in this case, even if it had been proved that *Pearee Khanum* had been the slave of *Mulka Jehan*, for her mistress might have emancipated her for the purpose of making the relations between her son and the girl lawful. It is clear that *Mulka Jehan*, as the grandmother of *Ara Begum*, has in the strongest way recognised her as a legitimate child of her son. She was so brought up in the family, and

(1) 3 Moore's I. A. 316; 1 P. C. J., 282.

the ceremony of her marriage with *Humayoon Bukht* was performed with much pomp and ceremony. After these acknowledgments, *Mulka Jehan* and the Appellants who act with her ought, in their Lordships' view, to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence they think the presumption must prevail.

The conclusion at which their Lordships have arrived makes it unnecessary to consider what would be the effect of the British Acts relating to slavery upon the capacity of *Pearee Khanum* to inherit from her daughter, if it had been proved that she was a slave at the time of her daughter's birth.

The result of their Lordships' opinion is that *Mulka Jehan* as grandmother is not entitled to inherit, and that *Pearee Khanum* is entitled, as the surviving parent, to a third share of her daughter's property (see *Baillie's Imameea*, book 7, c. 1, ss. 3, 4, pp. 272, 273; *Punjaub* Code, sec. 4, cl. 8, 9; *Macnaghten*, ch. 1, sec. 4, cl. 62), and the Appellants, the half brothers and sisters of the deceased, to the residue.

Their Lordships think that as between the Appellants and the first Respondent, they should each pay their own costs in the Courts below.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and that of the Civil Judge; and, in lieu thereof, to order that it be declared that the marriage of *Sooltan Ara Begum* with the first Respondent was imperfect and invalid, and that he is not entitled, as her husband, to a share of her estate, and that the Respondent *Pearee Khanum* as mother of *Ara Begum*, is entitled to one-third share, and that the Appellants, other than *Mulka Jehan*, are entitled, so far as relates to any claims by the Respondents (but without prejudice to any other claims) to the residue, and further to order that *Pearee Khanum* is entitled to her costs in the Courts below from the Appellants, that the Appellants and the first Respondent should each pay their own costs in those Courts, and that any costs which may have been paid by the Appellants to the first Respondent be refunded by him.

There will be no order as to the costs of this appeal.

22nd and 25th March, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMCHUNDER DUTT (Defendant.)* ... } *Appellant,*

versus

JUGHESCHUNDER DUTT, Heir of ROMKESHCHUNDER DUTT (Plaintiff). ... ... } *Respondent.*

Enhancement—Ryoti Kadimi Tenure—Regulation VIII. of 1793, s. 51—Regulation V. of 1812, s. 10—Service of Notice of Enhancement.

Where a *Zemindar*, a purchaser from a mortgagee, sued to enhance the rent of lands (part of the purchased *zemindari*) which were held on a *ryoti kadimi* tenure, which had existed more than twelve years before the decennial settlement, but the holder of which had subsequently accepted a *potta* from the *Zemindar*, *Held*, the acceptance of such *potta* did not debar the tenant from the right of exemption from enhancement to which he was entitled by reason of the nature of his tenure. Such a *potta* may be confirmatory only, and is not inconsistent with the presumption that a prior title existed (1).

Semble.—A claim to exempt a tenure from enhancement on the ground that it is a *ryoti kadimi* tenure does not fall within Regulation VIII. of 1793, s. 51.

Where substituted service is resorted to under

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* 12 B. L. R., p. 229.

(1) See *Baradakant Roy* v. *Chundra Kumar Roy*, 2 B. L. R., ; P. C., 1.

Regulation V. of 1812, s. 10, the Courts should take care to be first satisfied that the person who ought to be served personally is keeping out of the way.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR M. E. SMITH:

THIS was a suit brought by *Romesh Chunder Dutt*, who claimed to be the *Zemindar* of a *zemindari* called *Lot Porooe*, his title resting upon a purchase at a sale by a Master of the late Supreme Court, under a decree by which the *zemindari* was ordered to be sold in a suit by the mortgagee. The present suit was brought to enhance the rent of the Appellant, treating his tenure as one in which the rent was enhanceable. *Romesh Chunder Dutt*, as purchaser at the sale to which reference has been made, can have no higher title to enhance the rent than he would have had, if he had been a purchaser from the former *Zemindar*. The sale was not for Government revenue, and the title of the purchaser under it was no higher or better than it would have been under a conveyance direct from the *Zemindar*. Therefore, the question comes to this, whether the Respondent, as *Zemindar*, had, as against the Defendant in the suit, the right to enhance the rent.

The defence made to the suit is, first, that there was no notice to enhance, upon which some observations will hereafter be made; but the principal defence is that there was no right to enhance, based upon the contention that the lands of the Defendant were held on *kadimi ryoti* tenure. It was further alleged that that tenure had been confirmed by a former *Zemindar* by the grant of a *potta* which, as it was said on the part of the Defendant, was confirmatory only, and not a new grant. But the foundation of the case which has been put forward to exempt this land from an enhanced rent is that it was held on a *kadimi* tenure which had existed more than twelve years before the decennial settlement.

The first question which arises is upon whom the onus of proof lies? Mr. Cowie contended that upon the general principle running through the relations of landlord and tenant in Bengal, the liability to enhancement was the rule, and that those who sought to escape enhancement must prove their exemption. On the other hand it was said by Mr. Leith that this case fell within s. 51 of Regulation VIII. of 1793, and that it lay upon the *Zemindar* to bring the case within some of the conditions mentioned in that section. Their Lordships are disposed to think that this claim to exemption, being rested upon the ground that the tenure was a *ryoti kadimi* tenure, does not fall within the 51st section, which relates to dependent *talookdars*, properly so called; and they are not prepared to affirm what was said by the Judges in the case to which reference has been made—*Rajkishen Roy* v. *Bydonath Nundee* (1). It is there stated:—"We think the analogy of the law, s. 51, extends to *kadimi ryots*, which the defendants are." Now, arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a Statute, reasons founded upon analogies are scarcely applicable. However, assuming in this case that it lay upon the defendant in the suit to establish his claim to exemption, their Lordships have come to the conclusion that he has sustained the burden of proof cast upon him, and established a case which entitles him to be exempted from enhancement.

The earliest evidence which has been given is the proof of certain receipts for rent, of a date as long ago as the year 1771. There are receipts of that year which show that some of these lands were held by *ryots* at that date, paying the identical rent which has ever since been paid—that is, upwards of a century. These receipts, however, cover a part only of the lands in question, *viz.*, the lands in *Bashoodebpore;* and there are lands in three other *mauzas* which are not included within them. With regard, however, to those lands they are all included in a *jamabandi* made as early as the year 1783; apparently for the purposes of the decennial settlement, which took place about 1790. That *jama-*

(1) S. D. A. Rep., 1858, 902.

bandi, made seven years only before the decennial settlement, may not be sufficient in itself; it does not afford direct evidence in itself to satisfy the requirements of the law, that to escape enhancement there should have been a fixed rent for more than twelve years before the decennial settlement. But at the distance of time at which we are now arrived from the date of that settlement, it becomes absolutely necessary, for the purposes of justice and equity, that presumptions should be made. It may be that the *jamabandi* alone would be insufficient to found a presumption that these tenures were ancient tenures, and that this rent had existed for twelve years before the decennial settlement. But this case does not rest upon the *jamabandi* alone. The subsequent evidence which has been given in the cause, supports very strongly the presumption that those tenures were ancient at the time of the settlement; how ancient, it is impossible to say. It seems that the lands now held by the defendant had been divided into small *jotes* or holdings, and had been held by numerous tenants, whose names are found in the old receipts and the *jamabandi* to which reference has been made, and the rents there appearing are the same which have ever since been paid. These tenants from time to time sold their *jotes*, and they were purchased by a gentleman of that name of *Tara Chand Bandhopadhya*, to the extent of 236 *bigas*. *Tara Chand* having thus acquired the property, sold it to those under whom the present defendant claims, and at the time of that sale some transactions took place between *Tara Chand* and the purchaser, to which the *Zemindar* was a party. Their Lordships are of opinion that those transactions in the strongest way confirm the presumption that the lands at that time were held under an old tenure.

It appears that *Eshan Chunder Chattopadhya*, who was then the *Zemindar*, had become surety for *Tara Chand*, and that in order to relieve himself from the consequences, and also to obtain payment of of Rs. 1,000 which *Tara Chand* owed to him, he became "the medium," as he himself says in his *ikarar*, of the sale from *Tara Chand* to *Ram Chunder Dutt*. But before that sale took place, there were some disputes respecting the property and the rent; and it was to show his acquiescence in the sale, and to prove that all those disputes were at an end, that *Eshan Chunder*, the *Zemindar*, gave an *ikrar* or agreement to *Ram Chunder Dutt*, the purchaser.

This *ikrar* bears date the 27th *Magh* 1238 (8th February 1832); it was registered on the 25th November 1832; and its terms are most important. The *Zemindar* refers to his having given security, and that *Ram Chunder Dutt* had become the purchaser of the tenures by ten deeds of sale for a consideration of Rs. 10,078; that he had himself obtained Rs. 1,000 in satisfaction of the money due to him, and had been relieved from the liability which he was under as surety of *Tara Chand*. Then the most important part follows The *ikrar* says:—"But a dispute about mutation of names having arisen between you and ourselves, you filed a petition against us in the Civil Court of *Zilla 'Hawali Shahr'* (*suburbs* of the town of *Calcutta*), and a *perwanna* was issued calling for an answer from us. Thereupon we gave a *potta* to you, after settling the rents according to the *jamabandi*, by mutation of names." When the *Zemindar* refers to settling the rent according to the *jamabandi* he was aware of the conveyances which had been made by *Tara Chand* to *Ram Chunder*; conveyances which describe not an ordinary holding of a *ryot*, but something much more,—a tenure which was of value, and hereditary.

The deeds of sale are set out, and are all substantially to the same effect. In the part which relates to the sale there are these words:—"I sell to you the said lands for a consideration of Rs. 2,255, which have been received by me in full and in cash. You taking possession of these lands in the manner held by me, and causing your name to be entered in the *Zemindar's sarrishta* by expunging my name, and paying the rents according to the *jamabandi*, continue to enjoy them happily, heir after heir. The power to sell those lands, or give away in gift, rests with you." These were deeds to which the *Zemindar*

was privy. He was, therefore, aware that the sale was of a tenure which was to be held by the purchaser and his heirs, heir after heir, at rents according to the *jamabandi*; not any new rents, but rents according to the *jamabandi* of 1783, under which the decennial settlement had been made. Now, with the knowledge of those conveyances, the *Zemindar*, in his *ikrar*, says this:—"Thereupon we gave a potta to you, after settling the rents according to the *jamabandi* by mutation of names." Why should he have acceded, in the year 1831, to a settlement of rents according to the old *jamabandi* of 1783, if there had been at that time a power on his part to enhance? A very long time had elapsed since the settlement, and it can hardly be supposed that the value of the lands had remained the same. There is also the strong fact, which was brought to his knowledge, that the large sum of upwards of Rs. 10,000 had been given for these very lands, which, upon the hypothesis of the Respondent, must have been immediately afterwards enhanceable by the *Zemindar* himself.

Their Lordships think the above transaction, evidenced by the *ikrar* and the deeds of sale, affords very strong evidence of an acknowledgment on the part of the *Zemindar* that the lands were held as ancient tenures. Reference is made by this *ikrar* to a *potta*; and there can be no doubt that a *potta* of some kind was executed at that time by the *Zemindar*. Well, the Appellant has produced a *potta* which, he says, is that which was granted, and on the face of it, it certainly accords with the *ikrar*, and with the rest of the evidence in the case; and if this be an old tenure, this *potta* is entirely consistent with it. Confirmatory *pottas* are common in India; and this *potta*, if it really was made in the terms of that produced by the Appellant, must be taken to be confirmatory of the tenure which then existed.

But it was said that this *potta* is not genuine, and undoubtedly the Court below, the Principal *Sudder Ameen* and the *Zilla* Judge, have so found. It is not usual, and certainly it is not the desire of their Lordships, to interfere with the concurrent findings of the Courts below upon a question of fact, where the case depends entirely upon such a question; but where it becomes necessary, in the course of an appeal involving other questions for their Lordships to consider all the evidence, it may be essential that they should decide for themselves whether a particular document is a genuine one, or a particular fact exists one way or the other, for the purpose of satisfactorily disposing of the appeal. Their Lordships desire to say with regard to this *potta* that they are not fully satisfied with the reasons on which it was rejected by the Courts below. They cannot but think that great weight is due to the evidence of the *Zemindar*, *Eshan Chunder*; for, although he was unable from his blindness to see the document, yet when it was read over to him, he gave without hesitation his opinion that it was the *potta* he had granted. It was an important *potta*, not likely to have escaped his recollection; and whether he recollected all the terms of it or not is immaterial, when he had the impression on his mind, if he is speaking the truth, that he had granted a confirmatory *potta* of the *maurusi* rights of the tenants. However, their Lordships are of opinion that, even without the *potta*, the evidence is sufficient to support the contention on the part of the Appellant, namely, that these were old tenures in the nature of *kadimi* tenures existing more than twelve years before the decennial settlement, and therefore not liable to enhancement on the part of the *Zemindar*.

With regard to the 26 *bigas* not included in the deeds of sale from *Tara Chand*, their Lordships think that the evidence proves, without the aid of these deeds, that they were *kadimi* tenures of the same nature as those on which the larger quantity was held.

With regard to the judgment on the special appeal, their Lordships find that the High Court did not go into the evidence to ascertain whether there was an ancient tenure, which might establish freedom from enhancement, although the *potta*, which the Courts below had declared not to be proved, had never existed. No doubt, the High Court was limited on the

special appeal to the consideration of the law; they were obliged to assume that the *potta*, which had been found not to be genuine, was a document which could confer no title. But they appear to have founded their judgment upon the assumption either that the case had been put upon the *potta*, and that no other case had been made, or that *Ram Chunder Dutt* by accepting a *potta* had, as it were, attorned to the *Zemindar* under that *potta*, and acknowledged that he had no older title. Their Lordships think that is not the correct view. They have already said that in their opinion a *potta* may be a confirmatory grant only, and that there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed. It seems to have scarcely been a sufficient reason for not going into the early title that *Ram Chunder Dutt* had taken a *potta*, the terms of which the High Court were unable to ascertain.

Upon these grounds their Lordships think that the judgments of the Courts below must be reversed.

The conclusion at which their Lordships have arrived upon the right to enhance, renders it unnecessary to determine whether the notice was properly served or not. It appears that the Principal *Sudder Ameen* and *Zilla* Judge differed upon that point, the first Judge finding that the notice was not well served, the second that it was. Their Lordships desire to say that they have great doubt whether the evidence sufficiently shows that the notice was properly served. If it had been necessary to determine that point, the evidence must have been narrowly looked at to see if any presumption could have been raised that *Ram Chunder Dutt* was keeping out of the way at the time that it was attached to his door. Their Lordships are of opinion that in cases of substituted service, that is, service substituted for the personal service which the Statute requires wherever it is practicable, the Courts should take care to be satisfied that the condition, on which alone substituted service is good, exists, namely, that the person who ought to be served personally is keeping out of way. It will not be sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good has been first established to the satisfaction of the Court.

In the result their Lordships will humbly advise Her Majesty to reverse the decrees of the Courts below, and to direct that the suit should be dismissed, and that the Appellant should have his costs in the Courts in India and of this appeal.

27th March, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Lord Justice Mellish, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BODH SING DOODHOORIA and another (Defendants.)* ... ... } *Appellants,*

versus

GUNESH CHUNDER SEN, and others (Plaintiffs.) } *Respondents,*

Hindu Law—Joint Family—Separate Acquisition—Evidence— Act VIII. of 1859, s. 260.

In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the Defendant at a sale in execution of a decree passed against the estate of *R*, one member of the family, for his separate debt, the Defendant sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own; and that while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in dispute was the separate property of *R. viz.*, that during *R.'s* lifetime the other members of the family allow-

* 12 B. L. R., 317.

ed him to appear to the world as the sole owner thereof, and on one occasion when *R*, *B* the *kurta*, and a third member of the family, entered into a security-bond with the Collector, whereby *R*. pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any *no sharers*."

On the other hand the Plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, although the purchase was made in the name of *R* alone, filed the family account-books and the private account-books of *R* for the same purpose, as well as certain letters which passed between *B*. and *R* relative to the purchase of the property.

Held, 1*st*, that the evidence as to the separate trading, funds, and property of the several members of joint family, and their independent dealing with such property, disclosed such a state of things as might be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon the Plaintiff the onus of establishing the joint nature of the property claimed by clear and cogent evidence;

2*ndly*, that the provisions of s. 260, Act VIII. of 1859, apply to ordinary *benami* purchases at execution-sales, but do not affect purchases of property by one member of a joint Hindu family in his own name, but with the joint funds;

3*rdly*, that the mere fact that *R*, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates, did not disentitle those members to recover from the Defendant the purchaser at a sale in execution of a decree against *R*, their own share of such estates;

4*thly*, that the misrepresentation as to his separate ownership made by *R*, in the security-bond given to the Collector, could not be regarded in the present suit as more than an admission inconsistent with the title now asserted by the Plaintiff, the Defendant not having purchased on the faith of such misrepresentation;

5*thly*, that the letters between *B* and *R*, relative to the purchase by the latter of the estate in dispute, were admissible as against the Defendant.

THEIR LORDSHIPS gave the following judgment:—

On the 21st of November 1864, the Appellants became the purchasers, at an execution sale, of the right, title, and interest of one *Ramsoonder Sen* in two distinct estates, *viz.*, *Shahjehanpore* and *Cossipore*. Both had been attached by one *Inderchunder Doogur* in execution of a decree which he had obtained against the representatives of *Ramsoonder* in a suit commenced against that person in his lifetime for what is admitted to have been his separate debt. The price paid by the Appellants would have been adequate if the judgment-debtor had been the sole owner of the properties purchased. In August 1865, the Respondents representing themselves to be the persons who jointly with the sons of *Ramsoonder*, his brother *Ramchunder*, and one *Benoderam Sen*, constituted a joint and undivided Hindu family, and alleging that the properties so purchased formed part of the joint estate of that family, brought the suits out of which this appeal has arisen, in order to recover both estates, minus the assumed shares of *Benoderam*, *Ramsoonder*, and *Ramchunder* therein; and the first question for their Lordships' determination is, whether there are sufficient grounds for disturbing the conclusion to which both the Indian Courts have come, *viz.*, that the properties in dispute were, in fact, part of the joint family estate.

It is not disputed that *Ramsoonder* was a member of this joint and undivided family. The status, however, of the family was peculiar. Mr. Justice *Loch* says (and neither party has disputed the accuracy of the description):—"The evidence of the witnesses, and of those members of the family who have been examined, clearly shows that, though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at *Koredha*, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindu family in the ordinary sense of the term,—that is, as a family having all things in common, all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family." Such a state of things may, in their Lordships' judgment, be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as

to property in the name of one member of a joint family; and to throw upon those who claim as joint property that of which they have allowed their coparceuer, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence. There can be no doubt that, if the evidence adduced by the Respondents, the Plaintiffs in the suit, be believed, there is enough to prove their case. And both of the Indian Courts have found in their favor. The two Courts have, however, differed considerably in their appreciation of parts of the evidence; and the decision of the High Court is based upon narrower grounds than that of the Principal *Sudder Ameen*.

The following are undisputed facts concerning the two estates:—*Shahjehanpore*, or at least that portion of it which is in question in this suit, was the *zemindari* of one *Raja Soorjonarain Sing*. At various dates before 1859 he had granted a *patani* of part, and several *ijaras* of other parts, of this estate in the name of *Ramsoonder*, and had assigned the rents reserved by these *ijaras*, by way of security for certain advances ostensibly made to him by other members of *Ramsoonder's* family. On the 4th of July 1859, the *zemindari*, which has been attached at the suit of other creditors, was put up for sale, and was knocked down to *Ramsoonder* as the highest bidder. He was afterwards put into possession of it, and from that time until the date of his death, his name stood in the Collector's register as that of the sole registered proprietor. It has been admitted at the bar that there is no question in this suit touching the *patani* or other interests acquired in the name of *Ramsoonder* before this execution sale. The only question is, whether the *zemindari* interest, which was then sold, became, by virtue of that sale, the separate property of *Ramsoonder*, or part of the joint property of the family.

Of *Cossipore* a four annas share belonged to one *Kissorreemonee Dossee*, the remaining twelve annas standing in the name of *Shibram Dey*, who has been called as a witness in the cause. In 1855 the four annas share was purchased in the sole name of *Ramsoonder Sen*, and on his petition his name was substituted for that of the vendor as the proprietor of this share in the Collector's book. In April 1856, the interest of *Shibram Dey* was, on the suggestion that it had been purchased by *Ramsoonder*, also transferred into his name, and he was thence-forward, until the time of his death, the sole registered proprietor of the whole property.

Ramsoonder died in December 1862, pending the suit in which the execution, which is the foundation of the Appellants' title, issued, but before judgment had been recovered therein. He left as his heirs two infant sons, and, on the 15th of January 1863, his brother, *Ramchunder*, obtained a certificate of administration under Acts XL. of 1858, and XXVII. of 1860, empowering him to manage the estate of the deceased. In his application for this certificate, *Ramchunder* had stated that his brother's property in debts, *zemindari*, trade, cash, and Company's paper, was worth about Rs. 50,000. On the same 15th of January, *Benoderam Sen*, the eldest member, and manager of the joint family, presented two petitions to the Collector of *Zillah Moorshedabad*, praying in the one that *Shahjehanpore*, in the other that *Cossipore*, might be transferred into his name, on the allegation that each had been purchased by him in the name of *Ramsoonder*, and therefore that he was the true owner thereof. In February 1863, *Ramchunder*, as manager of *Ramsoonder's* estate, filed petitions admitting the title of *Benoderam*, and, on the 26th of May 1863, orders were made that the name of *Benoderam* should be recorded instead of that of *Ramsoonder* as that of the proprietor of both estates.

In June 1863, judgment was recovered against the estate of *Ramsoonder* in the suit of *Inderchunder Doogur*, and both estates were afterwards attached as part of the property of the judgment-detor. It follows, from what has been just stated, that both, when so attached, stood in the name of *Benoderam*.

Thereupon *Benoderam* came in to set aside the attachments. His claims were dealt with separately according to the pro-

visions of the 246th section of the Code of Civil Procedure. In each case he claimed to be the sole proprietor of the whole estate, and, as such, entitled to have the attachment removed. Both claims were dismissed by separate orders, dated the 20th of September 1864, which directed the property claimed to be sold. The usual proclamations of sale were made on the 23rd of September, and the execution sale took place on the 21st of November 1864.

It may be well, before considering the grounds upon which the two Indian Courts have held the estates in question to be the property of the joint family, to dispose of a point taken by the Appellants, which applies only to *Shahjehanpore*. The Appellants contend that, whatever be the weight of the evidence as to the real nature of the purchase, the title of *Ramsoonder* to this estate as his separate property must prevail, by reason of his having purchased it at an execution sale held after Act VIII. of 1859 (the Code of Civil Procedure) had come into operation, and by force of the 260th section of that Statute, which provides that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." Their Lordships will not inquire whether there is sufficient proof that Ramsoonder, who purchased at an auction-sale held a few days after the Act came into operation, did obtain a certificate under the Act, or of its terms, if he did obtain one; because, assuming him to have been the certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present. They were designed to check the practice of making what are known as *benami* purchases at execution sales,—*i. e.*, transactions in which A secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds.

It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase-money of the property in question was derived,—*i. e.*, whether it came from the common family chest at *Koredha* in *Beerbhoom*, or from the separate funds of *Ramsoonder* employed by him in carrying on his business, admitted to be separate, at *Khagra*, near *Moorshedabad*. The evidence adduced by the Respondents in support of their claim consisted mainly of a large body of oral testimony; of certain books and accounts kept at the family-house at *Koredha*, being part of the joint family accounts; of the separate books and accounts of *Ramsoonder* kept at *Khagra*; and of letters purporting to be letters which had passed between him and *Ramkristo*, the son of *Benoderam*, being together at *Khagra*, on the one side, and *Benoderam* residing at *Koredha* on the other. The Principal *Sudder Ameen* treating the whole of this evidence, whether oral or documentary, as trustworthy, came to the conclusion that the Plaintiffs had established their case. The Judges of the High Court appear to have considered that the letters on which the Principal *Sudder Ameen* had relied were not admissible in evidence against the Defendants, the Appellants; to have found reasons for discrediting the accounts; but to have held that, nevertheless, the finding of the Lower Court was capable of being supported upon the oral testimony viewed by the light cast upon it by the conduct of the parties.

If it were clear that the Judges of the High Court were right in rejecting the letters, and in treating the accounts as untrustworthy, the correctness of their finding would no doubt have to be determined by the sufficiency of the grounds on which they have rested it. Even in that case their Lordships, though unable to adopt the inference which the learned Judges have drawn from the conduct of *Ramchunder* and *Benoderam*, or altogether to concur in other parts of their

reasoning, would have felt great difficulty in disturbing their finding, inasmuch as both Courts are agreed as to the credibility of the Plaintiffs' witnesses. Their Lordships, however, are of opinion that the letters, if proved as the Principal *Sudder Ameen* has found them to have been, were clearly admissible in evidence against the Appellants who claim under *Ramchunder*.

It was said that the Judges of the High Court have treated these letters as not duly proved. But it appears to their Lordships that those learned Judges, thinking that the documents would not, if proved, be admissible against the Appellants, never addressed their minds to the sufficiency of the proof. The judgment on that point of the Principal *Sudder Ameen*, a native Judge, dealing with letters in the native character, and purporting to have passed between Natives, is, in their Lordships' opinion, of very great weight. The letters, moreover, afford internal evidence that they have not been concocted for the purposes of this suit. And since those with which *Ramchunder* has been directly connected, by proof of handwriting or otherwise, clearly show that he and *Ramkristo* were acting jointly on behalf of the family in the purchase of *Shahjehanpore*, the letters of *Ramkristo* written in the course of the same transaction seems to be also admissible; and the whole correspondence affords the strongest confirmation of the statements made by the Plaintiffs' witnesses.

Again, their Lordships are not satisfied that the objection taken by the Judges of the High Court to the accounts are such as ought to deprive them of the credit which the Principal *Sudder Ameen* (possibly a more competent judge of native books of account than any European can be) gave to them. A distinction is no doubt to be taken between those accounts. The family accounts, taken by themselves, are admissible only as corroborative evidence. But the private accounts of *Ramsoonder*, produced by his brother from the *Khagra kothi*, may, if genuine, be direct evidence, in the nature of admissions on his part against the Appellants. There are entries in the latter which strongly support the Plaintiffs' title. And these are not open to some of the objections taken by the High Court to the family accounts; particularly to one which their Lordships may observe they do not consider to be by any means conclusive, *viz.*, one to the effect that the last mentioned accounts, or some of them, were produced by *Benoderam* in support of his claims to the sole ownership of the estates. *Ramsoonder's* grant to *Surusuttee Dabee* also affords some corroboration of the Plaintiffs' case as to *Shahjehanpore*.

Regarding *Cossipore*, it may be observed that although much of the Plaintiffs' documentary evidence, and in particular the letters, have no bearing on the claim to this estate, the direct evidence of its having been acquired as part of the joint family property is stronger than that relating to *Shahjehanpore*. *Shibram Dey*, who has been treated by both Courts as a witness deserving of credit, has distinctly sworn that the twelve annas share in this estate, which once stood in his name, was purchased in his name with the family funds, and on account of the family; and that no consideration passed when it was transferred from his name into that of *Ramsoonder*. The High Court has found that, before this *benami* purchase, the family was interested as *patanidars* in this estate; and every probability is, therefore, in favor of the conclusion that the direct evidence given to prove that the purchase of the other four annas share in the estate was also a family transaction, is true.

Their Lordships are of opinion that the evidence so given on the part of the Plaintiffs is too strong to be outweighed by the inferences to be drawn from the conduct of *Benoderam* and *Ramsoonder* in the matter of the claims advanced by the former, or from the conduct of the family in allowing *Ramsoonder*, on the occasion of giving security to the Collector, to state that these properties belonged to himself without co-sharers. Their Lordships will afterwards consider how far the representations involved in these last-mentioned transactions (if false) affect the right of the Plaintiffs to succeed in this suit. In determining whether, in point of fact, the

property was joint or separate, they can only be treated as in the nature of admissions inconsistent with the title now asserted; and, viewed in that light, they do not seem to their Lordships materially to impair the strength of the case made by the Plaintiffs.

On the whole, then, their Lordships, after full consideration of the arguments for the Appellants, and notwithstanding the omission to call or account for *Ramkristo*, have come to the conclusion that the finding of the two Indian Courts, to the effect that both estates were purchased with joint family funds, and became joint family property, ought to be affirmed.

If this be so, the next question to be considered is, whether the Plaintiffs have forfeited their right to assert their title against the Appellants by reason of their own conduct, or the acts of any of those with whom they are connected?

Those who set up such a defence are bound to show clearly both the facts on which it is founded, and that the legal consequences on which they insist necessarily flow from those facts. In the course of the argument there was some want of precision upon this point.

The mere fact that *Ramsoonder*, when trading on his separate account, was permitted by the family to appear to the world as the sole owner of the estates, and so, perhaps, to obtain a fictitious credit, can be no foundation for such a defence. It may be an unfortunate consequence of the Hindu law touching the joint and separate property of members of an undivided family, but it is one of which all who deal with a Hindu trader must take their chance. Nor can greater effect be given to the misrepresentation made by *Ramsoonder*, probably with the concurrence of the adult members of his family, when he gave security to the Collector. Such a misrepresentation might possibly have been used as an estoppel against the family, had any question in respect of the security arisen between them and the Collector. But it has no bearing upon the present suit except as an admission, in which light it has been already considered, or as an instance of tortuous dealing, which affects the general credit due to the Plaintiffs. It was not upon the faith of that representation that the Appellant purchased.

The foundation, therefore, of the defence is to be found, if anywhere, in the acts done after *Ramsoonder's* death, and before the sale.

The first of these was the transfer of the estates into the sole name of *Benoderam*, on his application, and with the consent of *Ramchunder*. Their Lordships think it desirable, before considering its effect, to state their view of the nature of this transaction. They cannot but regard it as a contrivance, between *Benoderam* and *Ramsoonder*, at least, to put the estates beyond the reach of *Ramsoonder's* creditors, and therefore fraudulent as against those creditors. They do not impute to *Benoderam* or to *Ramchunder* any intention to defraud either the children of *Ramsoonder* or any other member of the joint family. But *Ramsoonder* was known to have died indebted; judgments against his estate, if not actually recovered, were imminent, and the only practicable mode of putting these properties wholly beyond the reach of his creditors was by treating them not as family property in which he would have a seisable interest but as the property of *Benoderam* alone. In furtherance of this scheme, *Benoderam*, when the estates were attached, filed his claims. If those claims had been successful, the attachment would have been removed, and this execution altogether defeated. If, on the other hand, a claim had been made, according to the truth, on the ground that the estates were joint family property, the execution must have gone on, though with notice to all concerned that such a claim had been made. The dismissal of *Benoderam's* claims became final by his failure to bring a suit to establish his alleged rights within one year from the date of the orders. But the orders themselves do not state the precise grounds of dismissal; and though they negative the title set up by *Benoderam*, they in no way affirm that *Ramsoonder* was the sole owner of the properties. And the depositions of the three witnesses from page 412 to 416 of the record, show pretty clearly that the case made by the decree-holders

in resisting *Benoderam's* claim to *Shahjehanpore* was rather that the estate was family property in which *Ramsoonder* had an interest as coparcener, than that it belonged to him alone.

How then do these proceedings affect the right of the Plaintiffs to assert against the Appellants the title to the estates which they have been shown to possess? They might be estopped, if it were shown that they had represented *Ramsoonder* to be the sole owner of the estate; and that the Appellants had purchased on the faith of that representation. But it is impossible from the proceedings in question to extract any such misrepresentation; even if the Plaintiffs on the record are to be held to be bound by every act and statement of *Benoderam*.

Again, is their right affected because, when *Benoderam* put forward a false claim, they did not formally prefer the true one? There is nothing in the Code of Procedure which made it imperative on them to do this; the claim, if made, could not have stopped the execution sale altogether.

The highest ground on which the Appellants can put their case is, that *Benoderam* misled them by his fraudulent attempt to defeat the execution; and that the whole family is bound by his acts. It is not necessary to decide how far *Benoderam* and *Ramchunder*, who are not parties to this suit, might be affected individually by these proceedings, if they were suing to recover their respective shares. On the present record it must be held that their shares have passed to, and are now vested in, the Appellants. Their Lordships have felt some doubt whether the Respondents, suing as members of a *Hindu* family, still joint and undivided, for property which, if recovered, will presumably again fall into the common stock of that family, might not have been shown to be bound by the acts of *Benoderam*, whether of omission or commission, and responsible for the consequences of them. But they are of opinion that a defence, intended to be founded on such a joint responsibility, should be far more clearly pleaded and proved than it has been in this case. How far the Plaintiffs on the record have been parties to, or are affected in law by *Benoderam's* proceedings, and to what extent, if at all, the Appellants were misled by those proceedings, are questions which have never been fairly raised or tried in the Courts below. This was so found, and as their Lordships think, correctly found, by the Principal *Sudder Ameen*.

Their Lordships are, therefore, of opinion that the second point taken by the learned Counsel for the Appellant is no answer to the suit, and they must humbly advise Her Majesty to affirm the decrees under appeal, and to dismiss this appeal with costs.

28th March 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature, North-Western Provinces.

RAJAH PIRTHEE SINGH (Defendant)* ... } *Appellant,*

versus

RANEE RAJKOOER *alias* RANEE SIBCOWAR (Plaintiff) ... } *Respondent.*

Hindu Law—Widow—Maintenance—Residence—Unchastity.

A Hindu widow is not bound to reside in her deceased husband's family house; and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity, or for any other improper purpose.

Arrears of maintenance may be awarded.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This was a suit brought by *Ranee Raj-*

* 12 B. L. R., p. 238.

kooer against *Rajah Pirthee Singh* to recover arrears of maintenance, and also to have a decree for future maintenance. *Rajah Pirthee Singh* was the adopted son of *Rajah Petumber Singh*, and the Plaintiff was the fourth or youngest of the four widows left by the late *Rajah*. The Subordinate Judge gave a decree in favor of the Plaintiff, which was appealed to the High Court, who supported that decision and increased the amount of maintenance awarded by it. From that decision there is an appeal to her Majesty in Council, which we now have to consider.

The defence set up by the adopted son was that the Plaintiff had been provided with maintenance so long as she lived with the family of her deceased husband, but that she had quitted his house for improper purposes. He says—"The Defendant provided the Plaintiff with maintenance so long as she remained in Ava" (that was the family house), "according to the family custom. In 1861, the Plaintiff, disregarding her husband's honor, left for *Kotah* with *Bholanath*, contrary to the terms of the will and the family custom, and became an abandoned character. This being so, she has lost her right. Even after this the Defendant, to avoid scandal and to oblige her, and relying on her promise that she would no more let *Bholanath* have any access to her, allowed her lodgings at *Durriyapur*, and regularly took care of her maintenance. The Plaintiff's claim for maintenance prior to the institution of the suit is therefore illegal, and her claim for interest is also illegal, the payment of which was never stipulated. The Plaintiff has nevertheless not parted with *Bholanath*, *i. e.*, she has continued to act and behave contrary to her promise, disregarding the honor and custom of the family, and has not left off her former bad habits. She has, therefore, no right under the Hindu law to have a maintenance fixed for her for the future." Now, that defence on the part of the Defendant has not been proved, and has been very properly given up. The Plaintiff alleged that some dispute arose between her and the elder widow with regard to her jewels which she did not make out; and she has not made out any cause for leaving the residence of her late husband any more than the Defendant has made out his defence. The question, therefore, comes to this,—whether a Hindu widow loses her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity or for any other improper purpose.

Several cases have been cited upon this point, and it will be as well to refer in the first instance to a case which was decided by the Privy Council, as that is one of the highest authority. That was a suit by *Cossinauth Bysack* v. *Hurrosoondery Dossee* (1) which was tried in the Supreme Court in Calcutta, in which the Chief Justice, Sir Edward Hyde East, gave judgment. The question was put to the *pundits*, whether a widow was deprived of her property upon the ground of her having left her deceased husband's residence. Sir Edward Hyde East says:—"Upon the last ground of error the *pundits* have uniformly answered that the widow was not bound to live with her husband's relatives. The eighth question put by the Court to their *pundits* was:—If a widow from a just cause cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate? *A.* If a widow, from any other cause but for unchaste purposes, cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited." He certainly goes on to say: "Here there was a good cause at the time, namely, the extreme youth of the wife, and no pretence was made of the prohibited cause." It was alleged that, having left the residence of her deceased husband, and having refused to reside with the family, she did not forfeit the property which she had taken. That case was appealed to Her Majesty in Council, and was decided on the 24th June 1826. The opinion of the Judicial Committee was delivered by Lord Gifford. He says:—"With respect to the last supposed ground of error in this decree which

(1) 2 Morl Dig., 198; and in the P. C., Clarke's Add. Ca., 91; and Morton's Rep., 85.

was assigned by the Appellants, namely, that it was not ordered by either of the decrees that *Hurrosoondery Dossee* should reside with, or under the care, protection, and guardianship of the Appellants, who, as the surviving brothers of *Bissonauth Byaack*, were alone entitled to have the care, protection, and guardianship of his widow, the *pundits* appeared to be unanimous in the opinion that a Hindu widow is not bound to live with her husband's relatives." That is the principle laid down. Then says his Lordship;—"I will read the answer to the eighth question put, which will explain what the Hindu law is upon the subject, and in that it appears the other *pundits* who were called in agreed, or at least they expressed no objection to the opinion pronounced. The question put is this:—'If a widow from a just cause ceases to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?' The answer is:—'If a widow, from any other cause but unchaste purposes, ceases to reside in her husband's family, and takes up her abode in the family of her parents, her rights would not be forfeited.'" Then his Lordship goes on to say:—"Now, it was not pretended in this case that she had removed from the protection of her husband's family for unchaste purposes. She was only of the age of fourteen years at the death of her husband. His brothers were young men, and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore it appears quite clear from the answers given by the *pundits* that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; that they had no right to insist upon her not withdrawing from them in order to put herself under the protection of her mother; and, therefore, there appears to be no foundation to that extent for the appeal." The reasons given, that she was only of the age of fourteen years at the death of her husband, and that his brothers were young men, do not appear to be the reasons upon which that decision was founded. It was merely pointed out, as their Lordships understand the judgment, for the purpose of showing that the widow was not removing from her husband's house for unchaste or improper purposes.

It, therefore, appears that a Hindu widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes.

That decision is quite in accordance with the *Vyavasthas* which are quoted by *Shamachurn Sircar* in his book called *Vyavastha Darpana*. At p. 370, *Vyavasthas* Nos. 199 and 200 are thus stated:—"Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, yet still she is entitled to maintenance. The widow, however, is not entitled to maintenance by residing elsewhere without a just cause, if she was directed by her husband to be maintained in the family house." The husband in this case left a will, but he did not impose any condition upon either of his widows to reside in his family house after his death. He wrote a letter to the Collector, in which he stated that he did not wish that his widows should have the management of his property, and put the property into the hands of a *mooktear*, because, he said, it was of importance to maintain the reputation of his family. But it is no more than any other Hindu gentleman would desire, that after his death his property should not be jeopardized, that the reputation of his widows should be maintained, and that they should not destroy the reputation of his family by destroying the reputation of themselves.

It has been held that the Hindu law does not require a Hindu widow, for the purpose of maintaining her reputation, necessarily to live with her husband's relatives. She does not injure her reputation by living with her own mother or her own father. It is laid down as a rule of law that she is not bound to live with her husband's relatives. The decision of the

Privy Council was quite in accordance with those texts of the Hindu law referred to by *Shamachurn Sircar*.

In the case of *Shibasundari Dasi*, the widow of *Golackchunder*, cited in *Baboo Shamachurn Sircar's* book at page 381, in which Sir Lawrence Peel delivered a judgment, it appeared that *Shibasundari Dasi*, widow of one *Golackchunder*, who died during his father *Rammohan's* lifetime, voluntarily left the family house ("voluntarily," that is to say, without any cause except her own will and desire), and sued the Defendants, who were the surviving sons and representatives of the other sons of *Rammohan*, for separate maintenance: a verbal reference had been made to three respectable Hindus, *Kashinath Mullik*, *Gobindachunder Banerjea*, and *Rammohun Neoghi*, who awarded Rs. 12 per month as sufficient allowance to her, she being allowed apartments in the family house, and food. Sir Lawrence Peel said:—"We think she is entitled to a separate maintenance. The words 'food and raiment' being too vague and ambiguous an expression, we must refer it to the Master to inquire and report whether the amount offered was just and proper with reference to her situation in life." Then in another case:—"*Srimati Mandodari Debi*, the eldest of the two widows of *Tilakram Pakrasi*, a *Hindu* native of Bengal, filed a bill against his son, praying that Defendant 'may set forth a full, true, and perfect account of the property, and may be compelled by a decree to pay her the same.'" I believe it was not made a question about her having left the father's house, but in that case arrears of maintenance were awarded to her and future maintenance secured.

There was also the case of *Jadumani Dossee* v. *Kheytramohun Shil* (1), in which Sir Lawrence Peel, having considered the whole question, laid down the law in a clear and explicit manner. Every one who is acquainted with Sir Lawrence Peel must have the highest respect for his opinion upon all questions of this kind. He delivered the judgment of the Court. He said:—"The question is, whether a Hindu childless widow, who, some short time after the death of her husband, uncompelled by cruelty or ill usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respect a proper one, and her conduct unimpeached, forfeits her right of maintenance out of the property which was that of her deceased husband in his life-time, and which had devolved on his heirs." There the question was whether the principle which had been laid down in the case cited from the Privy Council, which was applicable to property inherited by a widow from her deceased husband, was applicable to a case of maintenance. Sir Lawrence Peel, after referring to some conflicting authorities, said:—"This state of the authorities has induced us to examine closely into the law on the subject. We should not hesitate to follow the decisions of the *Sudder* in preference to those of our own Court, if they appeared to us to be at once more just and more conformable to the Hindu law. We have intended to follow the Privy Council. The Privy Council has, on the subject of the right of the Hindu widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe. That Court says:—'It was not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen at the death of her husband, his brothers were young men; and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death, therefore it appears quite clear from the answers given by the *pundits*, that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them, in order to put herself under her mother's protection.' The decisions of that Court must of course give the law to all Courts here. The answer of the *pundits*, which the Privy Council adopts, is, that 'if a widow, from any other cause but unchaste pur-

(1) Vyavastha Darpana, 381.

poses, ceased to reside in her husband's family and took up her abode in her parents' family, her rights are not forfeited.'" Then he says:—"In the Privy Council the question was whether the Hindu heiress forfeited her estate, by selecting without impropriety her father's roof for her residence. But it is to be observed that the opinion of the *pundits* was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow not an heiress, as to one who inherited;" meaning to say, that the rule which had been laid down was equally applicable to a case of maintenance as it was to the case of property which the widow had inherited; that is to say, that she was entitled to a freedom of choice, and that unless she left the residence of her deceased husband for unchaste purposes, she could not be deprived either of the property which she had inherited from him, or be deprived of maintenance which the Hindu law requires the heirs of her husband to provide for her.

We are, therefore, not now deciding the question for the first time. We are not now for the first time laying down a rule upon this subject. In the case of *Shurno Moye Dossee* v. *Gopal Lall Doss* (1), the widow sued for maintenance, and it was held that she was entitled to that maintenance notwithstanding she had left the residence of her deceased husband. The Court said,—"In this case a widow sues for maintenance. The Defendant, who is her step-son, objects that she resides in the house of her father, and alleges that she is, therefore, not entitled to maintenance. The widow alleges that she left the family home because she was tortured or rendered uncomfortable, but did not prove that allegation. We find, however, that it is laid down in the *Vyavastha Darpana* of *Shamachurn Sircar*, the learned interpretor of the late Supreme Court, vol. 1, p. 319, s. 160, that 'should a woman without unchaste purposes quit the family house, and live with her parents or own relations, yet still she is entitled to maintenance;' and in s. 161, 'The widow, however, is not entitled to maintenance by residing elsewhere without a cause if she was directed by her husband to be maintained in the family home.' We think, therefore, that the widow is entitled to retain the decree for maintenance which she has obtained, and dismiss the appeal."

In this case their Lordships are of opinion that there was no direction by the husband's will which rendered it necessary for the widow to reside in her husband's house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different. All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance, unless she is guilty of unchastity, or other disreputable practices, after she leaves that residence.

The case was tried by a Subordinate Judge, in this instance, who was a *Hindu*, and, therefore, must be acquainted with the habits, usages, and religion of *Hindus;* and he thought that the widow having left the husband's house, was still entitled to her maintenance, and he awarded her the sum of Rs. 150 a month, with a sum of money calculated at that rate for the years during which she had not been allowed maintenance. The case was appealed to the High Court, and that Court thought that, having regard to the amount of the husband's property, the widow was entitled to a larger sum; and they awarded her maintenance at the rate of Rs. 200 a month. Their Lordships do not think it necessary to disturb that decision. The amount of maintenance, it is stated in the *Vyavastha* 197 in *Shamachurun Sircar's* book, should be fixed with reference to the proprietor's estate. Now in this case the deceased husband left property to the extent of two *lakhs*, or £20,000, a year. It does not appear to their Lordships to be excessive, even though he left four widows,

(1) Marsh., 497.

that each of those widows should have a maintenance allowance at the rate of Rs. 200 a month, equal to £240 a year. Looking to the state in which a widow is bound to live and the religious duties which she is called upon to perform, it does not appear to their Lordships, having reference to the property of the deceased husband, that this widow ought to receive a less sum than that which has been awarded to her by the High Court, namely, Rs. 200 a month.

Some question was made as to the right of the widow to recover past arrears. A case was cited from the Madras High Court (1) in which arrears were awarded; in the case also in which Sir *Lawrence Peel* gave that elaborate judgment to which I have referred, arrears of maintenance were awarded to the widow, as well as a decree in her favor with regard to future payments.

Under these circumstances their Lordships are of opinion that the decision of the High Court is correct, and they will therefore humbly recommend Her Majesty that that decree be affirmed, with the costs of this appeal.

(1) See 2 Mad. H. C., 36.

6th and 7th May, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

A. J. FORBES (Plaintiff)* ... *Appellant,*

versus

MEER MAHOMED HOSSEIN and others (Defendants). ... *Respondents.*

Auction-purchaser—Burden of Proof—Julkurs.—Grounds of Appeal.

An auction-purchaser at a revenue sale of a permanently settled estate is remitted to all the rights possessed by the original settler at the date of the settlement. In order to abolish tenures and incumbrances subsequently created, his cause of action dates from his purchase. The existence of such tenures at the date of the permanent settlement must be proved by their holders; the presumption in favor of a purchaser resting upon the principle that every *biga* of land sold must contribute to the public revenue, unless specially exempted. The tendency of recent legislation and decision has been to give force to the contrary presumptions arising from long and undisturbed possession.

In a suit by an auction purchaser of a permanently settled estate to recover certain *julkurs* of which the Defendants had been admittedly in possession for nearly fifty years, and which they claimed as incidents to a tenure which existed before the date of the permanent settlement, it was held that the onus was on the Plaintiff to prove his title affirmatively.

The Judicial Committee refused to entertain an objection taken in the grounds of appeal, which had not been taken on appeal to the High Court.

Julkar, or the right of fishery, may exist in India as an incorporeal hereditament, and as a right to be exercised upon the land of another.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

THE appellant in this case is the *Zemin-*

* 12 B. L. R., 210.

dar of *Sultanpore*. *Sultanpore*, though now a separate *zemindari*, appears to have been at the time of the decennial settlement part of a larger estate called *Pergunna Havili*, which was then settled with a lady styled *Ranee Indrobutty*. When the separation took place does not very clearly appear, but what is clear is that, in the month of July 1850, *Sultanpore* was put up for sale for arrears of Government revenue, that it was then purchased by one *Pertab Singh*, and that in the following April he sold it to the Appellant, who thereby acquired all the rights which, by virtue of that auction-purchase, had been vested in the vendor.

The Respondents may be taken to represent the holders of an *istimrari* or *jagir* tenure which, at the time of the perpetual settlement, existed under a grant or *sanad* from the Government, but was then settled as part of *Havili*, or, as one may take it, of *Sultanpore*, in the nature of a dependent *talook*. It appears that, shortly after the auction-purchase, Mr. *Forbes* found that the holders of this tenure, which is admitted to be a tenure which he, as auction-purchaser, has no right to destroy, inasmuch as it existed before the decennial settlement, were in possession, and had long been in possession of certain *julkurs*, or rights of fishery. He seems to have attempted by the strong hand, or otherwise, to dispossess them of those fisheries; but on their suit, the Magistrate, by an order dated the 4th December 1852, and made in an Act IV. case, affirmed their possession, and on appeal that order of the Magistrate was confirmed by the Sessions Judge on the 9th April 1853.

It further appears by the proceedings that these *julkurs*, or rights of fishery, are of several kinds. Mr. Justice *Phear*, in his judgment, says "the most important of them is a river, which for portions of its course lies wholly within lands of the Plaintiff, and for other portions wholly within the *jagir* or *istimrari* lands of the Defendant, and thirdly, in other parts divides the lands of the Plaintiff and Defendant." There seem to be also some which do not strictly fall within either of the above descriptions. I mean those which are connected with the *Seetadhar* stream, and partially, at least, consist of rights which during the time of flood are exercised over the Appellant's admitted land.

It does not, however, appear to their Lordships to be necessary, at present at least, to examine very particularly into the distinction between these different rights of fishery, because if the Act IV. proceeding, which has been referred to, be examined, it will be found that they were all then in question—that the Respondents were then found to have been in possession of all of them for a long time anterior to the dispute; and it is even stated in the judgment of the Sessions Judge, that the Defendant did not deny that possession in fact. They appear to have been all claimed by the Respondents as held by the same title, that title being that they had been so held from a date previous to the decennial settlement, and as an incident to the tenure of which it is admitted the Respondents or their ancestors were the undoubted holders. The right of possession, or the fact of possession, having been thus found by the Act IV. proceedings, Mr. *Forbes* took no steps to impeach that finding until the year 1860, when he instituted this suit.

Now the first question which their Lordships have to determine is, whether the Indian Courts have been correct in throwing upon the Appellant the burden of showing that the *julkurs* which he claimed by his plaint formed part of the assets upon which the settlement of his *zemindari* was made? For that purpose it seems necessary, although the thing is common learning, to go back to first principles, and to consider upon what the stringent rights which the law gives to a purchaser at an auction-sale really rest.

It cannot be disputed that if there had been no auction-sale it would have been impossible for the *Zemindar* to question, at the time this suit was brought, either the possession or the title of the Respondents. There had been, in the year 1844, a previous Act IV. case between one of the former *Zemindars* and these parties, in which, as in the later proceeding of that kind, the possession of the Respondents

had been affirmed, and of course after that it would have been essential for the *Zemindar* to prove that within twelve years of bringing his suit he had been in possession of those *julkurs*; and at the time this suit was brought, twelve years had elapsed even from the date of the award of 1844.

It is conceded that by virtue of the purchase from the purchaser at the auction-sale, immediately after the sale, and at a time when he cannot be taken to have waived any rights which that transaction may have given him, Mr. *Forbes*, the Appellant, acquired the same rights which he would have acquired had he been the actual purchaser at the revenue sale. But what are those rights? The first is no longer here disputed. It is that in the case of an auction-purchaser the cause of action must be taken to have first arisen at the date of the purchase, and consequently that the Defendants cannot plead their long possession as an absolute bar to the suit. The statutory title, however, which the law gives to an auction-purchaser is that, for the protection of the revenue, and in order to ensure its due payment by him and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settler at the date of the perpetual settlement had; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding *Zemindars* since that date. In the assertion of this right, the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burthen of proof on his opponent. That presumption, however, is founded not so much upon the principle which I have just mentioned, as upon the principle that every *biga* of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the *Zemindar* to enhance rent is also presumable until the contrary is shown. Accordingly, in many cases, which may be found in the books, a very heavy burden of proof has been placed upon the Defendants, whose tenures have been questioned by auction-purchasers; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement, or even twelve years before, in order to escape the consequences of the claim.

It is, however, to be observed that the course of modern legislation, and also of modern decision, has, if not in the case of *lakhiraj* lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession. In the present case the Respondents are almost admitted to have given proof of possession for a period of nearly fifty years. But, if they had not done so, this particular case would, in their Lordships' opinion, stand clear of the presumptions which the Appellant invokes in his favor. For the Respondents are claiming these *julkurs*, or rights of fishery, as an incident to a tenure admitted to be incapable of being disturbed by the *Zemindar*—a tenure which existed before the date of the perpetual settlement. The question therefore resolves itself into one of parcel or no parcel,—whether the *julkurs* are parcel of the old estate of the under-tenant, or whether they have been granted by an act of the *Zemindar* for the time being-subsequent to the perpetual settlement. Therefore, it seems to their Lordships that there is nothing to relieve the Appellant from the ordinary rule which the law imposes on a Plaintiff,—namely, that of establishing his own title affirmatively, and indeed of making out a strong title in order to disturb a possession of very long duration. Their Lordships are, therefore, of opinion that the Courts below were right in holding that the burden of proving that these *julkurs* did form part of the assets upon which the settlement was made, and that his means of meeting the revenue had been diminished by the alienation of them by means of acts subsequent to the date of the perpetual settlement, lay upon the Appellant.

It remains to be considered whether they were also right in holding that he had failed to establish that case. The distinction between the different classes of

julkurs in dispute has already been noticed; and it may be admitted that although the Respondents would presumably have the right of fishing in waters lying wholly within the limits of their dependent *taloch*, they would not presumably have the exclusive right of fishing in the waters dividing their lands from those of the Appellant, or any right of fishing in places wherein the property in the soil is wholly in the Appellant. The proof, however, of the long possession of the Respondents applies equally to all the *julkurs* claimed. And that *julkur*, or the right of fishing, may exist in *India* as an incorporeal hereditament, and a right to be exercised upon the land of another, is shown by the case of *Lukhee Dasee* v. *Khatima Beebee* (1). In that case *A* had purchased at a public sale by the Collector the *julkur* of certain *jhils*. One of them became dry, and it was determined that *A's* purchase of the *julkur* only did not convey any property in the lands which belonged to the proprietor of the *jhil*. But the *julkur* was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser. The case went through all the Courts, and was ultimately decided by high authority; for it was decided by the *Sudder* Court with the concurrence of Mr. *Colebrooke*.

Again, the issue to be established by the Appellant was purely one of fact. It was first tried by the Principal *Sudder Ameen* who dismissed the suit, and found in favor of the Respondents, and that after a local investigation. The cause then went by appeal to the High Court. The High Court thought that some further light might be thrown upon the question by the production of certain documentary evidence, and remanded the suit for re-trial on that ground. It was re-tried, and the Principal *Sudder Ameen* again found in favor of the Respondents. There was then a second appeal to the High Court, and both the learned Judges, who formed the Division Bench of the High Court, thought that there was no ground for disturbing the decision of the Principal *Sudder Ameen*. Therefore, there has been a complete concurrence of all the Courts which have dealt with this case in *India* in favor of the Respondents, and against the contention of the Appellant. It has been urged, however, upon their Lordships that the High Court in particular has mistaken the effect of two documents,—namely, a copy of the quinquennial register and the return of the *sarbarahkar* during the time in which the *Pergunna Havili* or *Sultanpore* was in the custody of the Court of Wards. But it appears to their Lordships that the learned Judges of the Court below addressed their minds to those two documents, and were satisfied that they failed to establish the Appellant's case. The learned Judges in *India* are far more competent than their Lordships here can be to form an opinion of the credit due to documents of that kind coming from the Collectorate. Their Lordships do not deny that there may be found here and there a name in those documents, which raises some doubt whether the *julkur* of *Seetadhar* may not have been returned as part of the assets of the *zemindari*; but, considering what confusion there often is in the nomenclature of villages and other localities in *India*, their Lordships think that, even if the authority of the documents were upheld, they would not conclusively prove that the Plaintiff was entitled to any of the *julkurs* claimed in this suit. It is quite clear that there is considerable confusion as to the *julkurs* belonging to the estate, since the plaint originally included *julkurs* which were afterwards found and admitted to be in the Appellant's possession.

On the whole, their Lordships have come to the conclusion that, if they were to reverse the repeated decisions in favor of the Respondents, they would be departing, without any reason, from the rule which they have prescribed to themselves respecting concurrent findings of the Indian Courts upon questions of fact, and that therefore the decree ought to be affirmed. Their Lordships also desire to state through me, that they come to this conclusion the more readily, because they observe that when this Board granted special leave to appeal, in the year 1866, it did so upon the representation (and without that representation it seems very doubtful

(1) 2 Sel. Rep., 51.

whether it ever would have done so) that this case involved a question of great public importance, and of general application, —a representation which, in their Lordships' opinion, the argument at the bar has entirely failed to support.

Their Lordships therefore will humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal, with costs.

10th and 16th May, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

PUDDOMONEE DOSSEE and another (Heirs of Plaintiff)* ... ... } *Appellants*,

versus

ROY MUTHOORANATH CHOWDHRY and others (Defendants) ... } *Respondents*.

Alienation pending Attachment in Execution.

Certain property was attached in execution of a decree, and while the attachment was in force *pottas* were granted to certain persons by the judgment-debtors. Twelve years after the attachment, no further steps having been taken in the matter, the execution case was struck off the file, and the property was afterwards mortgaged by the judgment debtors to *R*. Subsequently a fresh attachment was issued at the instance of the heirs of the former attaching creditor, under which the property was put up for sale subject to *R's* mortgage, and *R* herself became the purchaser. In a suit by *R* to set aside the *pottas* granted during the continuance of the first attachment, *Held* that the prohibition against alienation of property under attachment avoids such alienation only as against the execution-creditor or persons entitled to claim under him.

A conveyance executed by the judgment-debtor after an attachment has been removed, and before a fresh attachment is issued, is valid, though the second attachment is under the same execution as the first.

Quære.—Whether an alienation of property under attachment void as against the execution-creditor becomes valid by relation when the attachment is removed?

Semble.—It may be presumed that an execution, long neglected and finally struck off, has ceased to be operative, and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The suit out of which this appeal has arisen was brought by the late *Rassmonee Dossee*, and her appeal has been continued by two ladies, who appear to be her heirs and representatives.

The suit was brought for the purpose of cancelling a *bhag potta* set up by the Defendants, the *Chowdhrys*, and recovering from them the possession of a parcel of land upon which a *bazar* had been built, with mesne profits, the title on which *Rassmonee Dossee* sued being that of a purchaser at an execution-sale. That was the object of the suit as stated in the plaint. When the *Chowdhrys* put in their answer, they not only relied upon the *bhag potta*, but also set up the second, which we may call the *maurasi potta*; and the validity of that being called in question by the replication, one of the issues settled in the suit put in issue the validity of both *pottas*, being in terms whether they had been granted *bonâ fide* to the Defendants, or whether they were collusive or illegal.

The title of *Rassmonee Dossee* to the right, title, and interest of the execution-debtors, a joint family which may be described as "the *Sirkars*," is not disputed; the only question is what were the extent and nature of their interest in the property sold at the date of the sale? It is necessary, however, in order to see how this question arose between the parties,

* 12 B. L. R., p. 411.

to recapitulate, as shortly as may be, the facts of the case.

The proceedings go back as far as the year 1830. In August of that year one *Bhoyrub Sen* recovered a money decree for an inconsiderable sum against the *Sirkars*. In execution of that decree, the land in question was attached on the 27th February 1832, and the usual proclamation of attachment was issued on that occasion. *Bhoyrub Sen* died, leaving (as it is said, and their Lordships will assume correctly said) only minor heirs. Nothing further was done between the date of this attachment in 1832 and the year 1844, when the case in execution was struck off the file, the judgment being still unsatisfied. It appears that within one year after that was done *Rasmonee Dossee* became mortgagee of the land under instruments executed by the *Sirkars*. There were two mortgages for Rs. 500 each. They seem to have been ordinary Bengali mortgages operating as mere pledges of the land; and she subsequently instituted proceedings to enforce those securities. Pending her suits, and, apparently, before she obtained a decree, the heirs of *Bhoyrub Sen* took fresh proceedings to enforce their judgment. A new attachment issued in June 1848. The order for sale was made on the 30th March 1849, and *Rasmonee Dossee* became the purchaser for a small sum, Rs. 1,400, of the property. This sale was founded upon the second attachment, to which objections were taken and disposed of before the order for sale. One-fifth of the property originally attached was leased as not being subject to the attachment, on the objection of some of the *Sirkars*. *Rasmonee Dossee* also came in as an objector, alleging her mortgage interest, and the result of that was that by the *latbandi* the property was put up expressly as subject to her mortgage. All, therefore, that she bought at the execution-sale was the equity of redemption remaining in the *Sirkars* subject to the mortgage to her. She then took proceedings to recover possession of the land; but she was met by the Defendants, the *Chowdhrys*, who alleged that they held the land under *pottas* granted by the *Sirkars*. After this she seems to have slept upon her rights for seven or eight years, at the expiration of which period she commenced the present suit.

The title so set up by the *Sirkars* was of this kind. The commencement of it was alleged to be a *bhag* or share *potta*, dated the 17th April 1833. From that instrument (which was afterwards produced to the High Court) it appears that the land was granted to them for the purpose of having a *bazar* erected upon it at their expense, the arrangement between the *Sirkars* who granted the land and their lessees being that the latter were to pay a 2-*anna* and 10-*gunda* share of the profits of the *bazar*, retaining 14-*annas* and 10-*gundas* for themselves. The duration of this tenure is, upon the face of the *bhag potta*, somewhat indefinite. It was evidently intended to be of an hereditary character, because heirs are mentioned; but there is a stipulation towards the end of the *potta* that if the lessees wished to give up the *bazar* they should be at liberty to do so, and that in that case the lessors would either purchase the huts and other things incident to the *bazar* which had been erected on the land, or allow the lessees to dispose of them elsewhere. And there is also a stipulation that if the lessors wished to transfer their right in the land they would give the lessees information of their intention to do so, and would give the latter a right of pre-emption.

The case of the Respondents, however, goes further than this. They allege that on the 2nd October 1836, the *Sirkars* executed to them a permanent *maurasi potta*, which materially altered the relation of landlord and tenant. The effect of that was to give them in terms a perpetual *maurasi potta*, in consideration of a *salami* of Rs. 1,000 and a reserved rent of Rs. 600 per annum, commuting the share of the profits to which the lessors had been previously entitled for that rent of Rs. 600. This is the second of the deeds of which the validity is in question in this suit. I have not alluded to a third deed, which appears to have come out in the course of the proceedings, and to have been first produced in the High Court, because it was only a second *bhag potta*, which does

not appear to relate to the property in question in this suit, but rather, as their Lordships understand it, to the one-fifth of the land which had been released from the execution. It was in nearly the same terms as the original *bhag potta*, and there is no issue directed to try the validity of that deed in this suit.

That being the state of the case, the two principal questions which have been argued upon this appeal, are, first, whether, as represented by the Plaintiff, these deeds, or either of them, were or was fraudulent and collusive, and a contrivance between the *Sirkars* and the *Chowdhrys* to defeat the creditors of the former, or whether they were *bonâ fide* documents; and secondly, whether, if admitted to have been *bonâ fide* conveyances, they are not void as against *Rassmonee Dossee* by reason of their having been executed whilst the first attachment was still subsisting and in force?

Their Lordships propose to deal with the first of these questions in the first instance, and without going at length into the evidence. The Principal *Sudder Ameen* seems to have found that the first *bhag potta* had not been formally or properly proved before him. He also thought that the second *potta* was a collusive document, and had not been proved to be a genuine one; but he seems to have admitted, by the very form of his judgment, that in some way or other the Respondents had been *bonâ fide* in possession of the property; that they had, under and by virtue of the arrangements (whatever they may have been) which subsisted between them and the *Sirkars*, laid out large sums in establishing this *bazar*; and that by reason of that expenditure they were entitled to be allowed one-half of the *wasilat*, or mesne profits, of which *Rassmonee Dossee*, by her suit, had claimed the whole.

The High Court, on the other hand, has found that both the documents must be taken to be genuine, or at least that they had not been shown to be collusive documents, and that the long possession of the Respondents had been held under them and by virtue of the title which they conferred, and that the suit ought to be dismissed.

Their Lordships, upon the evidence, cannot feel any doubt but that under the *share-potta* there has been a *bonâ fide* possession during many years on the part of the Respondents. The possession in fact, they think, cannot be disputed. There is nothing to which they can attribute it, except the title commencing with that document. They therefore do not quarrel with the finding of the High Court upon that point.

Then, as to the second *maurasi potta*, the objections seem to be, first, the inadequacy of the consideration stated; and secondly, that, although in the course of the proceedings in the suit of *Ramruttun Roy*, the *bhag potta* was there put forward and apparently proved, no mention was made of this second or *maurasi potta*. Their Lordships do not deny that these circumstances cast some suspicion upon this document. On the other hand, looking to the whole of the *res gestæ*, and to the statement made by the *Sirkars* on the occasion of the revenue settlement to the effect that the *Chowdhrys* were in possession under a permanent *maurasi* tenure, their Lordships do not feel at liberty to say that the finding of the High Court in favor of the second *potta* was wrong, or one which they would be justified in now disturbing. There was certainly evidence upon which the Court might come to that conclusion. Besides the evidence of one of the subscribing witnesses, there was that of two other witnesses, of whom one was a member of the family of the *Sirkars*. No doubt the Judge of first instance was not disposed to act upon this testimony. On the other hand, the High Court finding it corroborated by the circumstances to which I have referred have accepted it as true. Their Lordships cannot say that they were wrong in so doing. If the *maurasi potta* were executed when it bears date, the whole of the Respondents' title was completed before the grant of the Plaintiffs' mortgage, and when there was no adequate motive for the commission of a fraud. If, on the other hand, this document were concocted at a later date, and to defeat the Plaintiffs' claim (of which there is no proof), the parties would hardly have as-

signed to it a date which exposes it to the objection next to be considered.

That objection is whether, supposing the documents to be neither fraudulent nor collusive, they were void as against *Rassmonee Dossee*, by reason of the date at which they were executed, *viz.*, whilst the first attachment was subsisting.

On that point we have been referred to a great many authorities, and it may be admitted that there is some difficulty in reconciling all the cases on the construction of the prohibition against alienation which is involved in an attachment under the new procedure, and seems to have been equally involved in an attachment according to the old procedure. But it appears to their Lordships that one point at least has now been conclusively settled, *viz.*, that the prohibition against alienation avoids the conveyance only as against the execution-creditor, or some person entitled to claim under him.

Again, it follows from the first case, which was cited by Mr. *Leith—Gobindhun Singh*, v. *Meer Muheun Alee* (1)—as in fact he admitted, that if an attachment has been permanently struck off, and a new attachment has become necessary, a conveyance which is executed by the Judgment-debtor between the two attachments will be valid. And one result of that rule, when applied to the present case, is that the conveyances by which *Rassmonee Dossee* acquired her interest as mortgagee must be taken to have been valid, notwithstanding the old attachment which had been issued in 1832.

It may, however, be argued that although a conveyance executed between the striking off of the first attachment and the issuing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution-creditor and those who claim under him. That seems to be a point which is not touched by the authorities cited. Their Lordships, however, are of opinion that in this case *Rassmonee Dossee* cannot claim the benefit of any such rule, if it exists. Her case is peculiar. After the first execution was struck off she became mortgagee. When the second attachment was taken out she intervened in the proceedings as an objector. The result of that was that the property was put up for sale as subject to her mortgage. She therefore brought only the equity of redemption, and presumably paid a smaller price than the property would have realized, if it had not been sold subject to her mortgage. She did not buy the subject which was originally attached, *viz.*, the whole property free from mortgage, but the mere equity of redemption. She cannot be allowed to say that the original attachment ceased to be operative, so as to give her the power of acquiring the mortgage interest subject to which she has purchased, and yet to claim the benefit of it, in order to defeat conveyances which would unquestionably have been binding between the *Sirkars*, the judgment-debtors from whom she took her mortgage, and the Respondents in this case, if there had been an end of the execution altogether.

Their Lordships moreover are not prepared to say that in this case it would, under any circumstances, have been competent to the judgment-creditor, or any person claiming under him, to say that conveyances executed pending the first attachment were absolutely null and void. It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that in *India* the striking an execution-proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandon-

(1) S. D. A., 1855, 214.

ed and ceased to be operative, unless the circumstances are otherwise explained.

Their Lordships desire to add that the extraordinary and unexplained delay which has taken place in the conduct of this suit would have increased their regret at finding themselves compelled, if they had been compelled, to give way to the objection that these instruments were null and void by reason of the date at which they were executed. The effect of allowing this appeal would be to disturb a possession, now found to be a *bonâ fide* possession, which has endured for forty years. For much of this delay *Rassmonee Dossee* and the Appellants are responsible. It has been stated that seven years elapsed between the first assertion of the Respondents' title and the institution of the suit, and it appears that this appeal had been some ten years in the country before it was brought to a hearing.

For the reasons above stated their Lordships have come to the conclusion that it is their duty to advise Her Majesty to affirm the judgment of the Court below, and to dismiss the appeal. As it has been heard *ex parte* there will be no order as to costs.

17th May, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJA BISHEN PERKASH NARAIN SINGH (Plaintiff)* ... ... } *Appellant*,

versus

BAWA MISSER and others (Defendants) ... } *Respondents*.

Hindu Law—Mithila Law—Alienation—Self-acquired Property

According to Mithila law, the owner of self-acquired property has full power of disposition over it.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:

The facts of this case, and the law which arises upon them, may be very shortly stated. *Dabee Dutt Misser*, shortly before his death, executed an instrument, whereby he gave to his only son, who was considerably in debt at that time, his ancestral property. His self-acquired property he gave to his grandsons, and to his then second wife, afterwards his second widow. At the same time he made his son the guardian of these grandsons during their minority. It was contended in the first place that he had no right to make this disposition of his property; and secondly, that this deed was fraudulent,—the intention of *Dabee Dutt* being that, although upon the face of the deed the property was given to the grandsons, it

* 12 B. L. R., p. 430.

should really belong to the son, and that the transaction was not a real but a colorable one. The Principal *Sudder Ameen* appears to have adopted this view, but their Lordships are of opinion that there was no sufficient evidence to support it. The only evidence at all pointing in the direction of that finding, would be that, after the death of *Dabee Dutt*, the son remained in possession of the property, but inasmuch as the grandsons were minors and he was appointed their guardian, that possession was not inconsistent with the deed.

The High Court reversed the decision of the Principal *Sudder Ameen*, finding that the transaction was a real one, and not merely a colorable one—a finding in which their Lordships concur.

It only remains, then, to be decided whether or not by law *Dabee Dutt* was enabled to make this disposition of his property. The transaction occurred within the *Mithila* district, and the *Mithila* law would prevail. Of that law the principal authority is the *Vivada Chintamani*, in which it is laid down in very plain terms, without qualification, that "self-acquired property can be given by its owner at his pleasure" (1); and subsequently it is stated, that "the father has full dominion over the property of his father, which, being seized, is recovered by his own exertions, or over that which is gained by him through skill, valour, or the like. He may give it away at his pleasure, or he may distribute it" (2). In their Lordships' view this dictum would apply.

But it has been argued that, under the *Mitakshara* law, the father could not dispose of the property away from his son without the son's consent. The *Mitakshara* law appears to be referred to undoubtedly by the learned Judges of the High Court as applying to this case. But assuming, what it is not necessary to decide, that the *Mitakshara*[1] law applied, and assuming the *Mitakshara* law only to admit of the father making such a disposition with the consent of his son, in this case the consent of the son was given. It was, indeed, argued that because the son was in debt he could not consent, but their Lordships are of opinion that there is no foundation for that argument. The consent of the son was given, and in either view *Dabee Dutt* exercised a power which by law appertained to him.

On these grounds their Lordships are of opinion that the decision of the Court in *India* was right, and that this appeal must be dismissed with costs, and will humbly advise Her Majesty to this effect.

(1) Vivada Chintamani, by Prosonno Coomar Tagore, p. 76.

(2) *Id.*, p. 220.

16th, 17th, and 18th June; and 17th July, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

LUCKHINARAIN MITTER and another (Defendants) ... ... — *Appellants*,

versus

KHETTRO PAL SINGH ROY and another (Plaintiffs) ... ... — *Respondents*.

Reg. VIII. of 1819—Deposit by unregistered Assignees of a darpatani Talook—Res judicata—Limitation.

L and *R*, the holders of a *patani* estate, granted in 1856 a *darpatani* lease to *S* at an annual rent, the lease stipulating that *S* should have full power of sale and gift, but should not sub-let without the *patanidar's* consent. The lease contained no stipulation for the registration of any vendee or donee. In 1860 *S* sold the *darpatani* lease to *K*, the deed of sale which was duly registered providing for muta-

[1] 13 B. L. R., p. 146.

tion of names in the *patanidar's* books. No such mutation was ever effected by *K*, who was never recognized as their tenant by *L* and *R*, the rent of the *darpatani* being paid in the name of *S*. In 1861, the rent due from the *patanidars* being in arrear, the *Zemindar* proceeded to sell the *patani* under Regulation VIII. of 1819. Thereupon *K*, in order to protect his under-tenure, deposited in the Collectorate on 17th November 1861 a sum of money, on which the sale was stayed. *K*, being then in arrear in the payment of his *darpatani* rent, claimed to set off the amount deposited in the Collectorate against the rent due to *L* and *R*. This *L* and *R* refused to allow, and they brought a suit in the Collector's Court against *S* and his sureties to recover the arrears of rent. In that suit *K* intervened claiming the benefit of the set-off, to which however the High Court on 26th June 1866 on appeal held that he was not entitled, the deposit being merely a voluntary payment by *K*. On 30th October 1867 *K* brought a regular suit against *S* and *L* and *R* to recover the amount of the deposit and obtained a decree, but the decision was reversed on appeal and the suit dismissed for want of jurisdiction. On 6th June 1869 *K* filed his plaint in the proper Court. *Held* that he was entitled to recover the amount deposited by him in the Collectorate (1), and that the suit was not barred as being *res judicata*, by the decision of 26th June 1866.

Held also that whether the period of three years under s. 1, cl. 9 of Act XIV. of 1859, or of six years as provided by cl. 16, s. 1 of that Act, be the limitation applicable to such a suit, the suit was not barred, inasmuch as *K* was entitled to deduct the time during which he was *bonâ fide* prosecuting with due diligence a suit for the same purpose in a Court not having jurisdiction.

THE judgment of their Lordships was as follows:—

This is an appeal from a judgment of the High Court, pronounced upon special appeal in a suit in which the Respondents were Plaintiffs, and the Appellants were Defendants. The suit was brought to recover a sum of money lodged by the Plaintiffs in the Court of the Collector of East *Burdwan*, in order to stay the sale of a *patani talook* called *Mauza Astara*, for an arrear of rent due to the *Zemindar* from the Defendants, who were the *patani talookdars*, and thereby to save a *darpatani talook* of the second degree, which had been created by the Defendants out of their said *patani talook*.

The *darpatani* was granted by the Defendants to *Seetanath Ghose*, at an annual rent of Rs. 5,496, in consideration of a bonus of Rs. 100, and it was stipulated that *Seetanath* was to have full powers of sale or gift, but was not to under-let in *sepatani* without the consent of the *patanidars*. *Seetanath* sold and assigned the *darpatani* to the Plaintiffs for the sum of Rs. 2,925, and it was stipulated that the Plaintiffs were in the usual manner to cause mutation of names in the *patanidar's* books, by causing *Seetanath's* name to be removed and the Plaintiffs' names inserted instead, and that the Plaintiffs should duly pay the *darpatani* rent; and further that, if there should be any delay in causing mutation of names, and *Seetanath's* name should remain on the *patanidars'* books, it should not entitle him to profit, or subject him to loss. The Plaintiffs did not register the transfer in the *sarrishta* of the Defendants, and the Defendants never recognized the Plaintiffs as their tenants. The money deposited by the Plaintiffs was applied in discharge of the rent due from the Defendants as *patanidars*, and the sale of the *patani* was stopped. It was contended that the money deposited by the Plaintiffs was a voluntary payment, and consequently that they were not entitled to recover the amount from the Defendants. The Court of first instance held that the Plaintiffs were entitled to recover, and gave them a decree for the amount, with interest from the time of the commencement of the suit. The *Zilla* Judge, upon regular appeal, reversed that decree; but upon special appeal, the High Court reversed the decision of the *Zilla* Judge, and upheld the decree of the Court of first instance. From that decree the Defendants have appealed to Her Majesty in Council.

Their Lordships are of opinion that the decision of the High Court is correct. The Plaintiffs were assignees of the *darpatani talook*, and, though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the *Zemindar* in order to protect their own interest. They made the deposit, and the Defendants had the benefit of it. The Plaintiffs are consequently entitled to recover the amount from the Defendants. The law upon the merits of the case is very clearly and accurately laid down in the judgment of the High Court, and it is

(1) See *Ambika Debi* v. *Pranhari Das*, 4 B. L. R., F. B., 77.

scarcely necessary for their Lordships to enlarge upon it.

Several cases were cited by the learned Counsel for the Appellants, and amongst others the case of *Annundchunder Banerjea* v. *Soobulchunder Dey* (1). In that case it was held that a mortgagee of a *darpatani* tenure out of possession could not recover from the *patanidars* an amount deposited by him to prevent the sale of a *patani talook* for arrears of rent due from the *patanidars*: that he was not the holder of a *talook* in the second degree, and had no authority under s. 13, Regulation VIII. of 1819 to make the deposit. It does not appear what the nature of the mortgage was, and it would seem that the *darpatanidar* had not paid his rent to the *patanidar*, for it was said "the mortgagee might have sued the *darpatanidar* for the money which he had been compelled to pay." Without knowing more of the facts of that case it is impossible to say whether the decision was correct or not. It is, however, unnecessary to do so, as that case is very different from the present.

It may be remarked, however, with reference to that case, as well as to the case of *Luckhinarain Mitter* v. *Seetanath Ghose* (2), in which it was held that the amount deposited by the Plaintiffs in the present case could not be set off in a suit brought by the present Defendants against *Seetanath* for subsequent instalments of the *darpatani* rent, that neither of them is of any greater weight than the decision of the High Court now under appeal, and that their Lordships could not, upon the mere authority of those two cases, hold that the decision of the High Court in the present case was wrong.

With the exception of those two cases, none of the numerous authorities cited by the learned Counsel for the Appellants are in point. In some of the cases it is impossible to ascertain from the reports what were the precise facts; many of them had no relation to *patani* or *darpatani* tenures; and none of them appear to carry the case further than this that the grantor of a *darpatani talook* is not bound to recognize the assignee of the tenure, until the transfer has been registered in his *sarrishta* and that, until such registry has been effected, he may sue the original *darpatani* for the rent, and sell the tenure in execution of a decree obtained in such suit without notice to the assignee. This is the only effect of the cases of *Bissomoyee Dossee* v. *Mackintosh* (1), *Nittyanund Paul* v. *Ram Doollub Buttobyal* (2), and *Mrityunjaya Sircar* v. *Gopal Chandra Sircar* (3). Those decisions are quite consistent with the ruling of the High Court. Until the assignment has been registered, or the assignee has been accepted by the *patanidar* as his tenant, the assignor is not discharged from liability, and such liability may be enforced by the sale of the *darpatani talook*, in execution of a decree against him for the rent.

It was contended that the decision of *Luckhinarain Mitter* v. *Seetanath Ghose* (4), in which it was held that the money deposited by the Plaintiffs could not be set off in an action against *Seetanath* for arrears of the *darpatani* rent, was a bar to the present suit, as an adjudication by a competent Court in a former suit upon the same cause of action. Their Lordships are, however, of opinion that that determination was not one within the meaning of s. 2, Act VIII. of 1859. It was merely determined in a suit under Act X. of 1859 that *Seetanath* was not entitled to credit for the payment made by the Plaintiffs.

As to the point of limitation, their Lordships are of opinion that the High Court was correct in holding that the present suit was not barred. It is unnecessary to determine whether the period of limitation was three years under cl. 9, s. 1, Act XIV. of 1859, or six years under cl. 16 of that section. The deposit sought to be recovered by the Plaintiffs in the present suit, was made on the 17th November 1864, and the present suit was commenced on the 8th June 1869. On the 30th October 1867, a suit was institut-

(1) S. D. A., 1857, 1195.
(2) 1 I. J., N. S., 311; S. C., 6 W. R., Act X., Rul., 8.

(1) 2 Hay's Rep., 14.
(2) 2 W. R., 282.
(3) 2 B. L. R., A. C. 131.
(4) 1 I. J., N. S., 317; S. C., 6 W. R., Act X., Rul., 8.

ed by the Plaintiffs against the Defendants in the *Zilla* Court of *Hooghly*, to recover the amount claimed in the present suit. The Defendants pleaded to the jurisdiction of that Court, and, on the 14th April 1868, the Principal *Sudder Ameen* rejected their plea, and gave judgment for the Plaintiffs. The Defendants appealed to the Judge, who, on 31st July 1868, reversed the decision of the Principal *Sudder Ameen*, and, on special appeal to the High Court, the decision of the Judge was affirmed on the 26th of May 1869.

Deducting the whole period occupied in the suit commenced in *Zilla Hooghly* from the time of the commencement of that suit to the time when the High Court gave final judgment therein on special appeal, the present suit was commenced within three years from the time when the cause of action arose. It has been found as a fact that that suit was prosecuted *bonâ-fide*, and there is no reason for contending that that finding was in consequence of any error in law, or that the suit was not prosecuted with due diligence. Their Lordships are of opinion that, according to the true construction of s. 14, Act XIV. of 1859, the whole time occupied in that suit, including the time during which the special appeal to the High Court was pending, must be deducted. It was contended on the part of the Appellants that, as the decision of the Principal *Sudder Ameen* was annulled by the Judge in consequence of a defect of jurisdiction, the time in which the Plaintiffs were engaged in the special appeal to the High Court, who affirmed the decision of the Judge, cannot be deducted under the provisions of s. 14 of the Act. The words of that section are not very clear, but their Lordships are of opinion that, giving them a reasonable construction, the whole time in which a Plaintiff has been fruitlessly engaged in prosecuting a suit *bonâ fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination in the suit (whether upon appeal or otherwise) that the Court in which the suit was brought had no jurisdiction, is to be deducted.

The learned Counsel for the Appellants complained of the protracted litigation in reference to the Plaintiffs' claim, and he stated, in terms of indignation, that the case had been before eleven different tribunals. But surely the Appellants are not the persons to complain, when they have been the cause of the whole of this protracted litigation, first, by neglecting to pay their rent to the *Zemindar*, and thus rendering it necessary for the Plaintiffs, for their own protection, to deposit the money with the Collector; then by refusing to allow credit for the amount in the suit against *Seetanath*; afterwards, by objecting to the jurisdiction of the Principal *Sudder Ameen* of *Hooghly*; then by objecting to the amount of stamp on the plaint when it was transferred to the Court in *Burdwan*; and, finally, by appealing against the decision of the Principal *Sudder Ameen* in this suit, which was ultimately upheld by the High Court.

In short, the Appellants have resisted by every means in their power the endeavours of the Plaintiffs to recover the amount which they were obliged to deposit, of which the Appellants have had the benefit, and which they, according to every principle of justice and good conscience, ought to have repaid.

It is idle to say that they were afraid of repaying the money, lest by so doing they should be held to have recognized the Plaintiffs as their tenants before the registration of the assignment, or to contend that the Appellants are not bound to repay the amount deposited because they would have benefited by the sale of the *patani* free from incumbrances.

Their Lordships will humbly recommend Her Majesty in Council to affirm the decision of the High Court with the costs of this appeal.

21st and 27th June, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMANUGRA NARAIN (Plaintiff)* ... } *Appellant,*

versus

MAHASUNDUR KUNWAR (one of the Defendants) } *Respondent.*

Res Judicata—Deed of Gift—Fraud.

A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.

Quære.—Whether a donor can avoid his own deed on the ground of his own fraud?

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:

The suit out of which the present appeal arises was brought under these circumstances:—

A widow lady, named *Mahasundur Kunwar*, had two daughters, both married; and on the 28th August 1860 she executed two deeds conveying to them in equal moieties, immediately and absolutely, certain nine *mauzas*, of which she must be assumed to have had the power of absolutely disposing.

In the year 1864, *Gebr*, one of her daughters, died, leaving an infant son, who survived her three days; whereupon her husband, the present Plaintiff, brings this suit for the purpose of recovering possession of *Geer's* share of one-half of the nine *mauzas* so conveyed by *Mahasundur*. *Mahasundur's* main defence, which it becomes most material to consider, is thus stated by her:—"With a view of preventing disputes in future amongst her two daughters, she executed a deed of gift in the nature of a will, with this intention, that she should remain in possession during her life, and after her death her daughters would be entitled." The Plaintiff, undoubtedly, proved a *primâ facie* case. He showed the execution of the deed conveying the half of the property to his late wife; he showed that the name of his late wife was substituted for that of *Mahasundur* on *Mahasundur's* own application, and that an *amalnama* was shortly afterwards executed by *Mahasundur*, wherein she required the tenants to pay rents to her daughter, and he gave evidence that the daughter (his wife) had remained in possession of these *mauzas* during her life, although it appeared that after her death, by some means or other, *Mahasundur* had resumed possession of them. This case was answered on the part of *Mahasundur* in this way. She called several witnesses to prove that at the time of the execution of the deeds there was a verbal arrangement that they should operate only as a conveyance of the property after her death; and that, during her life, her daughters were to retain her property in trust or, as it is sometimes called, *benami* for her. Evidence was given that the Plaintiff himself, *Ramanugra*, the husband of the other daughter *Bhowanee*, and *Jeetun Lall*, the father of the Plaintiff, were parties to this transaction, and indeed the prime movers in it; and it may be observed that neither the Plaintiff nor *Jeetun Lall*, his father, was called upon the part of the Plaintiffs to contradict this. Some evidence was given on the part of *Mahasundur* that she actually received the rents; and it was argued, undoubtedly with great force, that it was extremely improbable that she should without apparently any consideration denude herself absolutely for her life of the bulk of her property. Such was the nature of the issues and of the proof as between the parties in this cause.

* 12 B. L. R., 433.

But the case is complicated in this way: one *Bishenloll*, a creditor of *Mahasundur*, instituted a suit against *Mahasundur*, to which the present Plaintiff became a party by intervention, for the purpose of setting aside the deeds in question, on the ground that they were fraudulent as against creditors. Both cases were tried together, and one judgment was delivered in both. The substance of the judgment is that these deeds were altogether colorable, being intended to have no operation whatever, and that they were fraudulent as against creditors. On this ground a decree was given for *Bishenloll* in his suit, and for the Defendants in the present suit. There is no appeal against the decision in *Bishenloll's* suit, therefore the judgment in that case cannot now be disputed. But the judgment in that case operates as no estoppel in the present, wherein the parties are not the same, and in their Lordship's opinion the same issue is not involved in the two suits. In *Bishenloll's* suit the issue was fraud or no fraud against the creditors. In the present suit the Defendant does not set up that defence against the Plaintiff. She does not allege the deed to be altogether void or inoperative, but her case is that it was intended to be operative so far as to convey the property after her death, and that there was, at the time of its execution, an agreement that for her life she was to have the beneficial interest, and her daughters were to hold *benami* for her. Their Lordships upon the facts find that the Defendant *Mahasundur* has made out this issue, and therefore they are unable to concur in the judgment of the High Court, which finds that the deed was altogether fraudulent and colorable, and not intended to have any operation. *Mahasundur* does not set that up, and it would be a serious question if she did, whether she could be allowed to avoid her own deed on the ground of her own fraud. The Plaintiff does not either set up any such case as that the deed was fraudulent, and that therefore *Mahasundur* was estopped from disputing it. In their Lordships' opinion, as between the present parties to the suit, the issue does not arise as to whether the deed was fraudulent as against the creditors, nor whether it was absolutely colorable and void.

Entertaining this view, their Lordships are of opinion that the finding of the High Court was wrong in as far as it decided that the deed was altogether inoperative. They think the High Court was right in determining that the Plaintiff was not entitled to maintain this suit, as far as it related to the present possession of the property; but they are also of opinion that he is entitled to a declaration that his wife had, and that he, as the heir of his wife through his infant son, has the right to a vested remainder upon the death of *Mahasundur*, and that he is entitled to have his name substituted for that of his wife upon the register.

They will, therefore, humbly advise Her Majesty that the decree of the High Court and also the decrees of the Principal *Sudder Ameen* be reversed; that it be declared that the Appellant, as heir-at-law of his infant son, is entitled to the interest of his late wife, *Mussamut Geer Kunwar*, under the deed of gift executed in her favor by the Respondent on the 28th August 1860, and to have his name substituted for hers upon the register; that it be further declared, as between parties to this suit, that, by virtue of the arrangement between them, *Mussamut Geer Kunwar* was entitled to the property comprised in the deed, but subject to the life-interest of the Respondent; that it be declared accordingly that the Appellant is not entitled to the possession of the property or the receipt of the rents during the Respondent's lifetime.

Their Lordships are of opinion that each party should bear his own costs in this appeal.

27th June, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner, Central Provinces, India.

GOKULDOSS and another (Defendants)* ... } *Appellants,*

versus

KRIPARAM and others (Plaintiffs) ... } *Respondents.*

Mortgage—Bai-bil-wafa—Construction—Foreclosure in the Central Provinces—Proprietorship—Settlement—Res Judicata.

By a bond dated 10th February 1857, a certain village was mortgaged by one *G* to the Appellants and their father as security for a loan; the bond providing that, "if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you." The interest of *G* in the village was described as that of a *malguzar*, and his proprietary right therein was declared by the Revenue Authorities shortly after the execution of the mortgage, but his payments of revenue being in arrear, the Board of Revenue granted a lease of the village for ten years to the Appellants' father. The mortgagees in a suit on the bond obtained the following decree on 3rd November 1860:—"As the Defendant acknowledges the Plaintiffs' claim, it is ordered that a decree be given to the Plaintiffs for Principal and interest and costs against the Defendant and the mortgaged property." In proceedings in the Civil Court taken under this decree, the mortgagees asked for possession of the village, and obtained, on 17th July 1862, an order in pursuance of which they were put in possession, an appeal by *G* being rejected. *G* took various steps to recover possession of the mortgaged property, or a declaration of his proprietary interest therein, but failed in his endeavours; an application for a grant of the proprietary right in the village, and an appeal from an order cancelling his *potta*, being rejected by the Revenue Authorities on 8th December 1864, and 27th July 1865 respectively; and on 12th August 1867 *G* conveyed the village by deed of sale to the Respondents. In a suit brought by them to redeem the mortgage and obtain possession of the property.

Held the suit was not barred by the order of the Civil Court of 17th July 1862, nor had the orders of the Revenue Officers of 8th December 1864 and 27th July 1865, effected such a transfer of any right which *G* might have had to the Appellants, as to render the sale to the Respondents invalid.

Held also that the effect of the bond was to create a simple mortgage, and not a conditional deed of sale; and that the proceedings taken under the decree of 3rd November 1860, and the order made therein of 17th July 1862, by virtue of which the mortgagees obtained possession of the mortgaged property, did not operate so as to extinguish the right of redemption.

The rule that a *bai-bil-wafa* does not become absolute upon breach of the condition as to payment, without proceedings for foreclôsure, obtains in the Central Provinces of *India*.

Pattabhiramier v. *Vencatarow Naicken* (1) distinguished.

THE judgment of their Lordships was as follows:—

This is an appeal from the Central Provinces of *India*; and the question is whether the decree of the Judicial Commissioner of those Provinces was right in holding that the Respondents were entitled to redeem a certain village, in which the Appellants contended that, though they were originally mortgagees, they had acquired an absolute interest. The nature of the property is somewhat peculiar. On the face of the mortgage, the mortgagor, one *Gujraj*, is described as *malguzar* of the village, and, it appears, that, previous to and at the date of the instrument, the interest of a *malguzar* was not exactly that of proprietor. Five days, however, after the execution of the mortgage,—that is to say, on the 15th February 1857, the law having been modified, *Gujraj* was declared, by the Revenue Authorities, to have the proprietary interest, and we must, therefore assume that his interest in the village was capable of being disposed of either by mortgage or sale. The title of the Respondents is founded on a deed of sale executed by *Gujraj*, on the 12th August 1867, and having thus acquired whatever interest then remained in him,

* 13 B. L. R., p 205.

(1). 7 B. L. R., 136; S. C., 13 Moore's I. A., 560.

they brought the present suit to redeem the mortgage; and the only substantial question between the parties is, whether, by reason of the proceedings which are about to be reviewed, the Appellants had acquired the absolute interest in the property, so that at the date of the sale to the Respondents there was no right of redemption capable of passing from *Gujraj* to them.

Their Lordships think it will be convenient, before they consider this question on its merits, to dispose of two preliminary points, in the nature of issues in bar of the suit which were raised in the Courts below, but have not been pressed very strongly here at the bar. The first was in the nature of a plea of *res judicata*, being in effect that, in the course of the miscellaneous proceedings had in execution of the decree of the 3rd of November 1860, there had been such an adjudication upon the rights of the parties, that under s. 2 of Act VIII. of 1859 the present suit was not cognizable by the Court. This was decided in the first instance in favor of the Appellants, but the decision of the Officiating Deputy Commissioner, although affirmed by the Commissioner, was, on special appeal, reversed, and in their Lordships' judgment correctly reversed, by the Judicial Commissioner. They entirely concur with the last-named officer in the opinion that the present cause of action *viz.*, the right to redeem, was not heard and determined in the course of the proceedings in question; and, consequently, that whatever may be the effect of the latter, they did not constitute a bar to the hearing of the present suit within the meaning of the 2nd section of Act VIII. of 1859.

The other point raised was in effect that a settlement of the village made by the Revenue Officers with the father of the Appellants had so taken the proprietorship of the village out of *Gujraj* and vested it in the other party, as to make the sale by the former to the Respondents utterly invalid. This point, after repeated remands and appeals, was ultimately disposed of in favor of the Respondents, and, as their Lordships think, was correctly decided in their favor. It is unnecessary to go at any length into the consideration of this question, because one of the Judges, a Mr. *Grant*, who seems to have had considerable experience as a Settlement Officer, and whose decision was generally in favor of the Appellants, fairly admitted not only that it had been conclusively disposed of by the Judicial Commissioner, but that the settlement proceeding, in his opinion, could have afforded no bar to the suit, inasmuch as the Settlement Officers have no power to determine questions of title. Therefore that point may also be treated as out of the present appeal.

Upon the merits the first question to be considered is what was the effect, and what the true construction of the instrument of mortgage? It has been treated by several of the Judges in the Courts below as a *bai-bil-wafa*, or deed of conditional sale, and that is the construction which the learned Counsel at the bar have to-day put upon it. Their Lordships, however, are by no means satisfied that it is a security of that character. The word "sale" is never used throughout the instrument. The security is described in terms as a mortgage of the village of *Gobra*, and the only passage from which any inference that it was in the nature of a deed of conditional sale can be drawn is the final sentence, "that if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village of *Gobra* to be made with you." Now, upon that it is to be observed that when the deed was executed the consent of the Revenue Officers would have been required in order to carry out such a stipulation; that the proprietary right of the mortgagor had not then been declared in the terms in which it was afterwards declared; and that, supposing it had been so declared, the instrument would not, like an ordinary deed of conditional sale, have imported in terms a sale of the interest of the party which was to become absolute and conclusive upon his failure to pay the stipulated sum at a certain date. Such a contract would, independently of any rule of law to the contrary, execute itself, and the remedy of the party upon it would, if he were out of possession, be a suit for possession.

Their Lordships, therefore, in construing this instrument, incline to the opinion that the effect of the document was to create a simple mortgage hypothecating the right of the party in the village of *Gobra*, and that the deed was not meant to operate by way of conditional sale. That this was the construction originally put upon the instrument by the mortgagees themselves seems to their Lordships perfectly clear from the first proceeding which they took to enforce it. They brought a suit for the recovery of the mortgage debt, and obtained a decree for the satisfaction of the amount decreed either by the Defendant himself or out of the mortgaged property. That is the only construction which their Lordships can put upon the decree of 3rd November 1860. The decree, however, was not executed in that way. After two years' delay, the mortgagees applied for execution of their decree, but in a different way. After stating that the money had not been paid according to the decree, they say the enforcement of the condition of the bond is now just, and therefore they pray that the full possession of the village may be given to them in perpetuity, and the Defendant be released from liability under the decree. These proceedings differ entirely from those which would have been had by parties entitled under a deed of conditional sale to an absolute interest. If the law did not impose upon them the necessity of taking proceedings for foreclosure, they would have brought their suit for the possession of the estate. If the law required them to take proceedings for foreclosure, they would have taken such proceedings, and after foreclosure would have sued for possession; or possibly, having regard to the nature of the property and the terms of instrument, they might have sued to compel a specific performance of the undertaking of the mortgagor to cause a settlement of the village to be made with them. But they certainly would not have sued for the mortgage debt, or taken a decree in the form of that of the 3rd of November 1860.

It is, however, argued that the substantial effect of the proceedings, taken in execution of this decree, was to destroy any right of redemption which may previously have existed. It is not necessary to go in detail through those voluminous proceedings. Their Lordships are not prepared to say that it was not the intention of the mortgagees to obtain, or even of the authorities who executed the decree to make, by means of those proceedings, such a permanent transfer as would extinguish to the mortgagors of the village the right of redemption. But their Lordships fully concur with the Judicial Commissioner in the conclusion that the decree did not warrant such a permanent transfer to the Respondents; and that the Courts, in executing the decree, did not, and could not effectually make such a transfer. If the construction which they are disposed to put upon the instrument is correct, if the security was in the nature of a simple mortgage, the proper course for the mortgagees to pursue was to raise the amount for which they had obtained a decree by the sale of the village, paying the surplus proceeds, if any, to the mortgagor. They could not make such a decree the foundation of a transfer which should destroy the right of redemption, supposing the right of redemption existed. Again, assuming that Mr. *Forsyth's* construction of the instrument is the correct one, and that it is to be treated as a *bai-bil-wafa*, their Lordships would have equal difficulty in saying that the interest under that *bai-bil-wafa* has become absolute, as Mr. *Forsyth* contends it has. The argument, indeed, involved this proposition, that inasmuch as the Bengal Regulations have not been introduced generally into the Central Provinces, a conditional sale must be taken to become absolute on the failure of the mortgagor to pay the mortgage debt on the day fixed, and that the mortgagee is under no obligation to take any proceedings by way of foreclosure. In support of that proposition Mr. *Forsyth* relied upon the decision of this Board in the case of *Pattabhiaramier* v. *Venkatarow Naicken* (1). If this contention were correct, it would be unnecessary to consider whether the proceedings actually

(1) 7 B. L. R., 136; S. C., 13 Moore's I. A., 500; 2 P. C. J., 623.

taken had the effect of destroying the equity of redemption, since after the day fixed for the payment of the mortgage money, the interest of the mortgagees had *ipso facto* become absolute, and there was no such equity to destroy. It has already been observed that in such a case their proper remedy was a suit for possession, and not such a suit as that which they actually brought. But their Lordships have also to observe, that the case cited by no means laid down broadly that out of the Regulation Provinces of Bengal—those provinces to which the Bengal Regulation law strictly and in all its fulness applies—the rule laid down was to be adopted. It is said distinctly at the end of the judgment, "it must not be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decision so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon." In the Province of *Madras*, which is governed by a body of Regulations of its own, it may well have been assumed that if those Regulations do not prescribe forms of foreclosure similar to those of Bengal, no such forms have been introduced. But the Judicial Commissioner, who decided this case, in his judgment clearly assumes that the law of foreclosure, as it obtains in the Regulation Provinces, is so far adopted that it is the course of the Courts in the Central Provinces to allow a time for foreclosure, and that some proceedings must be taken in order to obtain an absolute foreclosure: and it lay upon those who came to impeach his decision to show that his ruling was inaccurate. They have referred us to no law to that effect, and inasmuch as it is notorious that in the Non-Regulation Provinces a certain discretion is given to the Courts to apply the principles which prevail in the Regulation Provinces in the adminstration of justice according to the rules of equity and good conscience, their Lordships must, until the contrary is shown, presume that the law has been correctly declared by the Judicial Commissioner, who is the highest legal authority in this particular Province. And if that be so, it is perfectly clear that there had been no proceedings before the assignment to the present Respondents, which could in any possible way operate as a foreclosure of a mortgage by way of conditional sale. A decree was obtained, which was a mere money decree; there were then proceedings in execution irregular and inconsistent with that decree, but there was nothing which really gave the mortgagor the opportunity of coming in and redeeming; or notice that he would stand foreclosed if he did not redeem before a certain time.

It appears, therefore, that upon either view of the instrument the Appellants have failed to show that they had before the assignment to the present Respondents acquired the absolute interest in this village, and that the decision of the Judicial Commissioner, and of the Court of first instance, in this suit, that the Respondents are entitled to redeem on payment of the sum found due, is correct.

Their Lordships must, therefore, humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and dismiss this appeal.

3rd July, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

LUCHMEE BUKSH ROY (Plaintiff)*... ... } *Appellant*,

versus

RUNJEET RAM PANDAY (Defendant) ... } *Respondent*.

Act XIV. of 1859, s. 1, cl. 15—Acknowledgment—Statutes of Limitation, Construction of—Usufructuary Mortgage.

Where sixty years have elapsed from the date of a usufructuary mortgage, a suit by the mortgagor to recover possession of the mortgaged property is barred by cl. 15, s. 1, Act XIV. of 1859 (1).

Where a mortgagee signed a *mookhtiarnama* in which he stated that he would abide by any arguments which might be urged, and any documents which might be filed, by the *Mookhtar* thereby appointed, and the *Mookhtar* subsequently filed a written statement signed by himself alone in which he admitted the mortgagor's title,—*Held* that the *mookhtarnama* and written statement could not be read together as amounting to an acknowledgment sufficient to satisfy the requirements of cl. 15, s. 1, Act XIV. of 1859:—*held* also that the written statement could not be incorporated with the *mookhtarnama* so as to make it part of the document signed by the mortgagee.

Statutes of Limitation are in their nature strict and inflexible enactments, and ought to receive such a construction as the language in its plain meaning imports.

THEIR Lordships delivered the following judgment:—

This is a suit brought by the Appellant, the descendant of *Gujraj Roy*, who in the year 1790 mortgaged five *mauzas* to *Motee Ram Panday*, the ancestor of the present Respondent. It may be assumed, for the purpose of the present judgment, that the mortgage was a usufructuary mortgage, or in the nature of one. The defence made to the suit, independently of a defence on the merits, was that it was barred by limitation, and the only question is whether the suit has been so barred or not.

It appears that in the year 1802 the mortgagee had been dispossessed of four of the five *mauzas* by the sons of the mortgagor; apparently, it was an unlawful dispossession, and he brought a suit in that year for the restoration of possession, to which suit the then mortgagor set up the defence that the mortgage money had been fully satisfied by the usufruct of the property. An account was taken and it was found that so far from the mortgage debt having been satisfied, interest had accrued upon it to a larger amount than the debt itself, and it was therefore ordered by the Court that the mortgagee was entitled to a restitution of possession, and it made a declaration, which, perhaps, was unnecessary, that he was entitled to hold possession until the amount found due was fully paid. That suit and the decree in it do not really affect the question, because the present suit was not brought within sixty years after the decree in 1804. Even if it had been within that period, it might be a question whether that decree at all affected the right of the mortgagee to rely on limitation, for the suit was brought only to recover the possession of the *mauzas* which had been unlawfully taken from the mortgagee by the mortgagor or his sons.

The limitation, which applies in this case, is found in s. 1, cl. 15 of Act XIV. of 1859, and is in these terms: "To suits against a depositary, pawnee, or mortgagee of any property moveable or immoveable for the recovery of the same, a period of thirty years if the property be moveable, and sixty years if it be immoveable, from the time of the deposit, pawn or mortgage; or if in the meantime an acknowledgment of the title of depositor, pawnor or mortgagor, or of his right of redemption shall have been given in writing signed by the depositary, pawnee, or mortgagee, or some person claiming under him, from the date

* 13 B. L. R., p. 177.

(1) See Act IX. of 1871, sch. ii, No. 148.

of such acknowledgment in writing." It is clear that a period of sixty years has elapsed since the mortgage.

Two points have been made by Mr. *Leith* for the Appellant, first, that a usufructuary mortgage is not within this clause at all. He pointed out that in usufructuary mortgages, the possession was consistent with the original intention of the parties until the mortgage debt was paid off, and contended that a limitation which ran from the time of the mortgage could not apply to them; but the Legislature has enacted this limitation in the most general terms, and in language sufficiently large to embrace every kind of mortgage. There can be no doubt it was deliberately done, and that the provision found in the 4th clause of the 3rd section of Regulation II. of 1805, which excluded cases of mortgages or deposit from the Regulations relating to limitation, was designedly set aside, a different policy prevailing with those by whom the recent Act was passed. Their Lordships therefore think that this mortgage is clearly within Act XIV. of 1859.

The other and the main question is whether, sixty years having elapsed from the date of the mortgage, the right of the mortgagor to bring this suit has been kept alive by such an acknowledgment as is referred to in the Statute?

Now, the section requires an acknowledgment of the title of the mortgagor, or of his right of redemption, to be given in writing, signed by the mortgagee. In this case two documents are relied upon which appear in a suit instituted in the year 1846. It seems that in that year a descendant of the mortgagor instituted a suit in the Civil Court of *Lohardugga* for an adjustment of accounts. The suit was dismissed on the ground that the Court was not competent to entertain it, but in that suit the Respondent, the mortgagee, gave a *mookhtarnama* to a *mookhtar* to defend it, and the *mookhtar* filed a written statement, which, it is alleged, contains an acknowledgment of the title of the mortgagor and of his right to redeem. It is plain that neither of the documents by itself satisfies the Statute—the *mookhtarnama* is signed by the mortgagee, but contains no acknowledgment of title; the written statement of the *Mookhtar* does contain, or may be assumed to contain, an acknowledgment, but it not signed by the mortgagee—and their Lordships think that it is impossible to put those two documents together so as to satisfy the requirements of this Statute.

It was argued that the signature of an agent was sufficient, and that the *Mookhtar* being authorized to defend the suit, and to use such arguments as he thought fit, authority was given to him to make an acknowledgment of title, and that such an acknowledgment having been made and signed by him, the Statute was complied with. Their Lordships think that is not so. The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely, the mortgagee, and it would be a wrong construction of it to hold that any other signature would satisfy those words. The same question arose upon Lord *Tenterden's* Act in England, and was decided in the case of *Hyde* v. *Johnson* (1). *Tyndal*, C. J., in giving judgment there, says,—"When, therefore, we find in the Statute now under consideration that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the Statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." Their Lordships entirely adopt that principle of construction which they think applicable to the present case.

They are also of opinion that the written statement cannot be said to be incorporated into the *mookhtarnama* so as to make it a part of the document signed by the mortgagee. The *mookhtarnama* is no more than an authority to the *Mookhtar* to defend the action in the best way he can according to the best of his judgment.

It has been said that this case ought to be decided upon an equitable construction, and not upon the strict words of the Statute, but their Lordships think that

(1) 2 Bing., N. C., 776.

Statutes of Limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Statutes of Limitation are in their nature strict and inflexible enactments. The object of the Legislature in passing them is to quiet long possession and to extinguish stale demands. Such legislation has been advisedly adopted in India as it has been in this country, and their Lordships think that in construing these Statutes the ordinary rules of interpretation must prevail.

Their Lordships are therefore of opinion that the judgments of the Courts below are correct, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

3rd, 5th, and 8th July, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SOORJOMONEE DAYEE (one of the Defendants)* ... ... } *Appellant*,

versus

SUDDANUND MOHAPATTER (Plaintiff) ... } *Respondent*.

Res judicata—Act VIII. of 1859, s. 2.—Cause of Action.

C, a *Hindu*, subject to the *Mitakshara* law, adopted *S* and afterwards *B*, and made a will whereby, after providing for his widow, the family worship, &c., he made a division of his real and personal property between his two adopted sons. Provision was also made for forfeiture by either of the sons in case they disputed the will, in which event the whole estate was to go to the other son. This will was registered and filed in the Collector's Court. *S* was subsequently disowned by *C*, and declared to have forfeited his right to anything under the will. In 1859, *S* brought a suit against *C*, *B*, and certain persons who claimed portions of the property under deeds executed by *C*, to cancel those deeds, to cancel the will, to set aside the adoption of *B*, and for maintenance. In this suit he alleged that *C* had no power to make any of the devises of real estate contained in the will, inasmuch as the whole estate, consisting of property inherited by *C* and property acquired by him from the income of such inherited property, was ancestral. The only issue raised in that suit referring to the will was whether it was assented to by *S*. The first Court found that it had been so assented to; that the adoption of *B* was valid; and that *S's* conduct justified *C* in disinheriting him: the suit was accordingly dismissed. *S* appealed to the High Court and in his grounds of appeal raised the same contention as before, *viz.*, that the whole of the real property was ancestral, and therefore *C* had no power to dispose of it without his consent. The High Court, in 1863, varied the decree of the first Court, and held that the will must be set aside so far as it affected the right of *S* in the ancestral property, but that the ancestral property only included that inherited, and not that acquired by *C* from the income of the inherited property. In a suit brought by *S*, after the death of *B* and *C*, against *B's* widow and the parties to the former suit, or their representatives, to obtain possession of the whole estate of *C* on the ground that both the inherited property and the property acquired from the income thereof were ancestral.

Held (reversing the decision of the High Court), that although the issue as to the assent of *S* to the will clearly embraced only a portion of the controversy between the parties, the Court had jurisdiction, and indeed was bound, to decide whether or not the will was operative as to all or to any and what portion of the property, and that its decision on that point was binding on the parties.

According to the general law relating to *res judicata*, where a question has been necessarily decided in effect, though not in express terms between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form.

S. 2, Act VIII. of 1859, does not prevent the operation of this general law. The words "cause of action" in that section must be construed in reference to the substance rather than the form of the action.

THEIR Lordships' judgment was as follows:—

This suit was brought by *Suddanund Mohapatter*, as adopted son and heir-at-law of *Chuckurdhur*, against *Soorjomonee Dayee*, the widow of *Bonomalee*, the de-

* 12 B. L. R., p. 301.

visee of *Chuckurdhur*, to obtain possession of all the estate, real and personal, of *Chuckurdhur*. Other Defendants were joined, but inasmuch as *Soorjomonee* is the only Appellant against the judgment, which was in favor of the Plaintiff, the rights of the Plaintiff as against *Bonomalee* have only to be considered. The claim to the personal property was abandoned by the Plaintiff, nor did he dispute that *Chuckurdhur* had the right to dispose by will of all real property which had been self-acquired by him; but he asserted that there was no self-acquired real property; that all the real property of *Chuckurdhur* was either ancestral in the strict sense of the word (that is, acquired by inheritance from his father) or bought out of the income of ancestral property, whereupon it also became ancestral.

The Defendant did not maintain that *Chuckurdhur* could devise his ancestral property, properly so called, but maintained that what he had bought from the income of ancestral property was, according to the *Mitakshara* law (which is admittedly applicable to this case) self-acquired, and disposable by his will. She further maintained that this very question had been decided in favor of *Bonomalee* in a previous suit between the Plaintiff and him. She also contended that, in fact, a large portion of the property had been bought by *Chuckurdhur* from other sources than the income of ancestral property.

The High Court held that this question had not been so determined as to bind the Plaintiff. After directing further evidence to be taken upon the point, they found as a fact that the real property bought by *Chuckurdhur* had been bought from the income of ancestral property: and, that being so, they ruled that, according to the *Mitakshara* law, he had no power to dispose of it by will.

The first question which arises in the cause is, whether or not it had been decided, in a manner binding upon the parties, that *Chuckurdhur* had the power to devise by will such real property as he had acquired out of the income of his ancestral property?

The suit in which this question is alleged by the Defendant to have been so decided, was brought by the Plaintiff against *Bonomalee* and others in January 1859, and judgment was given in it in 1863. It is not now denied by the Counsel for the Respondent that this question was in fact decided by that judgment, but it is argued that the question was not so raised as to give the Court jurisdiction to decide it, and that the judgment upon it was *ultra vires*.

The facts necessary to make that suit intelligible are as follows:—

Chuckurdhur had first adopted the Plaintiff, and subsequently adopted *Bonomalee*. On the 5th April 1849 he made a will, giving a nine annas share of his real estate to the Plaintiff, and a seven annas share to *Bonomalee*, dividing his personal estate equally between them. The will contained a clause to the effect that if either devisee disputed it, he should forfeit all benefit under it. *Chuckurdhur* shortly afterwards published this will by filing it in the Court of the Collector.

Violent disputes having arisen between the Plaintiff and his father, in the course of which the Plaintiff disputed his father's competence to make a will, *Chuckurdhur*, in 1857, filed in the same Court two petitions, the purport of which was that he disowned the Plaintiff as his son, and adopted, and acted upon, the clause of the will depriving either devisee who disputed it of any benefit under it.

On the 14th January 1859 the Plaintiff filed a plaint against his father, and against *Bonomalee*, and some other persons who had obtained property under deeds executed by his father, for cancellation of those deeds, for cancellation of the adoption of *Bonomalee*, for cancellation of the will, and for maintenance. He alleged the will to be inoperative and fraudulent, on the ground that his father had no testamentary power over his ancestral property, to which the Plaintiff was jointly entitled with him during his life; he further alleged that his father had acquired such property as he had not inherited, from the proceeds of his ancestral property, and that such property was therefore ancestral; and in a schedule appended to his plaint, entitled "A schedule of the disputed property," he distinguished ancestral

zemindaris from *zemindaris* acquired from the profits of ancestral estate. The case of *Kauth Narain Singh* v. *Prem Lall Paurey* (1), decides that it was competent for the Plaintiff to bring such suit in his father's lifetime.

Chuckurdhur, in his answer, maintained his right of disposition by will in these terms: "The Plaintiff writes that I had no authority to transfer ancestral estates by sale or gift, and prays for the reversal of the will and the deeds of gift executed by me. This is his mistake, because I am the owner of all the estates, ancestral and self-acquired, and have every power to alienate them by sale or gift in various ways." He further denied the fact that his purchases of land were made solely from profits of the ancestral estate.

In the replication the Plaintiff reasserted his right of inheritance, and maintained that in that right he was entitled to require, among other things, the cancellation of the will. He reasserted that all the estates of his father were ancestral estates, and none self-acquired according to *Hindu* law, and that by that law they are not transferable by sale or gift or otherwise; and joined issue on the fact that the purchased estates were acquired otherwise than from the proceeds of ancestral estate.

In their Lordships' opinion, the effect of the pleadings is that the Plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father, and such as he had bought out of the income of it.

It is true that this question is not raised as distinctly as it ought to have been in the issues, the only issue directly referring to the will being, whether or not it was assented to by the Plaintiff; an issue clearly embracing but a portion of the controversy between the parties. That the question was, however, raised in the suit, appears not only by the pleadings which have been referred to, but by the grounds of appeal by the Plaintiff from the decision of the Principal *Sudder Ameen*, which was against him, wherein he insists (among other things) that the will is wholly irregular and illegal, and that the Defendant had no power under the *shastras* to execute such a will or wills. He says:—"all the properties moveable and immoveable are ancestral, and not the self-acquired properties of my adopted father; therefore, according to the provisions of the *Mitakshara shastra*, gifts of even a portion without the consent of your petitioner are illegal and improper." *Chuckurdhur*, in opposition to the grounds of appeal, insists that his will was valid and regular, and that he had the power to dispose by it of all property not ancestral in the proper sense.

If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Mussamut Mitna* v. *Syud Fuzl Rub* (1), wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.

Their Lordships are of opinion that the Plaintiff sought for the decision of the Court on this question, whether his father had or had not the power to dispose of all or part of his real property by will, he himself dividing that property under two heads, *viz.*, ancestral property, and that derived from the income or profits of ancestral property; that this question was raised by the pleadings and treated by both parties as before the Court, and that the Court had jurisdiction, and indeed were called upon, to decide whether or not the will was operative as to all, or to any, or what portion of the property. The Principal

(1) 3. W. R., 102.

(1) 13 Moore's I. A., 573; S. C., 6 B. L. R., 448; 2 P. C. J., 626.

Sudder Ameen decided in substance in favor of the Plaintiff as far as the ancestral property was concerned, but dismissed his suit as far as it related to the property derived from the income of ancestral property.

An appeal from this decision came before the High Court on the 28th February 1863, after the death of *Chuckurdhur*, and it now becomes necessary to refer to the judgment given on that appeal (1). After stating that "the present suit is brought by *Suddanund* for maintenance, to declare the adoption of *Bonomalee* invalid and unlawful, to declare that the father's repudiation of the Plaintiff as a son is illegal and beyond the father's powers, to declare the will and petitions disinheriting him inofficious and inoperative, and to set aside certain deeds of sale and gift," (with which we are not concerned at present,) the High Court proceed to say that the case involves several important questions of *Hindu* law, and they thus divide those questions:—First, "the status of *Bonomalee*, whom the Plaintiff seeks to declare to be no lawful son of *Chuckurdhur*;" secondly, "the status of Plaintiff who seeks to be declared a son, and whom the father sought to repudiate;" and thirdly, "the property." After deciding in favor of the Plaintiff on the question of adoption and status, they then proceed to deal with the question of property in these terms:—"With respect to the property, our decision must follow the decisions regarding personal status above laid down. By the *Mitakshara* law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that the ancestral property is only that actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it. On the other hand, the father has it de his power to dispose as he likes of all acq tra acquired and all personal property. Such, then, being the status of the parties, and such the law, we declare that the will and the petitions sought to be set aside are inofficious and inoperative so far as they profess to deprive the Plaintiff, the only son of *Chuckurdhur*, of his right to succeed to the whole ancestral immoveable property held by the said *Chuckurdhur*; but as regards all other property, seeing that *Chuckurdhur* was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the Plaintiff. There is not the least doubt that by the petitions presented by *Chuckurdhur*, he unmistakeably published his will and desire to deprive the Plaintiff of all right to the property so far as he could deprive him, and give it to *Bonomalee*." They then deal with the question of consent to the will, which they find in favour of the Plaintiff; and then they proceed to say, "the father being dead, the Appellants have waived a decision of the claim to maintenance; and with respect to the deeds of sale and gift sought to be set aside, as the Appellants must again go into Court to recover possession of the ancestral property, they are satisfied with the simple declaration that such deeds cannot affect the ancestral property, and that they are at liberty in any fresh suit, to recover possession of all such ancestral property." In their Lordships' opinion the Court had the power to substitute, with the consent of the parties, such a declaration for the relief specifically asked for, *viz.*, the cancellation of the will.

The 2nd clause of Act VIII. of the Code of Procedure of 1859 is in these terms: "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim." Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise

(1) See the report in Marsh., 417; and S. C., ed by Rep., 205.

the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle "*nemo debet bis vexari pro eâdem causâ.*" This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to—*Gregory* v. *Molesworth* (1)—in which Lord *Hardwicke* held that where a question was necessarily decided, in effect though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form: and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. *Smith* to the case of the *Duchess* of *Kingston* (2).

Applying these principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the Plaintiff and the Defendant—who, for this purpose, stands in the position of her late husband—that *Chuckurdhur's* will was operative to dispose of all such real property as he had acquired out of the income of ancestral property. Their Lordships agree with the High Court that *Chuckurdhur* did in fact devise the property over which he had the power of disposition to *Bonomalee*; and they regard the petitions of 1857 not as in the nature of new wills, but as declarations of his intention to act upon the clause of forfeiture in his will, a clause which, according to the case of *Cooke* v. *Turner* (3), would be valid and operative.

Having come to this conclusion, their Lordships forbear from intimating any opinion on the points of law which would have arisen had their decision on this been different, on one of the most important of which the judgment of the 28th of February 1863, and that which is now under appeal, are in conflict.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, and the decree of the Principal *Sudder Ameen* affirmed.

Considering that the complications which have arisen have been due in some measure to the manner in which *Chuckurdhur* himself dealt with his property, and that the Courts below, both that of the Principal *Sudder Ameen* and the High Court, thought this a case in which each party ought to bear his own costs, their Lordships are of opinion that each party should bear his own costs in this appeal, and before the High Court.

(1) 3 Atkyns, 626.
(2) 2 Sm. L. C., 6th Edit., p. 679.
(3) 15 M. & W., 727; S. C., 14 Sim., 493.

29th July, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Financial Commissioner of Oudh.

WIDOW OF SHUNKER SAHAI (Plaintiff)* ... } *Appellant*,

versus

RAJAH KASHI PERSHAD (Defendant) ... } *Respondent*.

Oudh Estates Act, 1869—Sunnud—Talookdar—Hindu Widow.

In a suit against the Respondent pending the regular settlement of *talook Sessendee* to establish Plaintiff's right to a direct settlement with her of four villages, and of a one-third share in seven others out of the twenty-six villages of which the *talook* was composed; it appeared that the Respondent had before judgment obtained a *sunnud* of the whole *talook*, his name being entered in the second schedule to Act I. of 1869, and further that he had admitted himself to be trustee for the Plain-

* Cowell's Sup. Vol., 220.

tiff as respects the said one third share of seven villages. It also appeared that the Plaintiff was entitled to a sub-settlement of the said four villages:—

Held (1), that the Plaintiff could not establish *talookdary* rights, for, having no interest in many of the villages, in order to make her a *talookdar* it would be necessary to reform the *sunnud* and break up the existing settlement and resettle the estate in three different portions.

Quære, whether the *sunnud* could be reformed after Act I. of 1869, without a special Act of the Legislature.

(2) The Plaintiff could not under the summary settlement and the order of the 10th of October, 1859, acquire proprietary rights as against the Respondent, who was sole hereditary proprietor of the *talook* before the summary settlement, and whose rights were reserved under the Proclamation.

(3) The summary settlement not having been made with the Plaintiff *as talookdar*, neither it nor the order of 1859 conferred *talookdary* rights upon her.

Held, lastly, that the Plaintiff was entitled to a Hindu widow's estate of inheritance in the said four villages, and in a one third share of the profits of the said seven villages, and to have a sub settlement of the four villages on terms of paying to the *talookdar* the government demand *plus* 10 per cent.

Quære, whether the effect of the letter of October, 1859, and the subsequent legislation is to relieve a Hindu widow, though a *talookdar*, from the disabilities imposed upon her by the general law.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The Respondent, the *talookdar* of *Sessendee*, is one of the six loyal *talookdars* who were excepted by name in Lord *Canning's* Proclamation of the 15th March, 1858, from the general sentence of confiscation thereby pronounced against the landholders of *Oudh*; and, as such, has had his name entered in the second schedule annexed to the "*Oudh Estates Act*" (No. 1, of 1869), pursuant to the provisions of the 4th section of that statute. The questions raised by this appeal are, how far the rights of the Respondent are affected by the conflicting rights which the Appellant possesses in certain of the villages comprised in his *talook*, and what effect can or ought now to be given to the latter as against him.

The family connection between the parties is of this kind: one *Imrit Loll* had three sons, *Koondun Loll*, *Mohun Loll*, and *Seetaram*. The pedigree in the Respondent's case states that *Seetaram* left descendants, but that they have no interest in the property; and however this may be in point of fact, *Seetaram* may, for the purposes of this appeal, be treated as having died childless. *Koondun Loll* died in 1838, leaving one son, *Shunker Sahai* (also deceased), of whom the Appellant is the widow, heiress, and representative. The other son, *Mohun Loll*, died in 1837, leaving a daughter, who is the wife of the Respondent.

The *talook* came into this family by gift from one *Bussunt Koonwur*. The gift was made nominally to *Shunker Sahai*, but, as the Respondent alleges, really in favour of *Imrit Loll*. It is immaterial to consider how this was, because it is admitted on all hands that, either by virtue of pre-existing family arrangements or of the proceedings had since the annexation of *Oudh*, the Appellant can now only claim the whole proprietary right in four, and a one-third share in seven others of the twenty-six villages which compose the *talook*; the full proprietary right in the remaining fifteen villages belonging to the Respondent.

The fiscal history of the *talook* is thus given in the Record:—"It is admitted that *Mohun Loll* died in 1243 F., *Koondun Loll* in 1244 F., *Shunker Sahai* in 1248 F.; that from 1243 F. to 1250 F. the engagements for the Government revenue of the *talook* were taken from the widow of *Mohun Loll*, those from 1251 F. to 1256 F. from the widow of *Shunker Sahai*, those from 1257 F. to 1259 F. from the widow of *Mohun Loll*, and those from 1260 F. to 1263 F. from *Kashi Pershad*, who had married *Mohun Loll's* only daughter, the widows being both alive." Hence it appears that, in 1856, when the annexation of *Oudh* took place, the Respondent was the ostensible *talookdar*, and he appears to have continued to be such at the date of Lord *Canning's* Proclamation.

The present litigation began in March, 1864, when the Appellant commenced proceedings against the Respondent in the Court of the Revenue Officer engaged in making the regular settlement. The Record, which is in other respects but loosely made up, contains only the pleadings as to one of the seven villages; and therefore it does not clearly appear what was the

precise case which she made in respect of the four villages of which she claimed to be sole proprietor. The nature of her claim touching all but the one village in question is only to be gathered from the judgments afterwards to be considered, of which some appear to have dealt with her whole claim.

The plaint set forth in the Record prays, "that the settlement of the proprietary and sub-proprietary rights to one-third share in the village may be made with Plaintiff, according to the provisions of section 167 of the directions to Settlement Officers and of section 31 of Circular No. 2, and that the *wajiboorlurz* (written representation) may be recorded by the Petitioner." This prayer, whether it does or does not amount to a prayer for *talookdary* rights as such, when distinguished from ordinary *zemindary* rights, as understood in *Oudh*, unquestionably imports a claim for a direct settlement of the Appellant's share of the village with her, independently of any superior.

On the 16th of April, 1864, the Respondent put in a petition insisting on the absolute right conferred upon him by the Proclamation of March, 1858; and objecting to the Appellant's being treated even as under-proprietor, as, according to the settlement paper, she does not possess these rights.

In answer to this the Appellant's agent, on the 11th of May, 1864, put in a petition, in which he entered into the history of the *talook* before the annexation of *Oudh*; insisted in paragraph 4 on the provisions made by the British Government for the protection and maintenance of the rights of persons in possession, and the rights and possession of under-proprietors; and after stating, in paragraph 7, "That if in consideration of the estate having been formally gained by the husband of Petitioner's client, who is in the possession of the same, she is entitled according to law to superior right, the objection of the *Rajah's Mookhtear* to the settlement of under-proprietary right with her cannot be held valid;" he concluded with the expression of a hope that after due inquiry a decree for the possession of the entire estate of *Sessendee* might be passed in the Plaintiff's favour.

Mr. *Capper*, the Settlement Officer who tried the case in the first instance, came to the following conclusions:—

1st. That the Appellant's claim to the entire *talook* as given to her late husband, was barred by the grant of the *talook* by Government to the Respondent.

2ndly. That this did not affect her claim to hold *Pookhta* as under-proprietor, villages which were the proprietary of her husband, and which she was holding in 1855-1856 A.D.; as to which appropriate orders would be issued.

3rdly. That the claim to share in the proceeds of the joint collections of other villages in which she had no distinct proprietary possession in 1855-1856 was barred by the rules which admit no share in a *talook*. And he added the following observations:—"The common collection must be held to be that of the *talookdar*, and any distribution of the proceeds must be held to be his voluntary act, granting maintenance to his relations. By the local rules these can only be enforced when the *talookdar* has bound himself in writing to continue it. If such document exist, it can be separately adjudicated."

His final decree in the case of the particular village sued for by the Plaintiff set out in the Record was in these words:—"I dismiss the claim of the widow of *Shunker Sahai* to under-proprietary title in one-third of *mouzah Sessendee Khas*, and decree full under-proprietary title to *Rajah Kashi Pershad*."

On appeal this decree was confirmed by Mr. *Currie*, the Settlement Commissioner, on the 22nd September, 1864. In his judgment he states that, although in the Lower Court the Appellant had claimed only one-third of *mouzah Sessendee* in under-proprietary right, she had before the Appellate Court laid claim to the whole; that he refused to admit an appeal for a larger portion than was claimed in the Lower Court; that her claim, such as it was, was barred by the Respondent's *sunnud*; that any possession which she may have had in the village was of a proprietary, not of an under-proprietary character, and that possession of a proprietary character could not entitle a person to be recognised as an under-proprietor. He added that, inasmuch

as the Respondent had voluntarily agreed to allow the Appellant to retain possession of her one-third of the profits for the term of her life, the Settlement Officer, if she applied for the benefit of this concession, and gave security not to disturb the Respondent further, should take the necessary steps to secure her the rights conceded.

Their Lordships have to observe on this decision that the reasoning on which it is based applies only to the particular village of *Sessendee Khas*, and the other six in respect of which the Appellant claimed one-third of the profits. It has no application to the four villages of which she claimed the full proprietary right, and the record fails to shew distinctly what proceedings were had in respect of the latter after Mr. *Capper's* judgment of the 23rd of May, 1864.

From Mr. *Currie's* order the Appellant brought a special appeal before Mr. *Davies*, the Financial Commissioner, which that officer dismissed on the 6th of December, 1864, regretting that he was legally debarred from interfering with orders of the Lower Courts. And on the 10th of July, 1865, he rejected a subsequent petition for review of judgment, stating that "he fully admitted the hardship of the case, but was unable to point out any legal remedy at present." The first of these orders may have been passed under some doubt as to the powers of the Financial Commissioner. But no such doubt can have existed in July, 1865, when the petition for review was rejected, since Act XVI. of 1865, which received the assent of the Governor-General on the 7th of April, 1865, had been passed intermediately to remove such doubts. On the 18th of July, 1865, the Appellant presented a long petition to the Financial Commissioner, which was the commencement of the proceedings out of which this appeal has directly arisen. This document is in terms confined to the previous adjudication concerning the single village of *Sessendee Khas*. It complains first, that no distinct issue whether the Appellant was or was not in proprietary possession of a third share in *mouzah Sessendee* had been regularly settled and tried in the suit. It contends that such possession was established by, amongst other evidence, a *kheut* and settlement forming part of the proceedings on the summary settlement of 1858. It then contests the conclusions of the Settlement Commissioner, in his order of the 22nd of September, 1864, to the effect that the Appellant's claim was barred by the Respondent's *sunnud*; and that any possession which she may have had in the village having been of a proprietary, and not of an under-proprietary character, it could not entitle her to be recognised as under-proprietor. It then cites certain paragraphs of a Circular Letter, No. 6 of 1862, and submits that the Petitioner's case falls within the 6th of those paragraphs, and entitles her to have it referred for the orders of the Governor-General in Council, in order to have the Respondent's *sunnud* reformed. The prayer of this petition was that the Court would be pleased to decree to her the continuance and enjoyment of the rights she was entitled to under and by virtue of the *kheut* and Settlement Statement A; or to refer the case for the order of the Governor-General in Council, in conformity with the ruling laid down in paragraph 6 of Circular No. 6 of 1862.

This application would seem, from a petition filed by the Respondent, on the 21st of March, 1866, to have been heard by the Financial Commissioner on the 1st of March *ex parte*. The Petitioner complained of this, and finally begged that if his objections were not still to be heard, his petition might be forwarded to his excellency the Governor-General in Council, with the report which the Financial Commissioner proposed to make in the case. The first step taken by the Financial Commissioner was to write, on the 28th of March, 1866, the letter to the Secretary of the Chief Commissioner of *Oudh* which is in the record.

The important paragraphs in that letter are the following:—

"2. The widow brought her claims in the regular way before the Courts, both for the proprietary rights and then for under-proprietary rights; but it was held that her suit for the first was barred by the *sunnud* being in the name of *Rajah Kashi Pershad* only, and for the second because any title she may have had inde-

pendently of our arrangements must have been to full proprietary rights, and that she had none to rights held in subordination to the *talook*.

"3. But having allowed her case to be again argued by counsel, I find that although the *sunnud* was made out in the name of *Rajah Kashi Pershad* alone, it is not in agreement with the orders for the settlement of 1858 A. D.

4. "That settlement was made by a proceeding of Captain *L. Barrow*, Special Commissioner of Revenue, a translation of which is annexed for reference. It will be seen that after stating that in 1264 F. (1856 A.D.), fifteen villages were settled with the *talookdar* (*Rajah Kashi Pershad*), four (1) with the widow of *Shunker Sahai*, and seven with both as copartners, and that in the co-parcenary villages two-thirds belonged to the *talookdar*, and one-third to the widow, the record goes on as follows:—"It is therefore ordered that the triennial settlement of the *talookdar* be made with *Rajah Kashi Pershad*, *talookdar*, on a *jumma* of Rs. 23,251, according to the assessment of 1264 F., and that the widow of *Shunker Sahai* be recorded as co-partner."

"5. The widow's name was duly entered in the *kheut* as one-third owner of the seven villages referred to, but this document would be of no effect *per se*, and apart from the specific recognition of the widow's right in the settlement proceeding.

"6. According to the Governor-General's Order of the 10th of October, 1859, it is ruled that *talookdars* with whom the summary settlement was made, thereby acquired the proprietary title in their *talooks*. This order is generally held to be law. It would follow, therefore, that the widow is entitled to have her name entered in the *talookdary sunnud* as owner of the four villages, and in one-third of the seven villages, her proprietary right to which was affirmed by the settlement proceeding."

"13. If the case were within the ordinary jurisdiction of the Courts, nice questions would arise as to the right of the widow of *Shunker Sahai* to more than a life-interest in her husband's estate, and as to the title of the husband of her brother-in-law's widow to succeed to it. But there is no occasion to discuss these. The *talookdar's* title is good under his *sunnud*, but it appears to me that the widow's is equally good to her share as defined under the proceeding of summary settlement.

"14. It should be mentioned that *Rajah Kashi Pershad* is one of those *talookdars* whose proprietary rights were specially reserved in the Proclamation of the Governor-General, under which the soil of *Oudh* was confiscated. The *Rajah* maintains that he thus became proprietor of the whole *talook*, how many soever share-holders there may have been previously. Without discussing this point on its merits, I may observe that it is not available to the *Rajah* in the particular case, as the terms of the Government Order of the 10th October, 1859, are distinct, that those with whom the summary settlement was made became *ipso facto* proprietors without reference to any antecedent rights.

"15. As much stress is laid on the rigid maintenance of the literal terms of the settlement of 1858, and as the widow has gone to much expense to have the case argued on that ground, I hold that it is not open to me to do otherwise than state the case as above for the consideration of the Chief Commissioner."

There is considerable confusion in the Record as to what was done, or intended to be done, on this report. This is a question which will be hereafter considered. One thing is certain, that nothing final was done until the 7th of November, 1868, when Colonel *Barrow*, who had then become Financial Commissioner, made an order, of which the substance is contained in the following paragraph:—"On these grounds, therefore, a life interest in the four villages named in the margin is decreed to the widow of *Shunker Sahai*, who will pay the Government demand, *plus* 10 per cent. only, to the *talookdar*: and she

(1) For these four villages the widow has obtained a sub-settlement after a good deal of litigation. Their names are 1, *Utteryaon*; 2, *Deburrcha*; 3, *Burrowan*; 4, *Kurrowlee*.

will be also entitled to a one-third share of the profits in the seven villages named in margin when the annual accounts are made up." Against this order the Appellant under leave of the Court in *Oudh* has appealed to Her Majesty in Council, and the Respondent, with the like leave, has preferred a cross appeal.

The Appellant in her case describes the order as *a proceeding purporting to be a judgment* of the then Financial Commissioner; and her learned counsel on the opening of the appeal treated the order as one made *ultra vires*. Their argument on this point seemed to assume that the memorandum of Major *MacAndrew* was in the nature of an order made by competent authority, which sent the case back to the Judicial Commissioner for adjudication upon one point only, viz., whether, by the summary settlement the widow was declared entitled to the third of the whole estate, or only to the four villages and one-third of the seven. It seemed also to assume that, by the report of Mr. *Davies* of the 28th of March, 1866, whatever power the Financial Commissioner might have had to determine generally the rights of the parties on the merits was spent; and, further, that the Chief Commissioner either had determined to refer the case to the Governor-General in Council, in order to have the Respondent's *sunnud* altered according to the result of Major *Barrow's* answer to the specific question referred to him, or at least had reserved to himself the power of so determining when he should receive the answer. If this were the true view of the case, it would, in their Lordships' opinion, be a very grave question whether any appeal against the order would lie to Her Majesty in Council. It was indeed suggested that the order, though made without jurisdiction, purported to be a judicial order, and consequently that the appeal would lie. But even if that were so, the utmost their Lordships could do would be to discharge Colonel *Barrow's* order as made without jurisdiction. They would certainly decline to adjudicate upon the propriety of the reformation of the Respondent's *sunnud* by the Governor-General in Council, an act to be done, not by any Court of Justice, but by the Supreme Executive Authority in *India*.

Their Lordships, however, having come to the conclusion that this view of the case is erroneous, do not think it necessary to consider more particularly what could or ought to have been done, had it been correct. They conceive that the argument ascribed a force and an effect to the memorandum of Major *MacAndrew* which do not belong to it. That gentleman had no power or authority to direct a judicial inquiry into any matter. He was but the secretary of the Chief Commissioner, also an executive officer. The memorandum in question does not even purport to be an extract from a despatch written by the authority of the Chief Commissioner. It is more like the mere memorandum of a secretary or *précis* writer submitting, for the information of his superior, his own view of the documents on which the latter was to pass an order. Again, this paper is dated the 10th of April, 1866; and it appears from the Record that on that date the Respondent was petitioning the Chief Commissioner; that the Appellant's counsel was addressing the same officer on the 6th of October, 1868; that in October, 1867, the Appellant was memorialising the Governor-General in Council and treating the question as still open; that the Chief Commissioner had returned the files to the officiating Financial Commissioner, suggesting that this case should be disposed of by mutual agreement or by the *talookdar's* association; that some such arbitration was attempted but that in December, 1867, the Appellant, dissatisfied with that course of proceeding, prayed that the trial of her case should be sent back to the Financial Commissioner; and that, finally, both parties appeared by counsel before Colonel *Barrow*, as Financial Commissioner, on the 7th of November, 1868, and argued their respective cases before him. The conclusion, therefore, to which their Lordships have come upon these confused, and perhaps somewhat irregular, proceedings, is that the Chief Commissioner never took action upon Mr. *Davies'* Report, in order to have the Respondent's *sunnud* reformed, or determined to take such action; but that in November, 1868, the case raised by the

Appellant's petition of the 18th of July, 1865, was still open for adjudication by the Financial Commissioner; and that the order under appeal must be taken to be the final judicial order on that petition. The learned counsel for the Appellant, at the close of the argument, seemed to intimate their desire to have the case thus dealt with. The learned counsel for the Respondent, however, did not abandon their contention that the suit had been finally disposed of when Mr. *Davies* rejected the first petition for review; and that the petition of the 18th of July, 1865, and all the subsequent proceedings were irregular. Looking, however, to the proceedings of the Courts below, to the conduct of the Respondent therein, and, indeed, to his printed case filed on this appeal, their Lordships are not disposed to adopt this view, but consider that it is open to them to review, as they will now proceed to do, Colonel *Barrow's* order on its merits.

The first question is, whether the Appellant has made out a title to any *talookdary* rights. It is admitted on all hands that the Respondent's *sunnud*, whilst it stands, is an effectual bar to her claim of such rights. And, since she has no interest in many of the villages comprised in the *talook*, it would apparently be necessary, in order to make her a *talookdar*, not only to reform the Respondent's *sunnud*, but also to break up the existing settlement, and to resettle the estate in three different portions. Whether, since the passing of the *Oudh Estates Act*, the first of these objects could be effected even by the Governor-General in Council without a special Act of Legislature, seems to their Lordships to be very questionable. The second will be found to be inconsistent with the title to *talookdary* rights which she sets up. For it is admitted by Mr. *Davies*, the officer most favourable to her, that the sole foundation on which her title rests is to be found in the summary settlement of 1858, and the effect given thereto by the Governor-General's Order of the 10th of October, 1859. In paragraph 8 of his letter he says distinctly: "It is nothing to the purpose to inquire whether the widow had any rights independent of the summary settlement, or whether under it she got more or less than she was entitled to, as its effect has been made absolute and irrevocable."—It is, however, clear that, if the summary settlement did anything, it treated all the twenty-six villages as forming one *talook*, to be settled for with somebody as *talookdar*, at one aggregate *jumma*.

Again, their Lordships are not disposed to assent to the proposition contained in the 14th paragraph of Mr. *Davies'* letter, to the effect that a title derived from the summary settlement and the Governor-General's Order must be taken to override the rights acquired by the Respondent under the Proclamation. Before the summary settlement the Respondent had been declared sole hereditary proprietor of the lands which he held when *Oudh* came under British rule (he seems to have been then *talookdar*), subject only to such moderate assessment as might be imposed on them; and the proprietary right of all other persons in the soil stood confiscated to the British Government, which reserved to itself the right of disposing of it. He had, therefore, at the date of the settlement the declared right to engage for the revenue. His doing so could not supersede or detract from the rights which he had already acquired, or become the foundation of his title. On the other hand, the general body of *talookdars* re-acquired no interest in their forfeited lands until they had been admitted to make the settlement. Accordingly the *Oudh Estates Act*, though it enacts that the estates of both classes of *talookdars* shall be of the same nature, and be held subject to the same conditions, recognises the distinction between them in the matter of title; and directs that the Respondent, and the four other loyal *talookdars* in the same category with him, shall have their names entered in a separate schedule.

Lastly, their Lordships are of opinion that there is no ground for holding that the summary settlement, and the subsequent Order of 1859 have conferred *talookdary* rights on the Appellant. The order declared that every *talookdar* with whom a summary settlement had been made since the re-occupation of the province had thereby acquired certain rights. To

bring any person within the operation of this clause, he must be shewn to be one with whom a summary settlement was made between the 1st of April, 1858, and the 10th of October, 1859, as *talookdar*. It does not appear to their Lordships that this can be predicated of the Appellant. She never entered into any engagement for the revenue. From the settlement proceedings, the Statement A and the *Roobacarry*, it appears that the *Rajah* was the only person who applied for the settlement; that he sought to settle for all the twenty-six villages as one estate or *talook*; that he was described on the face of the proceedings as "the *talookdar*," the Appellant being spoken of only as the widow of *Shunker Sahai*; and that the triennial settlement was then directed to be made, and was made with him, the *kaboolyut* being taken from him alone. Undoubtedly the application of the *Rajah* stated the interest of the applicant both in the four and in the seven villages, and admitted that, in 1856, and immediately after the annexation of *Oudh*, there had been three distinct settlements of the villages for which he was then seeking to settle as one entire estate or *talook*. But this latter fact, though consistent with the fiscal policy which prevailed between the annexation and the mutiny, is alike inconsistent with the policy inaugurated by Lord *Canning's* Proclamation, with the *status* of *talookdar*, thereby assured to the Respondent, and with the final order of the Settlement Officer. The construction which their Lordships would put on the words "and that the name of *Shunker Sahai's* widow be recorded as shareholder" is not that the Settlement Officer gave or intended to give to the Appellant the right of making a summary settlement as *talookdar*, but simply desired to place on record, for her benefit her admitted proprietary and beneficial interest in some, and some only, of the villages which made up the settled *talook*.

If this be so, the next question is to what, if any, relief is the Appellant entitled, though she has failed to establish a title to *talookdary*, or even to *malgoozaree* rights. It will be convenient to consider this first with respect to her interest in the seven villages, and afterwards with respect to the four villages, since her interests in the two classes of villages may admit of different considerations.

As to both, however, it is to be observed that the necessary consequence of holding that the twenty-six villages have been conclusively thrown into one *talook*, of which the Respondent is sole *talookdar*, is that the interest of the Appellant in the villages in which she is interested, whatever it may have been originally, has become in some sense subordinate or subproprietary. The *Oudh* Blue Book and in particular the memorandum of Mr. *Charles Currie*, shew how, under the native Government, the great *talooks* grew up, and how sometimes by a process of disintegration sometimes by one of acquisition they came to include *zemindaries* in which all proprietary right, short of a nominal superiority, was vested in persons other than the *talookdar*. In such cases the *talookdar* alone held, as it were, *de capite* from the State, and alone engaged for the payment of the public revenue; but he held his lands subject to the rights of the proprietors intermediate between him and the cultivators of the soil. It seems to have been the general policy of the *Oudh* settlement, begun by Lord *Canning* and continued by his successors, to perpetuate this system, however much the authorities may from time to time have somewhat oscillated between the policy of creating a landed aristocracy, and that of protecting against such an aristocracy the rights, real or supposed, of others in the soil. Their Lordships can see no reason why the Appellant because she may have originally claimed the superior, should not be allowed to assert in this suit any subordinate right to which she may be entitled. And this, which was originally the view of Mr. *Capper*, seems to have been finally ruled by Colonel *Barrow*. And it may be observed that in some of the earlier proceedings she has put her case in the alternative.

Again, Mr. *Capper* seems to have admitted, as to the seven villages, that though the Appellant had not been in independent possession of one-third of the collection of these villages; though the

collections were made in common and therefore presumably by the Respondent, the *talookdar*; yet that the latter might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit, because her agent had failed to produce a deed in writing so binding the *talookdar*. Colonel *Barrow*, however appears to have held that the admission of the *Rajah* at the time of the summary settlement, and on other occasions (the former being in the nature of an admission on record), were equivalent to such a deed; and that accordingly the relation of trustee and *cestui que trust* having, so to speak, been established between them, she was entitled to a one-third share of the profits of these villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur.

Colonel *Barrow's* order also recognises the proprietary interest, treating it as a subordinate interest, of the Appellant in the four villages. But the Appellant insists that he has improperly subjected her to pay a percentage of 10 per cent. to the *talookdar* over and above the Government demand. It is somewhat difficult for their Lordships, in the absence from the Record of the proceedings relating specifically to these villages, to deal with this portion of the Appellant's case. In a marginal note to his letter of the 28th of March, 1866, Mr. *Davies* states that the widow had obtained a sub-settlement for these four villages. If that were a final settlement their Lordships, on the materials before them, would not see their way to disturbing it. Colonel *Barrow* however appears to have thought that the amount payable by the Appellant to the Respondent in respect of these villages was a point open to him for decision; and his finding thereon is now to be reviewed. If there were no positive law on the subject their Lordships would see no ground for subjecting the Appellant, who as *Zemindar* must be in the collection of the rents, to the payment of more than her proportion of the Government revenue. But the propriety of the imposition of this 10 per cent. seems to depend upon the effect of the provisions of the *Oudh Settlement Act*, No. XXVI. of 1866. That Act was passed to give the force of law to certain rules regarding sub-settlements and other subordinate rights of property in *Oudh*. They seem to apply to all persons possessed of subordinate rights of property in *talooks* in *Oudh*; and the 3rd clause of the 7th of these Rules says. "In no case can the amount payable during the currency of the settlement by the under proprietor to the *talookdar* be less than the amount of the revised Government demand, with the addition of 10 per cent." Colonel *Barrow* appears, therefore, to have made the amount payable by the Appellant the least which, in his view of it, the law permitted.

Their Lordships conceive that they too are bound by this enactment. If the view which they have taken of the Respondent's rights as *talookdar* is correct, it is impossible to treat the interest of the Appellant in these villages as other than that of a subordinate *Zemindar*. If she has lost the right of settling directly with Government for the revenue, she must, if she retains any interest in the villages, be treated as one entitled to, and liable to make a sub-settlement for them. And if this be so, she seems to fall within the provisions of the statute.

The only remaining question relates to the extent and nature of the Appellant's interest in the property which has been found to belong to her. Colonel *Barrow* has decreed to her only a life interest. He seems to have had a notion that if her interest were more than this she would have an absolute power of disposing of the villages and of breaking up the *talook*. This could only have happened had she been found entitled to full *talookdary* rights; and even in that case it may be doubted whether the effect of the Governor-General's letter of 1859 and the subsequent legislation, is to relieve a Hindu widow, though a *talookdar*, from the disabilities imposed upon her by the general law. Such a construction seems opposed to the 23rd section of the *Oudh Estates Act*, at least as regards a widow who takes a *talook* by inheritance. The Appellant,

however, is now to be treated not as a *talookdar*, but as the proprietor of certain villages and rights within a *talook*. These she acquired by inheritance from her husband, and her estate is not a life interest, but the estate of inheritance of a Hindu widow with all its rights and all its disabilities. Their Lordships therefore will humbly recommend her Majesty to vary the order under appeal by declaring that the Appellant, as the widow and heiress of *Shunker Sahai*, is entitled to a Hindu widow's estate of inheritance in the four *mouzahs*, *Daberia*, *Bursooa*, *Kuroulee*, and *Ooturgaon*, and in a one-third share of the profits in the seven *mouzahs*, *Sessendikhas*, *Salsamow*, *Laloomur*, *Shahpur*, *Kharehra*, *Meerrampur*, and *Jubrelah*, such share to be ascertained and paid when the annual accounts are made up, and that she is further entitled to have a sub-settlement of the said four villages on the terms of paying the Government demand *plus* 10 per cent.

In this case in which there are appeal and cross appeal, neither of which has been wholly successful, their Lordships think that each party should bear his or her own costs.

29th July, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Financial Commissioner of Oudh.

RANEE OF CHILLAREE (Plaintiff)* ... *Appellant*,

versus

THE GOVERNMENT OF INDIA (Defendant) ... *Respondent*.

Oudh Estates Act, 1869—Talookdar—Temporary Settlement—Resumption Order of the 10th of October, 1859.

In a suit brought in 1867 to establish Plaintiff's right to a *talookdary* in *Oudh*, as grandmother and heiress to a deceased infant *Rajah*, with whom a summary and temporary settlement thereof had been made; it appeared that the *talook* had been, after the death of the infant *Rajah*, and before the letter of the 10th of October, 1859, resumed by the Government:—

Held, that the Plaintiff as heir of a *talookdar* who had been permitted to engage for the revenue, but who had died before the letter of the 10th of October, 1859, was not entitled to the permanent hereditary and transferable proprietary right described thereby, but which had never vested in the deceased *Rajah*.

Act I. of 1869 did not apply to the case.

THE judgment of their Lordships was as follows:—

This is an appeal from a decision of the Financial Commissioner of *Oudh*, dated the 21st of October, 1868, reversing on special appeal a judgment of the Commissioner of *Seetapore*.

The suit was brought by the present Appellant against the Government of *India*, the present Respondents and others in the Court of the Assistant Settlement Officer of *Zillah Seetapore*, in the course of a regular revenue settlement for the province of *Oudh*. The object of the suit was to establish the alleged right of the Plaintiff to the proprietorship of *talook Chillaree*.

* Cowell's Sup. Vol., 237.

The plaint was filed on the 26th of January, 1867.

The Plaintiff was the mother of *Rajah Bulbhudur Singh*, who was killed at *Nawabgunj* in the year 1858, whilst fighting in open rebellion against the British Government. He left a widow *enceinte*, who shortly afterwards gave birth to a son, *Rajah Digbehoy Singh*. It was found by the Assistant Settlement Officer, the Court of first instance, that a summary settlement for the *talook*, comprising ninety-two villages, was made with the infant *Rajah Digbehoy Singh* by Mr. *Forbes*; that it was confirmed by the Financial Commissioner, and that it remained in force until the child's death on the 25th of March, 1859. The mother died a few days later, leaving the Plaintiff the grandmother, the heiress of the child according to the *Hindu* law. It was also found by the Assistant Settlement Officer, that, "in July, 1859, Captain *Thomson*, the Deputy Commissioner, wrote to the Commissioner giving a statement of the case, and recommending, apparently on grounds of policy, that the *talook* should be resumed; that the case was forwarded to the Chief Commissioner for orders, who, after consulting the Judicial Commissioner as to the nature of the present claimant's rights, finally rejected her claim and reported the resumption of the estate to the Government of *India*."

The estate was, in fact, resumed, and in September 1859, an allowance of Rs. 5,000 a year out of the estate, commencing from the death of the child was, with the sanction of Government, reserved to the Plaintiff for life.

The Assistant Settlement Officer gave judgment in favour of the Plaintiff and decreed to her the absolute hereditary and transferable right in all the villages included in the settlement with *Rajah Digbehoy Singh*. On regular appeal to the Commissioner, the decree was modified by ordering that the Plaintiff was to have only a life interest in the property, and that execution should issue in a month. The effect of those decrees if upheld would be to subject the present holders, to whom the greater portion of the estate has been granted for loyal services, to be turned out of possession at any rate during the life of the Plaintiff. The Financial Commissioner, upon special appeal, reversed the decision of the lower Courts and dismissed the Plaintiff's suit.

It was contended at the Bar by the learned counsel for the Respondents, that the revenue settlement with *Rajah Digbehoy Singh* was never completed, and, indeed, it was so held by the Financial Commissioner in the third reason given in the conclusion of his judgment. But their Lordships are of opinion that the first two lower Courts, having substantially found that a revenue settlement was made with the infant, it was not open to the Financial Commissioner on special appeal to overrule those findings. Indeed, the grounds of special appeal to the Financial Commissioner did not raise the question whether a summary revenue settlement was in fact made with the infant *Digbehoy Singh*, but merely the questions whether the summary settlement was ratified by the letter of Government of the 10th of October, 1859, and whether the estate sued for was legally vested in the infant.

It appears to their Lordships that it must be assumed, in accordance with the findings of the first two Courts, that a revenue settlement was in fact entered into with the infant *Rajah*, but that the *talook* was resumed by Government after his death, and long before the letter of the 10th of October, 1859.

It is clear that, by the proclamation of the Governor-General of the 15th of March, 1858, the authority of which cannot now be disputed, the proprietary right in the *talook* in question was, together with nearly the whole of the proprietary rights in the soil of the Province of *Oudh*, confiscated to the British Government; and that that right was liable to be disposed of in such manner as the Government might think fit. It is equally clear that the temporary revenue settlement entered into with the infant *Rajah* did not of itself vest in him the absolute proprietary and inheritable right in the *talook*. The duration of the revenue settlement was limited to three years, which period had expired long before the Plaintiff's suit was commenced. The sole question is, whether

the letter of the Governor-General of *India* in Council of the 10th of October, 1859, coupled with that revenue settlement, vested an absolute proprietary and inheritable right to the *talook* in the young *Rajah*, who died on the 25th of March, 1859, more than six months before that letter was written; or if not, whether it vested in his heirs at law as grantees, an inheritable proprietary right which the deceased *Rajah* himself never possessed.

The letter, which was from the Secretary to the Government of *India*, Foreign Department, to the Chief Commissioner of *Oudh*, is set out in the first schedule to the *Oudh Estates Act*, No. 1 of 1869. The second paragraph of the letter is as follows:—

"2. His Excellency in Council, agreeing with you as to the expediency of removing all doubts as to the intention of the Government to maintain the *talookdars* in possession of the *talooks* for which *they* have been permitted to engage, is pleased to declare that every *talookdar* with whom a summary settlement *has been made* since the re-occupation of the province, *has* thereby acquired a permanent, hereditary, and transferable proprietary right, viz., in the *talook* for which *he has* engaged, including the perpetual privilege of engaging with the Government for the revenue of the *talook*."

The letter and the recital contained in it shew that the object of the Government was to maintain in possession those *talookdars* who then were in possession under summary settlements entered into with them after the re-occupation of the province. The *talookdars* who were declared to have acquired the right conferred by the letter, were those who had been permitted to engage. Nothing was said as to the heirs of *talookdars* who had been permitted to engage, and who had died between the time of the engagement and the date of the letter. It is not necessary to decide whether such heirs, if in possession at the date of the letter, would have been within the spirit or meaning of it. It is clear that the letter, which was a mere act of grace, was not intended to operate as an original grant to such heirs, for, if such were the case, the heir, if a widow mother, or grandmother would have taken an estate descendible to her own heirs instead of the estate of a Hindu female heiress descendible to the heirs of the person to whom she succeeded; and thus the estate would have been taken out of the family of the *talookdar* who had been permitted to engage. The letter could not operate as a grant of an hereditary estate to a deceased *talookdar* and his heirs. The only way in which it could operate for the benefit of the heirs of a deceased *talookdar*, who had been permitted to engage in a summary settlement, would be, by its being treated as a retrospective declaration of the effect of the revenue settlement for which he had been permitted to engage. Such a construction cannot be put upon the letter with reference to a *talookdar* who had died long before the date of the letter; upon whose death the estate had been resumed by Government, and whose heirs had not been permitted by Government to succeed to the *talook* even during the continuance of the temporary revenue settlement.

Their Lordships are of opinion that the letter ought to receive a liberal interpretation in order to effectuate the intentions of the Government; but they consider that it would be acting in direct opposition to those intentions if the letter were to be read in the sense contended for, as one which pledged the Government to restore a possession to which they had, in fact, put an end, and to vest in a dispossessed claimant an interest which the settlement itself did not give. Such an interpretation would be contrary both to the letter and spirit of the document, and at variance with every legitimate rule of construction. Their Lordships, therefore, concur in the view of the Financial Commissioner that the letter of the Governor-General in Council of the 10th of October, 1859, did not apply to the revenue settlement for which the infant *Rajah* was permitted to engage and which was resumed by Government after his death, and before the letter was written; and that it was not intended by that letter to create in the Plaintiff a proprietary right by inheritance in the *talook* by virtue of a temporary revenue settlement for three years to which she had not

been allowed to succeed. The temporary revenue settlement was resumed in 1859, and the suit was not brought until 1867.

Their Lordships are of opinion that Act No. I. of 1869 cannot apply to this case, in which the suit was commenced in 1867, and finally decided by the Courts in *Oudh* in 1868; but even if the Act could apply by retrospective operation it would not vest a right in the Plaintiff, for the word "*talookdar*" in the 3rd section of the Act, was defined to mean "a person whose name is entered in the first of the lists mentioned in section 8," and the Plaintiff's name has never been entered in such list. The case of the Appellant does not appear to their Lordships to fall within either the words or the spirit of the letter of the 10th of October, 1859, or of the *Oudh Estates Act* of 1869. They will, therefore, humbly recommend Her Majesty in Council to affirm the decision of the Financial Commissioner with the costs of this appeal.

4th November 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Financial Commissioner of Oudh.

THAKUR DURRYAO SINGH (Plaintiff)* ... } *Appellant*,

versus

THAKUR DARI SINGH (Defendant) ... } *Respondent*.

Hindu Law—Joint Estate—Impartibility—Partition.

A custom of impartibility must be strictly proved in order to control the operation of the ordinary *Hindu* law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition.

* 13 B. L. R., p. 165.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

Their Lordships are of opinion that this appeal must be allowed. It is an appeal against a decision of the Financial Commissioner, who, upon special appeal, overruled the finding of the two lower Courts, to the effect that the succession and enjoyment of the estate in question, and the rights of the Appellant and Respondent as members of a joint and undivided Hindu family, were to be regulated by the ordinary rules of the Hindu law. That the family was joint and undivided was indisputable; and it, therefore, lay on the Respondent, if he could displace the operation of the ordinary Hindu law, to do so by clear proof of some family or other custom which varied the law. Both the lower Courts have found that no such custom was established; but that, on the contrary, there was evidence, satisfactory to them, that the estate, though engaged for in the name of one brother, was, in point of fact, held and enjoyed by the two brothers as co-sharers. There was also evidence that although there had been no partition of this estate for six or seven generations, the property of the family had in former times been the subject of partitions. The case went before the Financial Commissioner upon special appeal, and he appears to have considered that it was governed by a former decision of his predecessor Mr. *Davies*, by reason of which he was bound to reverse the judgments of the Courts below. The only appeal is against that reversal, on special appeal.

It appears to their Lordships that the decision of Mr. *Davies* has not the effect which the Financial Commissioner, Colonel *Barrow*, attributes to it; and that it is not an authority which governs the present case. In the case before Mr. *Davies*, the lower Courts had found that during six or seven generations the estate then in question not only had remained

undivided in fact, but had descended as an impartible estate to a single heir. That being so, Mr. *Davies* appears to have ruled that this proof was sufficient to raise a presumption of an unbroken family custom, which could not be rebutted by some evidence that had been tendered, to show earlier partitions in the family, whereby a larger estate had been broken up into several smaller portions, one of which was the estate in dispute. In the present case there was no evidence of enjoyment by a single member of the family during six or seven generations; all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindu law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded.

If then the decision of Mr. *Davies* fails to support that which is under appeal, is there any other ground upon which the Financial Commissioner was justified in overruling on special appeal the judgments of the lower Courts? Their Lordships can find none. It certainly cannot be said that there was no evidence to support the material findings of these Courts; for they had before them the admission of the Respondent by his agent on the occasion of applying for the settlement of 1859, and his former admission on the occasion of applying for the settlement in 1856.

Their Lordships in the course of the argument intimated that it was not open to them upon such an appeal as this, as it was not open to the Financial Commissioner on special appeal, to disturb the findings of fact by the lower Courts. They may, however, state that if they could have violated the rule which they have laid down as to not giving special leave to reopen the whole case when the application is made to them for the first time at the bar, they do not think that upon the evidence on this record Mr. *Leith* could have succeeded in inducing them to come to a different conclusion from that arrived at by the Courts below.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal, to reverse the decision of the Financial Commissioner, and to affirm the decrees of the lower Courts.

The Appellant must have the costs of this appeal

5th, November, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porret Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Ex Parte (1).

MUNNOO LALL (Plaintiff)* ... ... } *Appellant,*

versus

LALLA CHOONEE LALL and others (Defendants) ... ... } *Respondents.*

Estoppel—Practice.

A man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.

Their Lordships of the Judicial Committee would not depart from the ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had sold some doubt upon the finding.

THE judgment of their Lordships was pronounced by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This appeal has been heard *ex parte*, and after considering the opening of Mr. *Leith*, which has been made in a fair and candid manner, it appears that there are concurrent findings of two Courts below

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* Macpherson's I. A. p. 144.

(1) The Respondent had put in his printed case, but was not represented at the hearing.

upon a question of fact decisive of the case, and decisive of it against the Appellant.

The circumstances are very short. It appears that a man of the name of *Reep Bhunjun Singh* was in debt, and at the time possessed some considerable estates. The Appellant *Munnoo Lall* had been his banker and advanced money to him, and, amongst other securities, he held a mortgage of the date of the 9th of October, 1863, from *Reep Bhunjun Singh*, of *Mouzah Shahpore*. It was an ordinary mortgage to secure the sum of Rs.20,000. Subsequently to that mortgage, on the 9th of August, 1864, *Reep Bhunjun Singh* sold the *mouzah* to the Respondents, or to those whom the Respondents represent, the bulk of the consideration given for the purchase being the money which was due to the purchasers from *Reep Bhunjun Singh*, for which they had obtained decrees. Besides the amount of the decrees, a small sum was paid on each of the purchases in cash. Four years after these purchases the Appellant commenced this suit, which is a suit to enforce payment of his mortgage bond against the Respondents, and prayed a sale of the *mouzah*. The defence set up by the answer, amongst others, was the equitable defence that *Munnoo Lall* could not enforce his mortgage bond as against these Respondents because at the time of their purchase he had been present when the negotiations for the purchase took place, and in answer to inquiries, had led the purchasers to believe that he had not any lien upon the estate, consequently that he had not the mortgage bond which he sets up in this suit. The defence is made in the answer, as Mr. *Leith* observed, in not very precise terms, but they say that the purchase was made in consultation with the Plaintiff and his son, and at that consultation they were led to believe that there was no such lien as the mortgage of 1863.

The issues were settled, and two only of them are material. The first was that the bond was altogether collusive and made without consideration for the purpose of defeating any subsequent purchasers; and the second, which has become the material one, is "Was its existence"—that is, the existence of the mortgage deed—"intentionally kept secret from the Defendants at the time of the purchase?" There was a third issue, which raised the question whether, the litigated property being under attachment at the time of the execution, the mortgage deed was thereby rendered nugatory. Upon the first trial of these issues, the Judge of *Shahabad*, having found the third issue against the Plaintiff, was of opinion that it decided the cause, and that it was immaterial for him to determine the other issues. However, on appeal to the High Court, that Court reversed the judgment of the Judge of *Shahabad*, and remanded the case for trial upon the first two issues to which attention has been called, and amended the second issue by inserting the words, "by the Plaintiff" after the words "was its existence intentionally kept secret." The parties went down to try that issue, which was in effect whether the Plaintiff had intentionally and designedly, and with a view to deceive the Defendants, kept the existence of his mortgage secret from them. That issue raises a pure question of fact. It appears that there was evidence on both sides, the witnesses on behalf of the Respondents giving testimony that the negotiations took place in the presence of the Appellant *Munnoo Lall*; that inquiries were made whether he had any mortgages, it being expected from his relation to the vendor that he might have them, and that in answer to those inquiries he distinctly stated that he had none; and documentary evidence was also given in support of the affirmative of the issue. Some evidence undoubtedly was given on the other side of a contrary character. The Judge of *Shahabad*, who heard the witnesses, has given credit to those who were called on the part of the Defendants. He distinctly gives credit to them, and he thinks that their evidence is corroborated not only by the documents but by the probabilities of the case. On appeal to the High Court, the High Court affirmed his finding, after much consideration given by themselves to the evidence. The Chief Justice, who analysed the evidence given by the witnesses, has pointed out various circumstances which appear to him to cor-

roborate them. The learned Chief Justice thought that *Munnoo Lall* was present at the time of the negotiations, and that inquiries were made of him. Their Lordships think it is a natural conclusion to draw from all the circumstances that some inquiry would have been made of him, and they think it must be pretty evident from the whole circumstances of the case that if the Defendants had had notice of the mortgage held by the Appellant, they would have hesitated to purchase as they did. They took the estate, giving up their decrees, and also an attachment which they held. Their Lordships agree with what is stated by Mr. *Leith*, that there may have been no duty upon *Munnoo Lall* voluntarily, and without being asked, to disclose his security, but the case is not put simply upon the omission to give notice, but upon an actual misleading of the Defendants, not merely by the acts, but by the express declarations of *Munnoo Lall* himself.

Under these circumstances their Lordships think that they could not have departed from their ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had felt some doubt upon the finding. But after the discussion of this case, their Lordships are disposed to agree with the findings of the Court below.

If then the issue has been properly found, it is really decisive of the case, because it supports the plain equity, that a man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.

The result is that their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed and this appeal dismissed, with the costs incurred by the Respondents previous to the hearing.

7th, and 8th, November 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the Court of the Financial Commissioner of Oudh.

RUNJEET SINGH, GOOMAN SINGH, and DOOND SINGH (Plaintiffs)* ... } *Appellants,*

versus

KOOER GUJRAJ SINGH (Defendant) ... } *Respondent.*

Partition—Limitation—Act XIV. of 1859, sect. 1. subsec. 13.

In a suit by three members of a *Hindu* family, alleged to be joint, against the fourth, who was the head of that family to obtain a partition of the joint property, it appeared that the family had been beyond all questions originally a joint one and that there had been from time to time partitions in that family, according to its custom. It further appeared that the Plaintiffs obtained possession of certain portions of the estate of their ancestor by way of seer, as it was called, which were argued to have been accepted by the Plaintiffs by way of partition in lieu of the share to which they would have been entitled, the contention on the other hand being that no partition was contemplated, but the seer lands were assigned in lieu of money payments by the head of the family in respect of their shares of the joint estate:

Held that a partition may be effected by agreement, although no actual division of the property may have been made by metes and bounds or otherwise. *Appovier* v. *Rama Subbu Aiyan* approved of and followed.

Held, upon the evidence and circumstances of the case, that the Plaintiffs continued to be joint and undivided in estate notwithstanding the assignments of seer land, and had not lost their right now to insist on a partition of their joint family property.

Held, further, that the Plaintiffs' claim was not barred by limitation (Act XIV. of 1859, sec., subsec. 13) as there had been no partition, and as the proceeds of the seer lands had been substantially payments by the Defendants down to the time of the action brought within the meaning of that section.

AT the close of the argument their Lordships' judgment was delivered by

THE RIGHT HON. SIR ROBERT PORRET COLLIER:—

This was a suit instituted by three

* Macpherson's I. A., p. 9.

members of a Hindu family, alleged to be joint, against the fourth, who was the head of that family, to obtain a partition of the joint property. The case has undergone a number of hearings and two or three remands, and has not come before their Lordships in as clear a shape as was possible.

It appears to their Lordships that two questions arise in the case, and two only. In the first place, this Hindu family having been beyond all question originally a joint one, and there having been from time to time partitions in this family, according to its custom, had there been, before this suit was instituted as between these parties, a partition? Their Lordships adhere to the doctrine laid down in the judgment of this Committee on the case of *Appovier* v. *Rama Subba Aiyan* (1), that a partition may be effected by agreement, although no actual division of the property may have been made by metes and bounds or otherwise. If it clearly appears that the parties intended to make a final partition of their joint property, that intention will be given effect to by this board; and the first question is, whether such intention has been proved in this case?

It would appear that the Plaintiffs did obtain possession of certain portions of the estate of their ancestor by way of seer, as it is called; and it has been argued that they accepted these seer lands by way of partition in lieu of the share to which they would have been entitled. On the other hand, it has been contended that no partition was contemplated, but that the revenues of those seer lands were assigned to them in lieu, wholly or in part, of money payments by the head of the family in respect of their shares of the joint estate.

There have been two findings of the Courts below to the effect that, notwithstanding these assignments of seer land, the Plaintiffs continued to be joint and undivided in estate with the Defendant, and had not lost their right now to insist on a partition of the joint family property. Their Lordships concur in those findings. The evidence which is most material, in their Lordships' view, upon this subject, appears to be that of *Jankee Pershad Dichit*, who was a *Zemindar* and banker by profession, and appears to have been called in as an arbitrator between the parties. His statement is this: "The estate has not been partitioned, but they," that is, the Plaintiffs, "get for their maintenance; the deponent does not recollect how much the Plaintiffs do get, but in the year 1265 *Fuslee*, during the Mutiny, a dispute had arisen between the parties, and it was this, that Plaintiffs said they could not support themselves; either something more be added to their maintenance or they must get their share; but *Newaz Singh*," that is the Defendant, "declined to give them more, and said they should maintain themselves with what they already got. The dispute was referred to the deponent, who accordingly asked *Newaz Singh* to give the village *Burkhurwa* and some more seer to Plaintiffs. Both parties consented to it, but the deponent did not settle whether Plaintiffs had any or no claim to any more share. If Plaintiffs claim to more share, telling that what has been allowed to them does not suffice their expenses, they are at liberty to do so. *Newaz Singh* is also the master of his will." Their Lordships understand from this, that the parties did not agree to a partition, and did not apply to this witness to arbitrate with a view to a partition, but that he expressed his opinion as to what would be a proper amount of seer land for them to receive in lieu of the payments in respect of their shares to which they were entitled, and he expressly says that his decision was not final even upon that point. And it further appears from his evidence, that if the Defendant had not thus agreed to increase their maintenance, the Plaintiffs would have insisted "on getting their share," or in other words on having a regular partition of the estate.

Their Lordships may observe that it would appear from the evidence of one of the witnesses for the Defendant, *Hem Singh*, and his brother, that the ancestor, *Hindoo Singh*, who made the last partition, which was in 1837, held 300 *bighas* seer, but on partition got not only those 300 *bighas*, but 400 or 500 *bighas* more.

(1) 11 Moore's I. A., Ca. 75; 2 P. C. J., p. 218.

It would clearly appear from that, that according to the custom of the family, the holding a certain amount of seer land was not inconsistent with the right to partition. Their Lordships have, on these grounds, come to the conclusion that there was no partition in this case, and that the family continued to be a joint and undivided Hindu family.

The other question is, whether the claim was barred by limitation, and it is upon this point that the judgment of the Financial Commissioner, which is under appeal, appears in a great measure to have proceeded. The Act applicable to the case is Act XVI. of 1859, sect. 1, sub-sect. 13, which is in these terms, reading as much as is applicable to this matter: "To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint property, the period of twelve years from the death of the person from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge." That time has elapsed. Then come the material words: "Or from the date of the last payment to the Plaintiff, or any person through whom he claims, by the person in the possession or the management of such property or estate on account of such alleged share."

The question is, whether there has been a payment by the Defendant to the Plaintiffs in respect of their alleged share within twelve years before the commencement of the suit.

Their Lordships, entertaining the view which they have expressed, that there was no partition, but that the Plaintiffs took the seer land as equivalent to a payment in respect of their shares by the Defendant, are of opinion that the proceeds of those seer lands have been substantially payments by the Defendant within the meaning of that section, payments which have continued to the time of action brought, and that, therefore, the *Statute of Limitation* does not apply.

On these grounds their Lordships are of opinion that this suit is maintainable, and they will humbly advise Her Majesty that the decisions appealed against be reversed, and the order of the Extra Assistant Commissioner of the 4th of January, 1868, confirmed as it was by the Settlement Officer, Mr. *Young*, on the 24th of July, 1868, be confirmed, and their Lordships are of opinion that the Appellant should have the costs of this appeal.

8th, 11th, 13th, & 14th November and 4th December, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Bombay.

MAHARANA FUTTEHSANGJI JASWANTSANGJI (Plaintiff)* ... — *Appellant*,

versus

DESAI KULLIANRAIJI HAKOOMUTRAIJI (Defendant)... ... — *Respondent*.

Limitation—Immoveable Property—Toda Giras Hak—Act XIV. of 1859, s. 1, cls. 12 & 16.

The expression "immoveable property" in Act XIV. of 1859, s. 1, cl. 12, must not be construed as identical with "lands or houses." It comprehends all that would be real property according to English law, and possibly more.

A *toda giras hak* (1) being a right to receive an annual payment, the liability for which is not a mere personal liability, but one which attaches to the *inamdar* (2), into whosoever hands the village may pass, is "an interest in immoveable property" within the meaning of cl. 12, s. 1, Act XIV. of 1859 (3).

The applicability of the particular sections of Act XIV. of 1859 must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The suit which has given rise to this

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* 13 B. L. R., p. 254; Macp. I. A., p. 84.

(1) A right of levying a cash composition in lieu of other claims, or of plunder.

(2) The holder of a rent-free grant.

(3) See Act IX. of 1871, Sched. ii. No. 132.

appeal was brought by the Appellant in January 1865, against the Respondent, to establish the right of the former to a *toda giras hak* upon the *inam* village of the latter, and to recover the arrears due in respect of that *hak* for the seven years preceding the commencement of the suit. The annual amount alleged to be payable by the Respondent to the Appellant is Rs. 501, though it may be questionable on the evidence whether this sum is the gross amount of the *hak*, or the net balance after deducting certain small payments and allowances to other persons which are entered in the accounts.

The Respondent admitted, as his father in other proceedings had admitted, the existence of the *hak*, and that it had been paid by the *inamdar* of the village up to the *Samvat* year 1914 (corresponding with 1857-58); but contended that his father had then properly exercised a right to put an end to it; and, further, that the present suit was barred by the law of limitation.

The issues settled are at page 20 of the record; but the only one which is to be considered on this appeal is whether the claim is within the appropriate period of limitation or not. Of the remaining issues, one, which is no longer treated as material, was disposed of in the Appellant's favor, and the others have not been tried.

The substantial question considered in the Court below was whether the suit, being one for the recovery of an "interest in immoveable property," fell within the 12th, or was to be governed by the 16th, clause of the 1st section of Act XIV. of 1859. In the former case, the period of limitation would be twelve years, and the suit would be brought in time; in the latter case, the period of limitation would be only six years, and the suit would be barred.

The determination of this question involves the consideration of the nature of a *toda giras hak*. A good deal of learning on this subject is to be found in the cases of *The Collector of Surat* v. *Pestonjee Ruttonjee* (1) and *Sumbhoolall Girdhurlall* v. *The Collector of Surat* (2), to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the *Grasias* from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by *inam* villages to fall on the *inamdar*. And since the decision of the case of *Sumbhoolall Girdhurlall* v. *The Collector of Surat* (1), it cannot be questioned that the *toda giras haks* of the former class constitute a recognized species of property capable of alienation, and of seizure and sale under an execution. How far that decision may govern the rights of an *inamdar*, and some of the questions raised by the untried issues in this suit, their Lordships abstain from considering. For the purpose of determining the question of limitation, it must be assumed that the claim of the Appellant, if not barred, has a legal foundation.

The question to which period of limitation these claims are subject has been the subject of several decisions in the Bombay Courts. The earliest of these, being the case of *The Collector of Surat* v. *Tujoobawa Bhugwansangji* (2), does not materially affect the present question. When that suit was commenced, Act XIV. of 1859 had not come into operation; and under the law then in force (the Bombay Regulation V. of 1827), the claim was subject only to the twelve years' rule of limitation, whether a *toda giras hak* was in the nature of moveable, or of immoveable property. It is true that the High Court, in delivering its judgment, intimated an opinion that, whatever might have been the original nature of that *toda giras* payment, its conversion into an annual

(1) 2 Mor., S. D. A. Rep., (Bom., 1855), 291.
(2) 8 Moore's I. A., 1; 1 P. C. J., 713.

(1) 8 Moore's I. A., 1; 1 P. C. J., 713.
(2) Special Appeal, No. 4277, dated 23rd March, 1865, unreported.

payment out of the Government treasury, not secured or chargeable on any particular lands, had deprived it of the character of immoveable property, if it ever possessed that character. But it is obvious that this dictum has no application to a *toda giras hak* payable by an *inamdar*, in respect of which there has been no such conversion. The case of *Furushram Nurbheram* v. *Syud Hossein Wullud* (1) is however in point. There the question arose between the purchaser of the *Grasia's* interest in a *toda giras hak* at an execution-sale, and an *inamdar;* and the law of limitation to be applied was Act XIV. of 1859. The Judge of *Broach* there held (and his decision was affirmed on appeal by the High Court) that the claim was clearly for a money payment, and that the case must be decided by the 16th clause of the 1st section of the Statute. The authority of this last case has been recognized, and its ruling adopted by each of the three judgments now under appeal.

The other decisions of the High Court of *Bombay* which have been cited, are all distinguishable from the present. That of *The Collector of Surat* v. *The Heiresses of Kuvarbai* (2) seems to their Lordships to have no bearing upon the question before them. The only questions raised in it were whether a *toda giras hak* was alienable, and whether by reason of its falling within the definition of "land" contained in a particular statute (which it did not), the Court was deprived of jurisdiction. In the case of *Bharatsangji Mansangji* v. *Navanidharaya Mansukhram* (3), the law of limitation to be applied was the Bombay Regulation V. of 1827; and what the Court actually decided was that the right to the *desaigiri* allowance claimed would be barred, unless the Plaintiff could establish the receipt of a payment on account of it within twelve years. The Court, no doubt, described the allowance claimed as "in the nature of one charged upon, or payable out of, land." But whether it were so or not was not a point in issue. Again, in *Raiji Manor* v. *Desai Kallianrai Hakoomutrai* (1), the Court, in ruling that the claim was barred by the six years' limitation, distinguished it from the last-mentioned case on the ground that it was a claim for a *pagdi* allowance, which was a mere money payment out of a *desaigiri* allowance, and not like the latter in any sense an interest in land. The same distinction may exist between a *pagdi* allowance and a *toda giras hak*.

The case of *Krishnabhat bin Hiragange* v. *Kapabhat bin Mahalbhat* (2) and that of *Balvantrav* v. *Purshotam Sidheshvar* (3) both relate to hereditary offices not to *haks*, and cannot, therefore, be regarded as directly in point, although the principles which they lay down for the construction of Act XIV. of 1859 are important, and will have to be considered hereafter. It is however, to be remarked that, in the latter case *Westropp*, C. J., at the close of his able and elaborate judgment, expressed strong doubt of the soundness of the decisions which had ruled that claims for *toda giras haks* were subject to the six years' rule of limitation. This being the state of the authorities at *Bombay*, their Lordships cannot think that there has been that long and consistent course of decisions which affords grounds for treating the question under consideration as concluded by authority, even in the Courts of India.

It has, however, been strongly urged on the part of the Respondent that this appeal is to be determined by the authority of their Lordships' recent decision in the case of *The Government of Bombay* v. *Desai Kallianrai Hakoomutrai* (the present Respondent) (4). Their Lordships cannot accede to this argument.

In the case so relied upon the question of limitation did not arise. It is, however, true that, in deciding it, the High Court of *Bombay* had held that the Respondent had acquired a title, by positive prescription, to the *hak* which he claimed, by force of the 1st section of the Bombay Regulation V. of 1827; and that their

(1) Unreported.
(2) 2 Bom. H. C. Rep., 253.
(3) 1 Bom. H. C. Rep., 186.

(1) 6 Bom. H. C. Rep., A. C., 56.
(2) *Id.* 237.
(3) 9 Bom. H. C. Rep., 99.
(4) 14 Moore's I. A., 551, 3 P. C. J. 103.

Lordships, though they upheld the decree in favor of the Respondent on other grounds, intimated that they were not satisfied either that the particular *hak* could properly be said to be "immoveable property" within the meaning of the Regulation, or that there had been such an enjoyment of it for thirty years without interruption, as would bring the right, if in the nature of immoveable property, within the operation of the Regulation. This was the expression of a doubt rather than a positive decision. Moreover, the *hak* then claimed differed widely from that which is the subject of the present suit. It was a money allowance for the sustentation of a palanquin, which had been granted by the then native power to an ancestor of the Respondent, not as a necessary incident to the office of *desai*, but as a reward for meritorious service, and was made payable by the native collector out of the general revenues of the *pergunna* of *Broach* received by him. As such it resembled the annuity granted by King *Charles* the Second, out of the *Barbadoes* duties which, in the case of *The Earl of Stafford* v. *Buckley* (1), Lord *Hardwicke* held to be "a mere personal annuity, having no relation to lands and tenements, or partaking of the nature of a rent by any means." But however that may be, their Lordships cannot treat the decision in the *palki* case as an authority on the present question, which they will now proceed to consider upon its merits.

The learned Counsel for the Appellants have argued, on the authority of the abovementioned cases of *Krishnabhat bin Hiragange* v. *Kapabhat bin Mahalbhat* (2) and *Balvantrav* v. *Purshotam Sidheshvar* (3), and particularly of the latter, that the construction of the Statute of Limitation must, in this particular case, be determined by the light of the Hindu law.

According to the report of the latter case in 9 Bombay High Court Reports, the Respondents had sued to recover from the Appellants the amount of fees due to the holder of the hereditary office of village *joshi* (or astrologer) for five years. This statement their Lordships conceive must be taken to import that the right to hold the office was matter of contest between the parties; since it can hardly have been held that, because the hereditary office was in contemplation of the Hindu law, of the nature of immoveable property, fees recoverable by the admitted holder of the office from persons whose horoscope he might have cast, fell within the same category. The case was referred to a Full Bench, partly in consequence of some difference of opinion between the two Judges who composed the Division Bench, and partly on account of a supposed inconsistency between the two decisions in the cases of *Raiji Manor* v. *Desai Kallianrai Hakoomutrai* (3) and *Krishnabhat bin Hiragange* v. *Kapabhat bin Mahalbhat* (1) which, nevertheless, seem to their Lordships capable of standing together. The judgment of the Full Bench was given by *Westropp*, C. J. It fully upheld the decision in *Krishnabhat bin Hiragange* v. *Kapabhat bin Mahalbhat* (1), and affirmed the correctness of the rule there laid down for the interpretation of Act XIV. of 1859, s. 1, cl. 12. The rule is shortly this, *viz.*, that, inasmuch as the term "immoveable property" is not defined by the Act, it must, when the question concerns the rights of *Hindus*, be taken to include whatever the Hindu law classes as immoveable, although not such in the ordinary acceptation of the word. To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immoveable property, or of an interest in immoveable property; and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the Appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community, incapable of being held by any person not a Hindu, were in the nature of immoveables. And those decisions receive additional support

(1) 2 Ves. Senr., 170.
(2) 6 Bom. H. C. Rep., A. C., 237.
(3) 9 Bom. H. C. Rep., 99.

(3) 6 Bom. H. C. Rep., A. C., 56.
(1) 6 Bom. H. C. Rep., A. C., 237.

from the 1st section of the Bombay Regulation V. of 1827, which expressly declares hereditary offices to be immoveables, an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV. of 1859, and to stand unrepealed in the Presidency of *Bombay*.

The learned Counsel for the Appellant have, however, insisted on the authority of these decisions that a *toda giras hak* must be held to be an interest in immoveable property, because, according to Hindu law it would be *nibandha*. Their Lordships, in dealing with this argument, prefer to use the Sanskrit word, inasmuch as they do not think that "corrody" is a very happy translation of it; "corrody" being a word of medieval origin, properly signifying a peculiar right, *viz.*, the grant by the royal or other founder of an abbey of certain allowances out of the revenues of the abbey in favor of a dependent or servant. (See Ducange, *in verbo*: Fitzherbert *De naturâ Brevium*, p. 230, Writ *de corrodio habendo.*)

Whether a *toda giras hak* be *nibandha* within the strict sense of that term is, in their Lordships' opinion, a question not free from doubt. The original text of *Yajnavalkya's*, which is the foundation of all the other authorities cited by *Westropp*, C. J., implies that the subject rendered by the word "corrody" in 2 *Colebrooke's* Digest, Bk. ii, v. 34; is something created by royal grant. This, too, is included in Professor *Wilson's* definition of *nibandha*. That the word in the subsequent glosses on *Yajnavalkya's* text is used in a wider sense may be due to the want of precision, for which Hindu commentators are remarkable. It is, however unnecessary to consider this point, because their Lordships are of opinion that the question whether a *toda giras hak* is an interest in immoveable property within the meaning of Act XIV. of 1859 is one which ought not to be determined by Hindu law. It appears from the authorities cited in the case of *The Collector of Surat* v. *Pestonjee Ruttonjee* (1) that the *Grasias* were sometimes Mahomedans, and therefore that the *hak* may in its inception have been held by a Mahomedan. It is certain that, as these *haks* now exist, they may pass to, and be held and enjoyed by Mahomedans, Parsis, or Christians; and their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the *status*, race, character, or religion of the parties to the suit. The period of limitation within which the claim is barred must be fixed and uniform by whomsoever that claim is preferred or resisted.

The determination, therefore, of the present question depends, in their Lordships' opinion, upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Indian Legislature. Their Lordships cannot think that the former term is identical with "lands or houses." They conceive that the word "immoveable" was used as something less technical than "real," and that the term "immoveable property" comprehends certainly all that would be real property according to English law, and possibly more. In some foreign systems of law in which the technical division of property is into moveables and immoveables, as, *e. g.*, the Civil Code of France, many things which the law of England would class as "incorporeal hereditaments" fall within the latter category.

Now, what is disclosed on the record touching the nature of this *hak?* The plaint claims it as "leviable upon the village *Mauza Kalam*." The fair inference from the written statements of the Respondent is that the *hak* existed, and was regularly paid by his father, as *inamdar*, up to the year 1857-58. The question raised by these statements as to the right of the Respondent and his father to discontinue the payments is one to be determined, not upon the issue of limitation, but on the trial of the other issues settled in the cause. The evidence taken in the suit shows that the answer of *Hakoomutrai* (the Respondent's father) to a question addressed to him in 1856 by a native official, to the effect, whether there was

(1) 2 Mor. S D. A. Rep (Bom., 1855), 201.

any *toda giras* paid for the *Maharana* of *Ahmod* on account of the village of *Kalam*, was, "there are payable Broach Rs. 501 for the *toda* of the said *Rana*;" that the same *Hakoomutrai* described the money paid by him on account of this *hak*, in his deposition of the 6th of November 1861, as "the money on account of *toda giras* leviable upon my *inam* village of *Kalam*," and, in his deposition of the 4th of April 1862, as "the annual amount of *toda giras* of my village of *Mauza Kalam*;" and further that the payments made were made out of the revenues of the village, and were so entered in the village accounts.

Taking this as the fair result of the evidence, and considering what has been ruled touching *toda giras hake* in the case of *Sumbhoolall Girdhurlall* v. *The Collector of Surat* (1) and other decided cases, their Lordships are of opinion that, whatever may have been the origin of the *hak*, it must be assumed to be now a right to receive an annual payment which has a legal foundation, and of which the enjoyment is hereditary; and that the liability to make the payment is not personal to the Respondent, but one which attaches to the *inamdar* into whosesoever hands the village may pass; or, in other words, that the *hak* is payable by the *inamdar virtute tenuræ*. This being so, their Lordships have come to the conclusion that the interest of the *hakdar* does possess the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the character of a freehold interest in or issuing out of real property (see 1 *Cruise's* Digest, p. 47, plac. 11); that upon the general principles of construction applicable to an Indian Statute, it must be held to be "an interest in immoveable property" within the meaning of Act XIV. of 1859; and, accordingly, that the suit, having been brought within twelve years after the date of the last payment, can be maintained.

This being their Lordships' conclusion on the first and principal question argued, it is unnecessary for them to consider the second, *viz.*:—Whether, upon the principles enunciated and enforced in such cases as *The Dean and Chapter of Ely* v. *Cash* (1), *Grant* v. *Ellis* (2), and *Owen* v. *De Beauvoir* (3), it ought to be held that, inasmuch as Act XIV. of 1859 contains no express words to bar the right as well as the remedy, that Statute can have any effect on the Appellant's claim, except that of preventing him from recovering more than the arrears for the six years next preceding the institution of the suit. Their Lordships abstain from the consideration of this question the more willingly because it was never raised in the Courts below; because the pleadings in the suit, which is brought to establish the right as well as to recover the arrears, assume that the whole claim is subject to the law of limitation; because there seems to be a considerable body of Indian authorities which support that assumption; and because the limitation applicable to claims to establish rights will, at no distant date, have to be determined by the more carefully-drawn Statute of Limitation of 1871 (4), which is soon to supersede that of 1859.

On this appeal their Lordships will humbly advise Her Majesty to reverse the decrees under appeal; to declare that the Appellant's suit is not barred by the Statute of Limitations, but was brought within time; and to remand the cause for trial on its merits. Their Lordships think that the Appellant ought to have the costs of this appeal. The costs incurred in India by reason of the trial of the second issue should be dealt with by the Bombay High Court in the usual way on the final determination of the cause; the Appellant receiving back the costs (if any) which he may have paid under any of the decrees reversed.

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(1) 8 Moore's I. A. 1; 1 P. C. J., p. 718.

(1) 15 M. & W., 617.
(2) 9 M. & W., 113.
(3) 16 M. & W., 547; and 5 Exch., 166.
(4) Act IX. of 1871, see Sched. ii, No. 132.

20th, 21st, and 22nd November, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, at Fort William in Bengal.

OLIVIA H. TIERY, Executrix of the Will of LEWIS TIERY (Deceased*) ... ... } *Appellant.*

versus

KRISTODHUN BOSE, GOBINDCHUNDER DUTT, OOMAMOEE DOSSEE, and THAKOMONEE DOSSEE ... ... } *Respondents.*

BY ORIGINAL APPEAL.

JAMES GEORGE and OLIVIA HOVENDEN (formerly TIERY), his Wife, Executrix of the Will of LEWIS TIERY (Deceased) ... ... } *Appellants,*

versus

MEER ACKBAR ALI, GOBINDCHUNDER DUTT, OOMAMOEE DOSSEE, and THAKOMONEE DOSSEE, the Mother and Guardian of HEERALOLL GHOSE (a Minor), the Son of NUNDOLOLL GHOSE (Deceased) ... } *Respondents.*

BY ORDER OF REVIVOR AND SUPPLEMENT.

Proof of Title—Lease by Lessor out of Possession.

A Plaintiff in ejectment must give strict proof of his title. A valid lease can not be granted by a lessor not in possession of the land leased, so as to confer on the lease that which the lessor has not himself a present right to enter.

THE decision of their Lordships was pronounced by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

In this case the Plaintiff was the possessor, under a *gantheedaree* lease, of a portion of land designated as Lot 100 in the *Soonderbuns*. The Defendant was the possessor, under a grant from the Government, of Lot 104, the northern boundary of which was admitted to be identical with the southern boundary of Lot 100. The parties have died since this suit was disposed of, and are now represented by others, but the case may be treated as if the original parties were the litigants. The Plaintiff sought by a suit in the nature of an ejectment to dispossess the Defendant from a large tract of land which the Defendant had been in possession of for some years before the suit, and a portion of which he had reclaimed from the jungle.

The question was one of boundary, and that question may be shortly stated thus:—It was agreed on both sides that the boundary between the two lots on the northern side of the one, and the southern side of the other, was a *khal*, called the *Kankrea Khal;* and it was further agreed that a watercourse flowing into or out of a stream, which was admitted to be the eastern boundary of both lots, was for some distance this same *Kankrea Khal*. But, at a point a mile or somewhat more from the eastern boundary, this *Kankrea Khal* divided itself into two branches, the one flowing to the westward with an inclination to the north, the other in a southwesterly direction; both these branches ultimately finding their way into a stream called the *Kolooargung*, which was admitted to be the western boundary of the two lots. The Plaintiff sought to recover possession of the intermediate land between the northern and the southern branches, he contending that the southern branch was the *Kankrea Khal*, properly so-called, the Defendant contending that the north-

* Macpherson's I. A., p. 76.

ern branch was the *Kankrea Khal*, properly so called.

The land in dispute is stated by the Plaintiff to be upwards of 8,000 *bighas*, but it does not appear ever to have been accurately measured or surveyed. The Plaintiff, on whom the burden of proving his title rested, was content to put in his *gantheedaree* lease, which was granted by *Nazir Ally Khan*. He attempted no proof of the title of *Nazir Ally Khan*, nor did he shew on what terms, or by what description of boundaries or otherwise, this lot had been originally granted by the Government. Strictly speaking, he proved no title to more than he shewed *Nazir Ally Khan* to have been in possession of at the time of the lease to him. The question of possession, therefore, in their Lordships' opinion, becomes very material.

It appears to their Lordships, upon a review of the evidence, that the Defendant, Mr. *Tiery*, had been, before the date of the *gantheedaree* lease to the Plaintiff, which was the 27th of December, 1853, in possession of the disputed land; and further, that he had reclaimed or begun to reclaim some portions of that disputed land, those portions immediately south of the northern boundary which he contended for. It further appeared, that the Plaintiff at the time when he took this *gantheedaree* lease was not only well aware of the possession and reclamations of the Defendant, but that he was the Defendant's servant, and was actually assisting in making these clearances, from which he now seeks to dispossess his former master. It further appeared that the Plaintiff, before he took this *gantheedaree* lease at the end of 1853, had been in possession of some portions of Lot 100, as what are called *chucks*, and that he was in possession of one *chuck*, called *Chuck Buckchur*, which their Lordships agree with the *Zillah* Judge must be taken upon his own shewing to be the southernmost part of Lot 100. It therefore becomes material to ascertain where this *chuck* was situated, and their Lordships have come to the conclusion, upon the evidence, that this *chuck* was situated immediately northward of the line which the Defendant claims as his boundary, a situation consistent with the case of the Defendant, and that it was not situated immediately to the north of the south line contended for by the Plaintiff, which it should have been if the case of the Plaintiff is correct. The situation of this *chuck* therefore appears to their Lordships one material circumstance, at all events, in the determination of this case. In this case there have been three surveys, two by a Mr. *Joseph* and by a Mr. *Smith* respectively, in the year 1856. They are not very intelligible, owing, as it appears to their Lordships, to various misprints; and they may observe that this record has been printed in *India* with scandalous negligence; but it sufficiently appears in their Lordships' opinion that both these gentlemen substantially reported in favour of the boundary contended for by the Defendants. A subsequent survey in 1857 was made by Mr. *Gomes*, the Government surveyor, who, acting chiefly, as it appears, upon a map or a field book which had been prepared by a Captain *Prinsep* some time before (it does not appear precisely when), came to the conclusion that the southern boundary contended for by the Plaintiff was the boundary. It should be observed that Mr. *Gomes* went upon the land twice, and on each occasion he made a map. On the first occasion, in 1854, his attention was directed merely to the amount of land cultivated, and not to the question of boundary; and, oddly enough, his map of 1854 is put in by the Plaintiff. On the second occasion, in 1857, he went for the purpose of ascertaining the boundary, and the map which he made on that occasion is not put in by the Plaintiff. As far as would appear from all three reports, the northern channel was at the time of these surveys, and their Lordships are disposed to infer at the time of the granting of the *gantheedaree* lease, navigable and open all the way, whereas the southern channel does not appear to have been open to boats throughout its whole course. It is, indeed, suggested on behalf of the Plaintiff that at some former time the southern channel was the broader one, but of that he has given no proof. Both the grants, the grant to the Plaintiff in *gantheedar* tenure

in 1853, and the grant to the Defendant from the Government, dated in 1854 (but it would appear very clearly to their Lordships that although the date of the *potta* was 1854, the Defendant had been in actual possession for about a year and a half before that), refer to a certain map of Captain *Hodges*. The Plaintiff did not put in that map in the Court below, but appears to have relied upon a map made by a Captain *Smyth*, which professes to be in great measure taken from the maps of Mr. *Hodges*, among others. Upon an inspection of that map, the *Zillah* Judge appears to have come to the conclusion that it favoured the contention of the Defendant rather than that of the Plaintiff; and the *Zillah* Judge, upon the whole evidence, came to the conclusion that the Plaintiff had not sufficiently proved his case to entitle him to eject the Defendant, and gave judgment for the Defendant accordingly. Upon this an appeal was preferred to the High Court in *Calcutta*, whereupon this judgment was reversed.

It appears to their Lordships that the High Court acted almost entirely upon the map of Captain *Hodges*, which was before the Court, although it had not been put in evidence in the Court below. That map has not been sent to *England*, and is not before their Lordships. If the map of Captain *Smyth* is to be taken as an accurate copy of that map, their Lordships do not agree with the High Court in supposing that that map is conclusive in favour of the Defendant. But even assuming that that map on inspection would turn out wholly in favour of the Defendant, it does not appear to their Lordships that the reversal of the finding of the Judge below solely or mainly upon this ground is satisfactory; for from the summary before given of the evidence, it appears to their Lordships that there was a great deal of evidence in this case independently of that map, far more in favour of the Defendant than the Plaintiff, and they are of opinion that upon all the circumstances and probabilities of the case the Judge of the *Zillah* Court was justified in coming to the conclusion that the case of the Plaintiff had not been established.

Their Lordships may observe that the expediency of insisting on more strict proof on the part of the Plaintiffs in ejectment is illustrated by this very case, in which an application has been made on the part of another party to become a party to his appeal on the ground that he had a paramount and prior title to the Plaintiff in this very Lot 100, a contention for which there would appear to be some ground. Of course their Lordships do not give any opinion upon this matter, and it is scarcely necessary to say that their judgment in this case can only affect the parties to it, and cannot give any other persons any rights, or impose upon them any liabilities.

Entertaining this view of the case, their Lordships are of opinion that the judgment of the High Court should be reversed, that the judgment of the *Zillah* Court should be affirmed, and they will humbly advise Her Majesty to this effect; and they are of opinion that the Defendant should have the costs in the litigation below, and of this appeal (1).

(1) It may be inferred from the judgment that their Lordships thought the objections urged to the Plaintiff's title to recover in this suit weighty objections. In form it was an ordinary suit in the nature of an ejectment suit. The matter disputed was one of boundary. The Plaintiff claimed as a lessee, but he neither proved his lessor's title, nor the possession by the lessor of the lands in dispute antecedent to the creation of the lease. The law in *India* does not permit an entry in assertion of title on lands in adverse possession, from the fear, which experience confirms, of the dangers to the public peace from that mode of clothing a right with possession. A mere lease of lands operates on possession, and cannot be created by one out of possession so as to confer on another that which he has not himself a present right to enter. The title must be shewn, and in such a case the title of the lessor is necessarily involved in the suit, and must be proved by a Plaintiff. The proper suit to establish boundaries is one in which the owners of the estate are bound by the adjudication. A decision adverse to a mere lessee would not bind the absolute interest; and it is obvious that the dangers to possession would be much augmented if the Courts in *India* did not require from one attacking possession clear and strict proof of his title, and substantially a due representation of the parties interested according to the real nature of the matter litigated.

22nd November, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

MEER REASUT HOSSEIN* ... *Appellant.*

versus

HADJEE ABDOOLLAH and others ... ... } *Respondents.*

Special leave to appeal—Zillah Judge Reviewing an order of Refusal to Register—Act VIII. of 1871.

Special leave to appeal granted to try the question whether, under the Indian Registration Act Act VIII. of 1871, a *Zillah* Judge can review an order of his own Court refusing to register a document.

THIS was a Petition for special leave to appeal. It set forth that the Petitioner on the 29th of December, 1871, as the father and guardian of the minor donees, applied to the Registrar of *Gya*, in *Bengal*, for registration under the provisions of Act VIII. of 1871, called the *Indian Registration Act*, of a deed of gift in favour of the Petitioner's children, executed on the 19th of November, 1871, by their grandmother *Mussumat Noorun*, and asked to have the heirs of *Mussumat Noorun*, according to Mahomedan law, cited under the 36th section of that Act; that the said deed of gift purported to be an instrument of gift of immoveable property of the donor, of which therefore the registration was compulsory under the 17th section of the said Act, and the effect on which of non-registration under the 49th section was that the instrument would not affect the immoveable property comprised therein, or be receivable as evidence of any transaction affecting such property; that the said heirs, being the said *Hadjee Abdoollah* and others, having appeared and denied the execution of the said deed by *Mussumat Noorun*, the Registrar, on the 5th of February, 1872, refused under the 35th section to register the document in question; that the Petitioner thereupon, and on the 16th of February, 1872, under the 73rd and following sections of the *Registration Act*, applied by petition to the District Court of *Gya*, in order to establish his right as such guardian to have the document registered; that thereupon the then Judge of *Gya*, Mr. *Tayler*, after taking the depositions of several witnesses on behalf of the Petitioner, none being called on behalf of the heirs, on the 23rd of August, 1878, delivered his judgment, and rejected the Petitioner's application on the ground that on the evidence he entertained "serious doubts as to the genuineness of the alleged execution;" that under the 35th section of the *Registration Act*, "no appeal lies from any order made under that section;" that the Petitioner feeling his wards to be aggrieved by the order of the Judge, and having no other mode of redress in *India*, on the 17th of September, 1872, presented a Petition to the then Judge of *Gya*, Mr. *Craser*, asking for a review of the judgment of that Court of the 23rd of August, 1872, on the ground that the previous Judge had travelled out of the limits of the inquiry intended by the Act upon such applications, and had acted on mere suspicion, and had not given due weight to the documentary evidence filed by the Petitioner, and to the probabilities of the case; that the said application purported to be made under the 376th and 378th sections of the Civil Procedure Code; that the heirs of *Mussumat Noorun* on the 8th of November, 1872, put in a Petition objecting to the admission of the review on various grounds; that on the 4th of January, 1873, the Judge of *Gya* made the following order:—

"Proceeding of the Judge of *Gya*, dated 4th January, 1873.

* Macpherson's I. A., p. 72.

"No. 53 of 1872.

"Present: *E. C. Craser*, Esq., Judge.

Roasut Hossein and others...Petitioners.

versus

"*Syed Abdoollah and others*... ... } Opposite party.

"To-day the case was taken up in the presence of the pleaders of the parties.

"I am of opinion that this suit can be admitted for hearing of argument. In accordance with general rules every Court is competent to review its own order. From the arguments at present adduced I do not see any reason to believe that this Court has not the power to review its own order in the present case, although the Act under which the order was passed contains no special rule authorizing this course. Therefore

"Ordered

"That this suit be registered for a new trial and be brought up for argument."

That thereupon the heirs of *Mussumat Noorun* applied to the High Court at *Calcutta*, and obtained a rule to shew cause why the order of the Judge of the 4th of January, 1873, should not be set aside as being in excess of his powers. That a Division Bench of the High Court on the 2nd of April, 1873, made the said rule absolute with costs. The reasons given by the learned Judges are in substance:—That an ordinary Civil Court possesses no such inherent power of reviewing and altering its own judgments as supposed by the Judge, and has the power only within the express limits and under the conditions prescribed by the Legislature, and that the admission of the review was therefore *ultra vires*.

The Petitioner submitted that this order was erroneous, and should be set aside for the following reasons (among others):—Because the High Court was without jurisdiction over the District Court of *Gya* in this matter, no such jurisdiction being given to it under the 15th section of the *High Courts Act*, 24 & 25 Vict. c. 104, or under the provisions of the *India Registration Act*, or of any other statute or Act then in force; because assuming the jurisdiction of the High Court under the provisions of the latter Act, and having regard to the justice of the case, there was nothing in the previous order rejecting the application of the Petitioner for registration, to prevent the Judge again taking the matter into his consideration on sufficient cause being shewn to him.

Mr. *Doyne*, for the Petitioner:—

The High Court had no jurisdiction to quash the Judge's order for review; and supposing it to have such jurisdiction, that jurisdiction has been wrongly exercised; the law provides no remedy for what may be an erroneous decision of the Registrar; no action lies against him for refusing to register: *Sheikh Ruhumutoollah* v. *Shuriutoollah* (1). The evil may be very grave, for the document cannot without registration be received or acted on by any Court of justice. Nor can the person failing to obtain its registration renew his application, for the Act requires the application to be made within four months after the execution of the document.

The order of the High Court is in the nature of a prohibition. The powers of that Court were derived from Act XXIII. of 1861, s. 35. That section means that the High Court can interfere where the *Zillah* Judge has in appeal miscarried.

The *Charter Act*, 24 & 25 Vict. c. 104, s. 15, no doubt confers on the High Court a general superintendence over the Courts subordinate to it, and enables it to cause the subordinate Courts to take up cases and dispose of them.

But here the application to the *Zillah* Judge was not an appeal to him from the Registrar, but is of a distinct and independent nature, so that the Judge is not subordinate in this matter to the High Court.

The order of the High Court absolutely deprives the Petitioner of any opportunity of trying the question. We only seek to remove the disadvantage of the deed being unregistered. The question of the genuineness of the deed remains behind.

The *Registration Act* does not limit

(1) 10 Sutherland's Weekly Reporter (Calcutta) F. B. 51.

the discretion of the Judge in granting a review.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

The point is important, and enough has been said to make it desirable that it should be discussed. Special leave may be granted on the usual terms for the purpose of raising the question.

22nd November, 1873.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

KRISTO INDRO SAJIA and ISSUR CHUNDER SAHA* } *Appellants*,

versus

HUROMONEE DASSEE, ... *Respondent*.

Consolidated suit—Valuation.

Special leave to appeal granted in a suit which had been consolidated by consent of both parties. Where Defendant in such consolidated suit had taken the values at the rates fixed in the plaint, which together exceeded Rs. 10,000 and had obtained the benefit of an appeal to the High Court upon the facts by so adopting that valuation :—

Held, that the defendant could not afterwards object to that valuation, and that leave to appeal to Her Majesty in Council should not have been refused on the ground of value.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

THIS Court is unwilling to interfere with the discretion of the Judge below as to value, but this case presents peculiar features. The Defendant as well as the Plaintiff has taken the values at the rates fixed in the plaint. The cases were consolidated and heard together, and the Defendant has carried out that consolidation, and has obtained the benefit of an appeal to the High Court upon the facts by adopting the Plaintiffs' valuation. She cannot afterwards come here and object to that valuation. The Judge ought to have given more weight to the acts of the parties, and not to have rejected the application on the ground of value. Their Lordships decide that special leave to appeal may be given on the usual terms as to giving security (1).

Macpherson's I. A., p. 84.

(1) The consolidation of causes is for the purpose of saving the time of the Court and suitors, and saving expense. It should not in any way prejudice parties in their rights to insist on the finality of a decision.

In the particular case the decision is based on the principle that a party in a suit cannot approbate and reprobate in respect of the same matter. The consolidated value is not made the basis of the decision.

25th & 26th November, 1873; 7th, 14th, 15th, and 16th January; and 14th March, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

OOLAGAPPA CHETTY (Plaintiff)* ... *Appellant;*

versus

D. ARBUTHNOT, Collector of Trichinopoly, and Agent of the Court of Wards, on behalf of the minor Son of GUNDAMA RAMAKRISTNA NAIKER and others (Defendants) ... *Respondents.*

THE COLLECTOR OF TRICHINOPOLY, on behalf of the Governor of Fort St. George (Defendant) *Appellant;*

versus

LEKAMANI, first Widow of the late Zemindar since deceased (Plaintiff) and THE ZEMINDAR OF MARUNGAPURI (Defendant) ... *Respondents.*

PEDDA AMANI and CHINNA AMANI, 2nd and 3rd Widows of the late Zemindar, admitted as Plaintiffs after the Death of LEKAMANI (Plaintiffs) ... ... *Appellants;*

versus

THE ZEMINDAR OF MARUNGAPURI (Defendant) ... ... *Respondent.*

Unsettled Polliam—Hereditary Tenure—Evidence—Proprietor of Land—Bengal Code of 1793—Proprietary Possession—Madras Regulations XXV. and XXXI. of 1802—Construction of Statute—Hindu Law—Legitimacy.

The affirmative words of Madras Regulation XXV. of 1802, s. 2, the preamble thereto forming no part of the enactment, did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all *Zemindars* an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The words "proprietors of lands" as used both in the *Bengal* Code of 1793, and in the *Madras* Code of 1802, have a technical signification. They refer to "*Zemindars*, independent *talookdars*, and others, who pay the revenue assessed upon their estates immediately to Government." So also the words "proprietary possession" in the recital of Regulation XXV. of 1802, means the possession of a person who is a proprietor according to the technical meaning of the term.

According to the true construction of *Madras* Regulation XXV. and XXXI. of 1802, the Legislature recognizes the right of private property, and does not assert a right on the part of Government to deprive or dispossess *Zemindars* in their lifetime, or their heirs after their deaths, independently of any considerations connected with the realization of the public revenue. It provides for the protection of the revenue from invalid *lakhiraj* grants, and for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue.

There is no long uniform current of decisions at *Madras* sufficient to show that every *polliam* not permanently settled, is necessarily only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it had been held, are matters judicially determinable on legal evidence.

In *India* the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary *zemindari*. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a *polliam* and an ordinary *zemindari*.

Under Hindu law, it is not necessary in order to render a child legitimate, that the procreation as well as the birth should take place after marriage.

14th March, 1874.

The judgment of their LORDSHIPS was delivered by

THE RIGHT HON. SIR BARNES PEACOCK (who, after discussing the evidence, continued):—

Their Lordships think that the High Court came to a correct conclusion that a marriage did take place between the father and mother of the child prior to its birth; and, assuming that the High Court are correct in finding that the child, although born after marriage, was procreated or begotten before the marriage took place, their Lordships are of opinion that that Court came

* 13 B. L. R., p. 115; 1 Macpherson's I. A. p. 203.

to a right conclusion, in point of law, that the child was legitimate.

The point of illegitimacy being established by proof that the procreation was before marriage had never suggested itself even to the learned Counsel for the Appellant at the time of the trial, nor does it appear, from the authorities cited, to have been distinctly laid down that, according to Hindu law, in order to render a child legitimate, the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law, that law must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of opinion that the Hindu law deceased is the same in that respect as the English law.

Under these circumstances, their Lordships are of opinion that the High Court came to a correct conclusion in finding that the Defendant had made out that he was the legitimate half-brother of the deceased *polligar;* and that, being members of an undivided family, the *polliam* decended to him.

That disposes of the cause: for, if the Defendant is the heir of the deceased *polligar*, the widow can have no claim. The decree of the High Court was correct, and her suit must be dismissed.

Their Lordships will, therefore, humbly recommend Her Majesty that the judgment of the High Court be affirmed, and the widow's appeal dismissed with costs.

THE judgment of their Lordships in the second appeal was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The nature and object of the suit in which this appeal was preferred are clearly stated in the judgment pronounced by the High Court at *Madras*.

To make the case intelligible it may be shortly stated that the suit was brought in the Civil Court of *Trichinopoly* by *Lekanani*, the first widow of *Terumalai Puchaya Naiker*, the late *Zemindar* of *Marungapuri*, to recover, as his heiress, amongst other things, the villages attached to the *zemindari*. The suit was brought against the Collector of *Trichinopoly* as the agent of the Court of Wards in charge of the *zemindari*, on behalf, and as the guardian, of *Ranga Kristna Muthu Vira Puchaya Naiker*, a minor, who was the half-brother of the deceased *Zemindar*, and who, after his death, had been recognized by the Government as the *Zemindar*. At the time of the late *Zemindar's* death, he and his half-brother the minor were members of an undivided family, and, consequently, if the estate was hereditary, and the minor was legitimate, he was the heir of the deceased *Zemindar*—*Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1).

The principal defences set up by the Collector were:—

1. That no *istimrari sanad* had been granted for the *zemindari*, and that it was an unsettled *polliam;* that after the death of the late *Zemindar* the right to nominate a successor to him was vested in the Government; that the Government had granted the *zemindari* to the minor, *Ranga Kristna;* and that this, being an act of State, could not be questioned by any Municipal Court.

2. That, even if an *istimrari sanad* had been granted, and the *polliam* had been settled, the minor, as the undivided half-brother of the deceased *Zemindar*, would be the rightful heir thereto.

The widow disputed the legitimacy of the minor, and the following were the principal issues laid down for trial:—

1. Whether the Court was competent to entertain the suit?

2. Whether the half-brother of the deceased *Zemindar* was his legal heir, or whether the Plaintiff herself was entitled to succeed to the *zemindari*?

3. Whether the minor was the half-brother of the deceased *Zemindar*?

Subsequently, the minor, having attained his full age, was admitted as a supplemental Defendant in the suit; but the first Defendant, the Collector, was also allowed to be heard in defence. Whereupon the first Defendant, the Collector, having been examined as a witness, the Judge held that it was conclusively proved that the

(1) 9 Moore's I. A., 66, 2 P. C. J., 826.

zemindari was an unsettled *polliam*, and that the right of succession having been declared by the highest authority to be vested in Government and not in the line of lineal succession, it followed that that right could not be called in question in that Court. He, therefore, found the first issue in favor of the first Defendant, and dismissed the Plaintiff's suit with costs.

The Plaintiff appealed to the High Court and made only the second or supplemental Defendant, the half-brother, Respondent. Whereupon the Collector presented a petition to the High Court stating that it was contended on the part of the Appellant that the *zemindari* was not an unsettled one, and consequently that the Government had no right to interfere with the succession thereto on the death of the *Zemindar*, and that the Government was interested in the decision of that question; he therefore prayed that he might be made a party to the suit and allowed on behalf of Government to defend the appeal. On the 17th June 1870, the petition of the Collector was dismissed. Another petition to the same effect was subsequently presented by the Collector, the Government offering to forego all claim to costs. Whereupon it was ordered that the application should be admitted on condition that, in the event of the appeal being dismissed with costs, no more than the costs of one Respondent should be allowed against the Appellant.

Thus it appears that the Collector, who was originally a Defendant merely as agent of the Court of Wards and as guardian of the minor *Zemindar Ranga Kristna*, became substantially a party to the suit on behalf of and as representing the interests of Government. The appeal came on to be heard before the High Court who, at the close of the arguments on the first day of the hearing, were of opinion, for the reasons specified in their judgment, that, upon the case presented by the record returned to the Court, the decree of the *Zilla* Court could not stand, and they adjourned the further hearing of the appeal; afterwards, having obtained all the evidence which the parties were able to adduce with respect to the proprietary right of the late *Zemindar*, and having heard the case fully argued, they delivered judgment.

In the first place, they held that the Government proceedings admitting the minor to the succession did not amount to an act of State, which debarred the cognizance of the suit by a Municipal Court. The correctness of their decision upon that point has not been disputed in the present appeal.

They then proceeded to consider the question whether the estate of the late *Zemindar* was hereditary or whether he had merely an estate for life. Upon that point they delivered a very able and elaborate judgment in which they held that the *polliam* was an ancestral hereditary estate.

They said:—

"With respect to the proprietary right possessed by the late *Zemindar*, there is now before the Court the whole of the evidence which the parties have been able to adduce, and we have had the advantage of hearing the case ably argued. The question for determination is, whether he had vested in him an hereditary estate, which passed on his death to his heir in the order of legal succession, as the plaintiff contends, or an estate for life, on the termination of which the right to dispose of the property reverted to the Government, as the Defendants contend. The villages and lands mentioned in the plaint form one of the *Manapuri polliams*, but the estate and the holder of it have been commonly given the designations used in the plaint, of *zemindari* and *Zemindar*; it is, however, a conceded fact that no *istimrari sanad* granting the estate under Regulation XXV. of 1802 has ever existed; and the positions advanced on both sides, stated summarily, are, on behalf of the Plaintiff, that there is sufficient evidence from which to draw the inference that the property had been permanently assessed; but, if not, that the tenure by which the *polliams* not permanently assessed are held had not attached to it, as an essential incident, the limit of the life of the holder, but that, both historically and by judicial authority, the tenure is rather shown to be in its nature hereditary; that it may be either hereditary or for life according to the nature of the

grant creating it, and that in the present case the evidence proved the *polliam* to have been held as an hereditary estate."

Then, after reviewing the authorities, the evidence, and the arguments of Counsel, they proceeded:—

"Upon the whole, we are of opinion that it has been established as strongly as a claim of this nature can be expected to be proved, that the *polliam* in dispute is an ancestral hereditary estate which has devolved through several generations in the ordinary course of legal succession. Almost everything tending to this conclusion that could reasonably be looked for, it seems to us, exists, save the grant of a *sanad* under Regulation XXV. of 1802; and that is not, in our judgment, made by law indispensable, except to render the revenue assessment permanent. It follows that the right of succession contested in the present suit depends upon the question raised by the second issue in the suit, whether the second Defendant is the legitimate brother of the late *polligar, Tirumalai Puchaya Naiker*. If so, he is the rightful heir to all the property claimed in the plaint, no division having taken place between him and his deceased brother. But if illegitimate, he has no right to any portion of it. No additional issue is necessary."

An issue was then directed to try whether the half-brother was legitimate or not.

It is admitted that the villages and lands mentioned in the plaint are, as pointed out by the High Court, one of the *Manapuri polliams*, and that no *istimrari sanad*, granting the estate under Regulation XXV. of 1802 of the Madras Code, has ever been issued.

The case has been very elaborately and ably argued on both sides, and their Lordships having carefully considered all the Regulations and authorities which have been cited, are clearly of opinion that the decision of the High Court is correct.

It was contended by the learned Counsel for the Collector Appellant that in the Presidency of *Madras* the Government had reserved to itself, and had by legislative enactments asserted, its right to all lands of every description; and Regulations XXV. and XXXI. of 1802 of the Madras Code were referred to as having that effect.

It was recited in the preamble of the former of those two Regulations, that the assessment of land revenue had never been fixed, and that the *Zemindars* and others had no security for the continuance of a moderate land tax; *that for the attainment of an increased revenue it had been usual for Government to deprive the Zemindars and to appoint persons on its own behalf to the management of the zemindaris, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever;* that it was obvious that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population, and wealth, and diminishing the security of personal freedom and of *private property*, and that the British Government, impressed with a deep sense of the injuries arising to the "State and to its subjects, from the operation of such principles, had resolved to remove from its administration so fruitful a source of uncertainty and disquietude, to grant to *Zemindars* and other landholders, their heirs and successors, a *permanent property* in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances."

It was then enacted by s. 2 that, in conformity with these principles, *an assessment should be fixed on all lands liable to pay revenue to Government: and in consequence of such assessment the proprietary right of the soil should become vested in the Zemindars or other proprietors of land and in their heirs and lawful successors for ever;* and it was further enacted by s. 3 that, when the conditions of the permanent settlement of the revenue should have been adjusted, a *sanad-i-milkiat istimrar* or deed of *permanent property* should be granted on the part of the British Government to all persons being or constituted to be *Zemindars* or proprietors of land.

Laying out of consideration for the present the words of the preamble, which form no part of the enactment of the Regulation (see *Dwarris* on Statutes, p. 655), it is clear that the affirmative words of the 2nd section "that, in consequence of the assessment the *proprietary right* of the soil shall become vested in the *Zemindars*, &c.," did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all *Zemindars* an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a Statute without any negative expressed or implied do not take away an existing right (see *Coke's* 2nd Institute, p. 200; *Dwarris* on Statutes, p. 637). There are no words declaring that no proprietary right then existed, or should thereafter be deemed to exist except in Government, in any lands not permanently settled; and in their Lordships' opinion it was not the intention of the Legislature to pass such an enactment.

The words "proprietors of land," as used both in the Bengal Code of 1793, and in the Madras Code of 1802, have a technical signification, (see the definition in Bengal Regulation VIII. of 1793, ss. 5, 6, and 7; and Regulation XXVII. of 1802, Madras Code, s. 2). They refer to "*Zemindars*, independent *talookdars*, and others who pay the revenue assessed upon their estates immediately to Government;" and the words "proprietary possession," as used in the recital of Regulation XXV. of 1802, must also be read in a similar sense as meaning the possession and rights of a proprietor in the technical sense in which that word is used, *viz.*, the person who pays the revenue immediately to Government, (see Regulation I. of the Madras Code, ss. 14 and 16.)

There are frequently many valuable tenures existing between the *Zemindar* and the *ryots*, or actual cultivators of the land. If the Regulations XXV. and XXXI. of 1802 were to be read in the sense contended for on the part of the Collector Appellant they would have the effect of vesting in Government, not only all hereditary estates, but all sub-tenures, whether for life or otherwise, and whether created by the native Governments before the territories came under the Government of the East India Company or not.

The words of the recital "the *implied* right" and the *actual* exercise of the *proprietary* possession are, to say the least of them, very ambiguous. But whatever may be the real meaning of those words, the recital clearly was not intended to amount to more than a declaration that it had been usual for Government, in order to enforce an increased revenue to deprive or dispossess the *Zemindars*, and to take the management of the *zemindaris* into the hands of their own officers; or, in other words, that they were in the habit of taking *khas* possession of the *zemindaris* of those *Zemindars* who neglected to pay any increased amount of revenue assessed upon them.

A similar course seems to have been adopted in *Bengal* up to the time of the permanent settlement, (see Regulation I. of 1793), and to have been continued at the time of that settlement, with respect to every *Zemindar* who might decline to engage for the *jama* proposed to be permanently settled upon his estate, (see Regulation VIII. of 1793, s. 48, Bengal Code.)

Further, the usage recited was limited to the purpose of obtaining an increased revenue; and it was by means of the usage that the Government was said to have reserved to itself the implied right, &c. The words are "*thereby* reserving to the ruling power the implied right, &c." The preamble recognized the right of private property when it stated that the then existing mode of administration was injurious "*by diminishing the security of private property.*" It did not assert a right on the part of Government to deprive or dispossess *Zemindars* in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The language of the recital applied as much to *Zemindars* in their lifetime as it did to the heirs of *Zemindars* upon their deaths. If the words were to have the

unlimited construction and effect contended for, the Regulation would have justified Government in depriving or dispossessing the deceased *polligar* in his lifetime, and in transferring the *zemindari* to a new holder, to the same extent as it would have justified them in dispossessing his heirs after his death. Such a construction would go far beyond the claim set up by the Collector in the suit, *viz.*, that the deceased *Zemindar* had only a life estate which reverted to Government and was at their absolute disposal after his death; nay, it would do more, it would render every landowner in the Presidency, except those who claimed under a permanent settlement, liable to be dispossessed or deprived of his estate, and to have it transferred to a new holder at the will of Government.

The preamble to Regulation XXXI. of 1802, which, as before observed, was not an enactment, is as follows:—"Whereas the Ruling Power of the provinces now subject to Fort St. *George* has, in conformity to the ancient usage of the country, reserved to itself and has exercised *the actual proprietary right of lands* of every description, and whereas, consistently with principle, all alienations of land, except by the consent of the Ruling Power, are violations of that right; and whereas considerable portions of land have been alienated by the unauthorized encroachment of the present possessors, by the clandestine collusion of local officers, and by other fraudulent means; and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description, it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding or claiming to hold, lands exempted from the payment of revenue to Government under grants not being *badshahi* or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose."

The Act, s. 2, then proceeds to render valid all grants for holding lands exempt from the payment of public revenue which had been made before certain dates, and to leave to the determination of Government all doubts respecting the validity of other grants of that nature.

The words "has reserved to itself and has exercised the actual proprietary right of lands of every description," used in the above preamble, are not precisely the same as those used in the preamble of Regulation XXV., but they evidently have reference to the same usage, *viz.*, the custom of dispossessing *Zemindars*, and taking their *zemindaris* into the *khas* possession of Government, for the purpose of realizing the public revenue from time to time assessed upon them. The object of the Regulation XXXI. of 1802 was merely the protection of the revenue from invalid *lakhiraj* grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which did not then exist. The words "alienations of land" referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. It is clear that the Regulation never intended to assert that, *according* to the usages of the country, there was no private right to lands; for in rendering valid all *lakhiraj* grants made prior to a certain date, and declaring that the holders should continue to enjoy the same free from the payment of revenue, there was this proviso, that the lands had not escheated to the State since those dates.

It was urged, in support of the Collector's appeal, that there was a long course of judicial decisions, from 1813 to the present time, showing that *polligars* had merely a life interest in their *polliams*.

The first case cited was No. 13 of 1813, 1. Mad. Sel. Decrees, p. 87. In that case the Plaintiff had never had the possession of the *zemindari*. His claim had been repeatedly brought to the notice of Government, and had been rejected. The permanent settlement had been entered into with the Defendant, and a *sanad-i-milkiat-i-istimrar* granted to him by Government, under the provisions of Regulation XXV. of 1802. The case was not decided upon the mere words of the recital of Regulation XXV. of 1802, but upon the enactment in s. 2, and

it was held that the Government having *permanently* settled with the Defendant, *and granted him a sanad*, he had acquired a title under that Regulation, and that the Plaintiff could not recover the estate. The decision, however, whether right or wrong (probably right under the law as it then stood), was decided before the passing of Regulation IV. of 1822, by which it was enacted that Regulations XXV., XXVIII., and XXX. of 1802 were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and left them to recover in the established Courts of Justice *their rights* if infringed, (an enactment similar in effect to that contained in the Bengal Regulations relating to the permanent settlement in that Presidency; see Regulation VIII. of 1793, Bengal Code, s. 30.)

Regulation IV. of 1822 expressly recognized the fact that landholders had actual rights which they might recover if infringed.

In the case cited (No. 13 of 1813), a case was referred to (Appeal No. 9 of 1813), in which a *talookdar's* rights were asserted and enforced against a *Zemindar*, which is quite at variance with the contention that the property in lands of every description belonged to and was vested in Government. It is true it was stated by the Court, in No. 13 of 1813, that it was plainly deducible from Regulation XXV. of 1802 that, previously to the fixing of the permanent assessment, succession to *zemindari* tenures was not governed exclusively by the law of inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures in such manner as might be considered most expedient for the purpose of realizing the public revenue due from the lands, and that it was clear therefore that, in rejecting the claims of the Plaintiff, whatever might be the specific grounds of such rejection, and in granting the *zemindari* to the original Defendant, the British Government exercised a right which, according to the declared usages of the country, was vested in the ruling power. It was to correct opinions such as those that Regulation IV. of 1822 was passed.

The next case was No. 11 of 1846, p. 141. In that case there had not been any permanent settlement or any *sanad* granted by Government. The *zemindari* had been made over to the father of the Plaintiff and Defendant after the district came into the possession of the East India Company, and it continued in his possession to the year 1811, when, upon his death, it was made over to his eldest son. The Court said that the Respondent held under a title which the Government, in the exercise of the right vested in them by the usage of the country, had conferred upon him. One of the Judges who decided the last case was also one of those who decided No. 13 of 1813, evidently putting the same construction upon Regulation XXV. of 1802 as he had done in No. 13 of 1813.

Case No. 14 of 1817 is subject to similar remarks. The Court, of which two of the Judges were the same as those who decided the former case, acted upon similar deductions from Regulation XXV. of 1802.

All those cases were decided prior to Regulation IV. of 1822, and were probably some of the decisions which induced the Legislature to pass the Regulation.

Their Lordships do not consider that the cases cited from the Madras Select Decrees are binding authorities in support of the contention that Government has a right to deal with the *polliam* in the present case, or any other *polliam*, according to arbitrary will, independently of the rights of the parties, or in support of the position that the absolute right to every *polliam* not permanently settled is vested in Government, or that the tenure is for life only, and that upon the death of the *polligar* the estate reverts to Government.

Many of the cases cited in argument are of no greater weight or authority than that which is the subject of the present appeal. They are modern authorities, and there is no long uniform current of decisions sufficient to show that every *polliam* not permanently settled is necessarily only a tenure for life, or at the will of Government.

In the case of *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1), and in

(1) 9 Moore's I. A., 67; 1 P. C. J., p. 826.

that of *The Collector of Madura* v. *Veeracamoo Ummal* (1), the *polliams* were treated as hereditary, the question in each being as to the person entitled to succeed as heir. In the latter case, the Government of *Madras* claimed to be entitled by escheat for want of male heirs, thereby admitting that the estate was hereditary: but it was held that females were not precluded from inheriting a *polliam*, thereby deciding that it was hereditary. It did not appear in any of those cases that the *polliam* had been permanently settled or that a *sanad* had been granted in respect of it under Regulation XXV. of 1802. They show that a *polliam* may be hereditary though not permanently settled under Regulation XXV. of 1802.

Their Lordships are of opinion that each case must depend upon its own particular circumstances; that a *polliam* may be hereditary, and that the position laid down by the High Court is correct. They there say: —

"The existence of a proprietary estate in *polliams* or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property.

Their Lordships are also of opinion that the finding of the High Court upon the evidence adduced that the *polliam* in dispute is an ancestral hereditary estate is also correct.

It does not at all follow from the application made to Government for the recognition of the minor that he had not an hereditary estate. It was extremely common in *Bengal* before the acquisition of the *Dewanny* where a tenure was in fact hereditary from father to son to take out a new *sanad* upon each descent—*Kooldeep Narain Singh* v. *The Government* (2): so also it appears that upon a transfer of title to lands in *Calcutta*, either by alienation or descent a fresh *pôttah* was given to the new holder; but that was merely a fiscal regulation, and the *pottah* formed no part of the holder's title—*Freeman* v. *Fairlie* (1).

The Collector in his written statement alleged that the *polliam* was unsettled, and that after the death of the late *Zemindar* the right to appoint a successor was vested in the Government, and that accordingly the Government had granted the said *zemindari* to the minor Defendant. No grant from the Government was produced. That which is called a *sanad* was not a grant creating a new right, but a mere recognition or acknowledgment of an existing title; see the proceedings of the Madras Government (No. 17A, Record, p. 23). From this document it appears that, upon the death of the late *polligar*, the Collector sent a report to the Court of Wards stating among other things as follows:—

"The deceased *Zemindar*, on the day previous to his death, addressed to me a petition requesting me to recognize his brother as his successor to the estate, and to appoint his cousin to manage the affairs of his estate during the minority of his brother.

"The *Tahsildar* was deputed to ascertain the wishes of the widows of the deceased on this point, and to afford information regarding the property left by the *Zemindar*. The *Tahsildar* submitted a statement obtained from the widows, from which it appears that they earnestly request a compliance with the request contained in the petition addressed to me by their husband, but with this modification, that the cousin should conduct the affairs of the estate under the direct control of the first-mentioned widow. The widows admit the genuineness of the petition.

"The deceased left no will. The estate consists of the *Marungapuri zemindari* and certain *mirasi* lands, the assessment of which amounts to Rs. 2,528-8-10."

The above report was submitted by the Court of Wards to Government with a recommendation that the Collector *be authorized to recognize* the brother of the deceased (the Defendant in the suit) as *Zemindar* of *Marungapuri*, and to take charge of the estate. They added—assuming that the family is undivided, as is

(1) 9 Moore's I. A., 446; 2 P. C. J., p. 43.
(2) 11 B. L. R., 71; S. C., 14 Moore's I. A., 247; 2 P. C. J., 731.

(1) 1 Moore's I. A., 346; 1 P. C. J., 123.

probably the case, *the brother of the deceased would be the legal heir to the zemindari, irrespective of the petition or consent of the widows.* Upon that report the Government passed an order, dated September 17, 1864, that the Court's proposal is approved.

It also appears that after the death of the father of the late *polligar, Terumalai,* the Collector reported that the deceased left one son *Terumalai, the heir to the estate,* and one son, the present Defendant, a little boy by his fifth wife, then three years of age, and he recommended that *Terumalai* should be recognized and invested as *polligar* in the room of his father. Upon which the Government ordered that *Terumalai* should be recognized and placed in charge of the estate.

In England, proof of the possession of land or of the receipt of rent from the person in possession is *primâ facie* evidence of a seisin in fee. In *India* the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary *zemindari.* The evidence is still stronger if it be proved that the estate has passed, on one or more occasions, from ancestor to heir; see *Kooldeep Narain Singh* v. *The Government* (1). There is no difference in this respect between a *polliam* and an ordinary *zemindari.* The only difference between a *polliam* or *zemindari* which is permanently settled and one that is not is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter, the Government may or may not have that power.

The history of the *polliams* of southern *India* is well known. It is to be found in the Fifth Report from the Select Committee from the House of Commons on the affairs of the East India Company, presented in 1812, a work of great research, and in the Madura Manual, compiled by Mr. *Nelson* of the Madras Civil Service, by order of the Government of *Madras.* The account given in the Fifth Report was adopted in the judgment pronounced by Lord *Kingsdown* in the case above quoted, in which it was held that a *polliam* was an ancestral estate in the nature of a *raj.*

Looking at the evidence in the cause with reference to the tenure of the *polliam* in question, their Lordships have no doubt that the High Court arrived at a correct conclusion, and that the *polliam* is an ancestral hereditary estate.

The question as to the legitimacy of the minor Defendant, and his right to inherit, if the estate of his brother was an estate of inheritance, was found by the High Court in his favor, and that decision has already been upheld by their Lordships in the widow's appeal. The legitimacy of the minor having been upheld, the suit of the widow was properly dismissed, for whether the estate was one of inheritance or one merely for the life of her deceased husband, with a right on the part of the Government, on his death, to appoint a successor, the widow could have no right to succeed. The decree of the High Court was correct, and even if the point raised by the Collector on the part of the Government were decided in his favor, the decree dismissing the widow's suit must still be upheld. Their Lordships have already stated that they will humbly recommend Her Majesty that the decree of the High Court be affirmed with costs.

As the point raised by the Collector was one of importance, and necessary to be decided with reference to the costs of the Collector's appeal, their Lordships have heard that question argued; and having fully considered the very able and elaborate arguments of the learned Counsel on both sides, they have arrived at the conclusion that beyond all doubt the decision of the High Court was correct, and they will therefore humbly recommend Her Majesty, with reference to the Collector's appeal, that the decree be affirmed and the appeal dismissed with costs.

THE judgment of their Lordships in the first appeal was then delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This case is governed by the principles

(1) 11 B. L. R., 71; S. C., 14 Moore's I. A., 217; 2 P. C. J., 123.

laid down in the appeal just decided between the Collector of *Trichinopoly* and the widow of the *Zemindar* of *Marungapuri*.

Primâ facie, the *polliam* was hereditary. If it was hereditary and descended to the minor son as the heir of his father, the income of the *zemindari* was liable to pay the debts incurred by the deceased *Zemindar*.

The Civil Judge, upon the authority of decided cases, principally of those cited from the Madras Select Decrees, to which their Lordships have referred in the other appeal, held that the *polliam* was not hereditary, but that the object for which the debt was incurred was such that the debt was a charge upon the estate, and that the income derivable from it was liable to discharge the debt, and he gave a decree accordingly.

Upon appeal, the High Court held that, upon the death of the *polligar*, by whom the debt was contracted, the proprietary right to the *polliam* reverted absolutely to Government, and that, by their fresh grant to the Defendant, a newly-created estate for life became vested in him; and that, consequently, the Defendant, as the representative of his father, was not liable to pay the debt out of the revenues of the *zemindari*, and they reversed so much of the decree of the Lower Court as declared the liability of the Defendants in respect of the revenues of the *polliam*. The judgment of the High Court was pronounced on the 13th May 1870, before the judgment of that Court in the *Marungapuri* case was given. Their Lordships are of opinion, that no sufficient evidence was given to prove that the *polliam* reverted absolutely to Government upon the death of the late *polligar*, or that the defendant held under a fresh grant, by which a newly-created estate for life became vested in him. They are, therefore, of opinion that the decree of the High Court ought to be reversed with the costs of this appeal.

In ordinary course, their Lordships would at once proceed to recommend that the decree of the Civil Judge be affirmed. Mr. *Forsyth*, however, suggested that the Collector may have been misled by the decisions prior to the judgment in the *Marungapuri* case, and may, in consequence of those decisions, have abstained from offering evidence to show that the *polliam* was not hereditary, and that, if the decree of the High Court should not be upheld, the case ought to be remanded, to enable the Collector to adduce evidence to that effect, if he has any.

The first issue raised in the lower Court, *viz.*, whether the *zemindari*, or the income thereof, was answerable for the debt contracted by the late *Zemindar*, certainly involved the question whether the *zemindari* was hereditary, or whether the late *Zemindar* had merely a life interest in the estate. But that issue was too general; it involved several mixed questions of law and fact, and did not sufficiently direct the attention of the parties to the main question of fact necessary to be decided. Their Lordships are, therefore, of opinion that, if the Respondents, or either of them, desire it, it ought to be referred to the lower Court to raise and try the following issue, *viz.*, whether the late *Zemindar* had an estate of inheritance in the *zemindari* which descended to his minor son as his heir. That reference, however, ought not to be made except upon the condition of the Respondents, or one of them, notifying to the High Court, within a reasonable time, their or his desire to have that issue referred for trial, and upon payment of the costs of this appeal and of the costs of the appeal to the High Court. Their Lordships will, therefore, humbly recommend to Her Majesty that the decree of the High Court be reversed; that the Respondents do pay to the Appellant the costs of this appeal and also the costs of the appeal to the High Court; and further that, upon payment of such costs the High Court do, under the provisions of s. 354 of the Code of Civil Procedure, refer for trial by the Court of the Civil Judge the following issue, *viz.*, "Whether the late *Zemindar* had an estate of inheritance in the *zemindari* which descended to his minor son as his heir," provided the Respondents, or one of them, do, within six months from the date of the order to be made by her Majesty in Council, notify to the High Court their or his desire to have such issue tried; and that, in the event of

no such notification being made within the period aforesaid, the decree of the Civil Judge do stand affirmed; that, in the event of such issue being referred, all subsequent proceedings be taken under the provisions of s. 354 of the Code of Civil Procedure; that the costs hereby ordered to be paid come out of the estate; that the sum of £300 in the hands of the Registrar, as security for the costs of the Respondents in case this appeal be dismissed, be returned to the Appellant, *Oolagappa Chetty* or to his attorney.

27th November, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the the Right Hon. Sir Lawrence Peel.

On appeal from the High Court of Judicature at Fort William in Bengal.

BENODERAM SEN and others (Plaintiffs)* ... } *Appellants,*

versus

BROJENDRO NARAIN ROY (Defendant) ... } *Respondent.*

Execution of decree—Act XIV. of 1850, s. 20—Bona fides.

In judging of the *bona fides* of proceedings to obtain execution of a decree the whole course of those proceedings must be regarded. The fact that unexplained delays have occurred during the proceedings in execution of the decree, or that some of the proceedings were ineffectual, is not necessarily evidence of a want of *bona fides*.

The judgment of their LORDSHIPS was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This appeal arises out of execution proceedings which were taken to obtain execution of a judgment obtained by the Appellants against *Chundernarain Roy*, the father of the Respondent.

The original judgment is dated on the 5th April 1855, and was obtained in the Civil Court of *Zillah Beerbhoom* for Rs. 7,460 and costs.

The only question which arises is whether the proceedings in execution which were commenced on the 18th May 1868 are barred by the operation of the 20th section of the Limitation Act, XIV. of 1859. The ground on which it is urged that limitation is a bar is that no proceeding had been taken to enforce the judgment within three years next preceding the application for execution in 1868 within the meaning of the Act.

Now, unfortunately for the Appellant in this case, he has been obliged to resort to no less than four different attempts to obtain execution of his judgment. The first effort he made was to a certain extent fruitful and successful, for he obtained a sum of Rs. 6,650, in part satisfaction of his judgment. The proceedings in which that sum was realized commenced on the 6th August 1857, and it appears from the schedule to the petition to obtain execution in that year that he sought to attach three estates, one in *Zillah Beerbhoom* and two in *Zillah Moorshedabad*. The Court, rightly or wrongly, put him to his election whether he would take out execution first against the estate in *Zillah Beerbhoom*, or in the other *Zillah*. It appears that he elected to attach the estate in *Zillah Beerbhoom*; and having attached it, proceedings were taken by the Defendant to obstruct that execution,—proceedings which went to the High Court. Those proceedings were undoubtedly prosecuted by the Plaintiff in a vigorous manner and with success, for he obtained ultimately the sale of the estate, and under that sale obtained payment of the sum already adverted to. But it appears that the obstruction opposed by the Defendant delayed that payment until the 17th March 1859. The execution proceeding was then at an end, so far as that estate was concerned, and on the 26th March of that year it was struck off the file.

* 13 B. L. R., p. 109.

The next proceeding is on the 31st December 1861. That was, undoubtedly, within three years of the former. The execution was commenced by petition, praying for the arrest of the Defendant. It appears there was then remaining due on the judgment for principal and interest a sum of upwards of Rs. 5,000. The application being more than a year after the date of the last order in execution, the Court required that notice should be served upon the Defendant in pursuance of s. 216 of Act VIII. of 1859, and it appears that a formal notice was issued by the Court on the 13th April 1863, which was sent to *Moorshedabad* for service. It was put into the hands of the regular officer of the Court, and the *Nazir* made a report to the Court that he had in vain endeavoured to effect personal service of it, but had affixed it to the front door of the Defendant's house. That report was in May 1863. It seems that no arrest was made. Why it was not made does not certainly appear, but the Plaintiff apparently desired to effect the arrest. If he did not mean to arrest the Defendant, why did he obtain the order, get it transferred to *Moorshedabad*, and go to the expense of paying the fees of the officer for executing it? It may be that there is not sufficient to show that the Defendant was absconding, but there is nothing to show that he was in the way; and when the charge is made of want of *bonâ fides*, it certainly lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

This last proceeding was, undoubtedly, abortive, but within three years of the report of the *Nazir*, that is, on the 23rd March 1865, the Defendant having died in the interval, a fresh petition to execute the decree by an attachment and sale of some property in *Zillah Dinagepore* was presented. It was presented to the Judge of *Beerbhoom* who made an order, of the date of the 31st July 1866, that copies of the decree and the application for execution should be sent to *Dinagepore*, in order that the Judge there might execute it. It seems that the decree was taken there, and then began proceedings, which emanated from the Defendant, to set aside the execution, on the ground that it was barred by limitation. The Judge at *Dinagepore* decided that limitation was a bar. There was an appeal to the High Court by the present Appellant, and he was successful in that appeal. The High Court reversed the order below, on the ground that the Judge at *Dinagepore* had no authority to make it. In the meantime, pending that appeal, the Defendant presented a petition to the Judge of *Beerbhoom*, praying that the proceedings might be dismissed on the ground that they were barred by limitation. The Judge of *Beerbhoom* decided, upon the issue raised on that petition and the petition in answer, that the proceedings were not barred by limitation. His order rejecting the objection was made on the 29th June 1867, and in May 1868 the present proceedings were commenced.

Now it was not contended by Mr. *Cutler* that there was an interval of three years between the proceedings which have been narrated, and which were taken on the part of the Appellant; but his sole contention before their Lordships to-day was that these proceedings were not *bonâ fide*, and when pressed during the argument to show in what respect they were not *bonâ fide*, and to what particular proceedings he alluded as open to that charge, he referred to those of 1861, which were commenced by the petition praying for the arrest. He says that those proceedings were not *bonâ fide*, first, because there was delay to take them after 1859; next that the Defendant was not arrested; thirdly, that the Plaintiff petitioned for an arrest instead of an attachment.

The delay may have been caused by the Plaintiff making inquiries about the Defendant's property before applying for an arrest. Probably, though he had inserted in his schedule estates in *Moorshedabad*, of which he had some knowledge, there was difficulty in reaching them, and he may have thought that if he arrested the Defendant, he might obtain payment under the compulsion of that arrest. At all events it is a probable solution of the delay. He may have thought that, instead of incurring the difficulty of following the estates, perhaps in other names, it would

be a more cogent mode of obtaining the money to arrest the Defendant.

Their Lordships, in considering whether these proceedings were *bonâ fide* or not, cannot be confined to this particular attempt to revive the execution in 1861, but must look at the whole course of the proceedings; and when they find that the first proceeding to obtain execution was not only prosecuted, but prosecuted with effect, and a large sum obtained; when they find also that in the third attempt, when the Defendant set up the defence of limitation and attempted to bar the proceeding, the Appellant opposed him, and successfully opposed him, in two Courts, going up to the High Court; they think the case affords strong evidence of a *bonâ fide* desire to execute his decree, which was thwarted and baffled by the Defendant.

Their Lordships are unable to concur in the view taken by *Markby*, J., that these proceedings appear to have been taken merely to keep the decree alive for some ulterior purpose. The learned Judge does not explain what ulterior purpose he supposes the Plaintiff had in view, nor does he suggest any. There is no doubt it would be, what he calls, a "nefarious practice" for Plaintiffs having decrees to keep them for some wrong motive hanging over the heads of Defendants; but there is not the slightest evidence that any such motive existed in this case.

Their Lordships, therefore, think that upon the facts there is not only an entire want of proof of *mala fides*, but strong evidence of a real and in some respects (though there are delays which are not quite accounted for) a strenuous prosecution of these proceedings.

Their Lordships find that *Jackson*, J., gave as one of his reasons for thinking the statute was a bar, that "no steps of an effectual kind were taken." Now it is perfectly clear that the inquiry, whether the steps taken were in fact effectual, can only be material, provided the proceeding be in its nature one to enforce the judgment, so far as it may be an element in considering the question of *bonâ fides*.

It constantly happens in these executions that proceedings are taken which are ineffectual, because of some mistake in the particular step which has been advised. The point was before this Committee last year in a case of *Roy Dhunput Singh Roy Bahadoor* v. *Mudhomotee Dabia* (1); the judgment was delivered on the 2nd May 1872. In that case the Plaintiff had obtained two decrees. He had attached some money under decree *A*, and then he filed a petition by mistake in suit *B*, praying to have the attached amount paid out to him. When it came before the Court, the defect was pointed out, and the petition was of course abortive and ineffectual. In a subsequent execution suit under decree *B*, it became necessary for the Plaintiff to establish that he had taken a proceeding within three years of the proceeding in execution which he was then prosecuting, and to rely upon the former abortive petition as a step to enforce the decree. This Committee held that, although it had been of no avail by reason of a mistake, it was a step which the Plaintiff had taken to enforce his decree, and therefore that it did protect him from the operation of the Statute of Limitations.

For these reasons their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, to affirm the decree of the Principal *Sudder Ameen*, and to order that the Respondent do pay the costs of this appeal and the costs in the High Court.

(1) 11 B. L. R., 23.

27th and 28th November, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MIRZA HIMMUT BAHADOOR (Plaintiff)* } *Appellant,*

versus

SAHEBZADEE BEGUM and another (Defendants) } *Respondents.*

Mahomedan Law—Illegitimacy—Acknowledgment by a Brother.

The Plaintiff, *E*, and *M* were the illegitimate sons and daughter of *B*, a Mahomedan woman. *E* died, and, after his death, the Plaintiff sued his widow and *M*, to recover his share of the property of *B* which he claimed as co heir of *E*. He relied upon a recital in a petition in which *E*, the Plaintiff, and *M*, describing themselves as the sons and daughter of *B*, had prayed for a certificate under Act XXVII. of 1860. *Held* that this was not such an acknowledgment of the Plaintiff by *E* as to constitute between them the status of full brotherhood and heirship by Mahomedan law.

Semble.—The acknowledgment by one man of another as his brother is not by Mahomedan law valid, so as to be obligatory on the other heirs, but is binding against the acknowledger.

THEIR Lordships' decision was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This was a case in which *Mirza Himmut Bahadoor* was the Plaintiff, *Sahebzadee Begum* and *Mussumat Bismullah Begum*, one being the widow and the other the illegitimate sister of *Mirza Ekbal Bahadoor*, were Defendants. The case of the Plaintiff was that he was one of the co-heirs of *Mirza Ekbal*. If this point were decided in his favour, other questions would arise respecting the title of the widow to dower, and the title of the sister to maintain possession of certain property of *Ekbal* which she was possessed of; but if the question of heirship be decided against *Mirza Himmut*, none of these questions arise, and their Lordships are of opinion that the judgment of the High Court is right, which decided this question against him.

In the Court below a question was raised on which a good deal of evidence was given, and which was discussed at great length, whether or not *Mirza Himmut* and *Ekbal* were the legitimate sons of their mother *Baratee* and their father *Modenarain Sing*, but the Court below as well as the Court above have come to the conclusion that there was no marriage between their parents, and it must be taken, and, indeed, is admitted, that they were illegitimate. The Court below held, however, that notwithstanding this illegitimacy, and notwithstanding therefore that by the law of the *Sheah* sect of the Mahomedans (which by admission of both parties applies to this case), the Plaintiff would not be heir of *Ekbal*—that *Ekbal* had so acknowledged the Plaintiff to be his heir that the Plaintiff acquired that status, and was entitled to succeed to his property as such. The High Court, agreeing with the Court below upon the first question as to the legitimacy, reversed its decision upon the second point, being of opinion that there was no proof of any such acknowledgment on the part of *Ekbal*; and the sole question before their Lordships now is whether or not there was such an acknowledgment. There is no question that under the Mahomedan law acknowledgments may be made of such a kind as to operate not merely as admissions but as actually conferring certain descriptions of status, among others a status of heirship, limited or general, as the case may be, upon the persons acknowledged. With respect to acknowledgments of relationship, their Lordships have been referred to Mr. *Baillie's* "Digest of Mahomedan Law," Part I., published in 1865, and they find it there thus laid down (1):—"The acknowledgment of a man is valid in regard to five persons, his father, mother, child, wife, and *mowla*, because in all these cases he acknowledges an obligation, and it is not valid except for those," and then, further, after giving cases of those acknowledgments which have been stated to be valid, on page 406 this is found:—

* 1 Macpherson's I. A., p. 23; 13 B. L. R., p. 182.

(1) Page 404.

"The acknowledgment of a man is not valid with respect to any other persons than those before mentioned, such as a brother, or a paternal or a maternal uncle, or the like," so that if this passage stood without further explanation it would lead to the conclusion that by the Mahomedan law an acknowledgment of one person by another as his brother, and as such his heir and successor, would have no validity. However, the passage is further explained thus:—"When it is said that the acknowledgment of a man is not valid with respect to any other than those above mentioned, it is only meant that it is not obligatory on any other except the acknowledger and the acknowledged; but with regard to such rights as affect them only the acknowledgment is valid, so that if one were to acknowledge a brother, for instance, having other heirs besides who deny the brothership, and the acknowledger should die, the brother would not inherit with the other heirs, nor would he inherit from the acknowledger's father if he denied the descent, but he would be entitled to maintenance as against the acknowledger himself during his life." The acknowledgment contended for consists in this and this only:—it appears that after the death of the mother a proceeding in the Civil Court of *Gyah* was instituted on the 20th of January, 1860, in which it is recited that *Mirza Himmut Bahadoor*, *Mirza Ekbal Bahadoor*, and *Mussumat Bismullah Begum*, sons and daughter of *Mussumat Baratee Begum*, deceased, by their pleaders, prayed for a certificate under the provisions of Act XXVII. of 1860, on the proof of heirship to the said *Mussumat Baratee Begum*. That, coupled with this further fact which appears, that these three did by some means or other obtain possession of some property belonging to an elder sister, apparently in the character of her heirs, is relied upon as such an acknowledgment as to constitute the status of full brotherhood and heirship on the part of the Plaintiff to the Defendant. Their Lordships are of opinion that it would be carrying the doctrine of heirship constituted by acknowledgment to an extent to which it has never been carried before, and farther than the principles of the Mahomedan law as to acknowledgments warrant, if they were to give such an effect as has been contended for to what is but an argumentative or inferential admission at best. All that is directly admitted by the statement in Court (the language being that of the pleader of the parties) is that the Plaintiff and the Defendant were the sons of *Baratee*, and as such claimed her property. It is sought to deduce from this that they must therefore necessarily be taken to have declared, not only that they were sons and heirs of *Baratee*, but that they were to all intents and purposes brothers and heirs to each other,—"full brothers" is the term in the plaint,—and that they were entitled to succeed to each other's property, not only property obtained from *Baratee* but any property which may have been obtained by either of them from any source whatever. It appears to their Lordships that it would be very unduly stretching the purport of this document to give it any such interpretation. It does not appear to their Lordships by any necessary implication that they must have intended to constitute each full brother of the other for all intents and purposes as has been contended. It may be that they sought to avail themselves of the *Soonee* Mahomedan law, whereby, as it was admitted, they would, although illegitimate, be heirs of their mother. If that were so, the statement in this document amounts to no admission at all, but simply to a statement of fact, and to the inference which the law would derive from that fact. But, be that as it may, their Lordships are of opinion that it is by no means shewn, and no inference can be fairly deduced, that it was the intention of the parties by this document to constitute each brother to the other, so as to make him an heir to his estate.

This being their Lordships' opinion on the question of fact it is unnecessary for them to consider the question whether the widow, who is generally included with the other sharers in the term "heirs," but is not, like sharers, entitled in the absence of "residuaries" to a "return," is or is not an heir in the sense in which the word is used in the passage above cited, and also in the passages in the *Hedaya* to which their Lordships were referred in the course

of the argument, so that her existence would have destroyed the effect of the acknowledgment, had one been proved.

On these grounds their Lordships are of opinion that the judgment of the High Court is right; and they will humbly advise Her Majesty that it be affirmed, and this appeal dismissed with costs.

9th and 11th December, 1873; and 31st January, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BYINATH LALL* ... *Appellant,*

versus

RAMOODEEN CHOWDRY, MOHUNT PARSOO RAM DOSS, RAMANOOGRAH SAHOY, MOULVIE MAHOMED AHSEEN, MOHUNT ANUND DOSS, KASHI PERSHAD SINGH, and MUSSUMAT (Name unknown), Mother and Guardian of BABOO GUNESH PERSHAD NARAIN SINGH and KISHEN KISHORE NARAIN SINGH ... *Respondents.*

Undivided Share—Butwara Proceedings.

G. S., was, with others of his branch of the family, joint proprietor of eight annas of *mouzas* G., P., T. R., and M. On the application of some of the joint proprietors, a *butwara* or partition under Regulation XIX. of 1814 was ordered by the Collector. Pending this partition, G. S., by deed of conditional sale, mortgaged his eight annas interest in *mouzas* G., P., and R., and in express terms excluded from the mortgage his eight annas of *mouza* T. R., and made no mention of his interest in *mouza* M. Under the partition when completed, G. S., had allotted to him the whole of *mouzas* P., and R., 36 *beegas* in G., and another *mouza*, F., not mentioned in the mortgage deed. The right, title, and interest of G. S., in the several *mouzas* thus allotted to him was subsequently sold to the Defendants, in execution of decrees against him.

The mortgagee obtained an order for foreclosure of his mortgage under the provisions of Regulation XVII. of 1806 and subsequently sued the representatives of G. S., and the Defendants for a determination of his title to, and possession of, all the *mouzas* P., and F., and eight annas of T. R., and that portion of *mouza* M., which had been allotted to G. S.,

Held, that the mortgage by G. S., of his undivided share might be enforced against the properties allotted to him under the *butwara*, in lieu of such share, both as against G. S., himself and as against the Defendants, purchasers of his right, title, and interest in execution of decrees against G. S.

The mortgage, being of the undivided share of G. S., could not affect the interests of the other sharers; and the mortgagee, who took the security subject to the right of those sharers to enforce a partition, and thereby convert what was an undivided share of the whole into a defined portion held in severalty, could not successfully have sought to charge any other parcel of the estate in the hands of the former co-sharers.

The case of *Nawab Sidhee Nuzur Ali Khan v. Ojoodyaram Khan* (1) *approved of.*

31st January, 1874.

THE decision of their Lordships was pronounced by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

The suit out of which these appeals have arisen was brought by the Appellant to recover possession and be registered as proprietor of various parcels of land, all of which once belonged to one *Gopal Narain Singh*, deceased, but had afterwards been purchased by different persons at several sales in execution of decrees against him. The Defendants were the representatives of *Gopal Narain Singh*, and the several auction purchasers; and the title on which the Plaintiff sued was based upon a deed of mortgage by way of conditional sale alleged to have been executed to him by *Gopal Narain Singh*; and upon the proceedings subsequently taken under Regulation XVII. of 1806 to foreclose that mortgage.

The principal defences raised in the suit, and indeed the only defences now to be considered, were—1st, that the mortgage deed having been made collusively and without consideration, was fraudulent and void as against the auction purchasers; and, 2nd, that even if it were good against them, it conferred no title on the Plaintiff to several of the parcels claimed by him.

(*) 1 Macpherson's I. A. p. 106.

(1) 10 Moore's I. A., 540; 2 P. C. J. 198.

The Principal *Sudder Ameen* who tried the cause in the first instance decided the first question in favour of the Plaintiff, and gave him a decree for the lands claimed with the exception of some which are now no longer in dispute.

Against this decree which bears the 8th of January, 1866, the different Defendants presented four separate appeals, the Plaintiff also preferring a cross appeal to the Judge of *Zillah Tirhoot*. That officer on the 14th of June, 1867, decided that the Plaintiff had failed to establish that the mortgage deed was executed *bonâ fide*, and dismissed the suit. His decree was, however, reversed on special appeal by a division bench of the High Court, which transferred the regular appeals for final hearing and decision to itself. There is no further trace of Plaintiff's cross appeal; but the appeals of the different Defendants were separately numbered in the High Court as Nos. 96, 100, 101, and 102, and were heard by this division bench, consisting of Mr. Justice *Kemp* and Mr. Justice *Jackson*, which made a separate decree in each. On appeals Nos. 96 and 101, the two Judges were divided in opinion, Mr. Justice *Kemp* holding that the mortgage was a fictitious transaction in which no consideration passed, and that the suit ought on that ground to be dismissed generally; and Mr. Justice *Jackson* holding that the mortgage deed was executed *bonâ fide* and was valid, but that the Plaintiff could recover only such of the parcels claimed as were specifically mentioned in the deed. Accordingly, each of the decrees originally made on these appeals stated that the senior Judge had given a decree for the dismissal of the suit; but that the junior Judge dissented therefrom, and was of opinion that the Plaintiff ought to have a decree for certain of the lands claimed, inasmuch as they were included in the mortgage deed; but that his claim to others which were held not to be covered by the deed should stand dismissed.

In deciding the appeals Nos. 100 and 102, the two Judges concurred in the dismissal of the suit as against the parties Appellant, on the ground that none of the lands sought to be recovered from them were covered by the mortgage deed; touching the validity of which they expressed no opinion.

In this state of things there was a reference to a full bench of the High Court, which held that it was only competent to deal with the two appeals in which the Judges had expressed conflicting opinions, and with the particular point on which they differed. And having thus limited the reference to the appeals Nos. 96 and 101, and to the question of the *bonâ fides* and validity of the mortgage deed, it decided that question in favour of the Plaintiff (the present Appellant). The result was that the final decrees upon all the appeals were drawn up in accordance with the principle laid down by Mr. Justice *Jackson*. The Plaintiff appealed to Her Majesty in Council in each case; but the four appeals were afterwards consolidated, and have been heard as one appeal by their Lordships. Of the Respondents those only who were Appellants in Nos. 100 and 101 have appeared here by Counsel.

Mr. *Doyne* on their behalf insisted that, although they had filed no cross appeal, they were nevertheless entitled to impeach the validity of the mortgage deed, on the ground that their appeals were never before the full bench of the High Court, and consequently were not affected by the last decree. Their Lordships do not think it necessary to examine very nicely into the question of right, because they are of opinion that, if the right be conceded, no sufficient grounds for coming to a conclusion upon the *bona fides* and validity of this deed other than that in which the Principal *Sudder Ameen*, one of the Judges of the division bench, and the three Judges who composed the full bench of the High Court have concurred, have been laid before them. There may be in the transaction circumstances of suspicion arising out of the position in life, and presumable means of the Plaintiff; but there is no evidence on which their Lordships would feel justified in over-ruling so many concurrent judgments.

This disposes of the first defence raised in this suit; and the only remaining question is whether the principle applied by Mr. Justice *Jackson* is correct; or whether

the High Court ought to have affirmed the decree of the Principal *Sudder Ameen* in its integrity.

To elucidate this question, which is both novel and difficult, it is necessary to consider the facts of the case somewhat more in detail.

Gopal Narain Doss, the mortgagor, was, on the 24th of September, 1860, when he executed the deed of conditional sale, the undisputed owner of an 8-*anna* undivided share in an estate consisting of three *uslee mouzahs*, called *Gunniporebeja*, *Pemburinda*, and *Tajpore Ruttunpore*, to each of which certain *dakhilee* villages were appurtenant. The deed describes him as proprietor of 8 *annas* severally of the two first *mouzahs*, and inhabitant and shareholding proprietor of 8 annas of *Tajpore Ruttunpore*, and some argument was sought to be raised on this distinction. Their Lordships, however, conceive that the utmost which it imports is that he may have collected his share of the rents of the two first *mouzahs* separately, and the rents of the other *mouzahs* jointly with his co-parceners, it being perfectly clear from what afterwards took place that his interest in the whole estate was an undivided moiety. In this state of things he executed a conditional sale of "the whole and entire 8 *annas* out of the whole 16 *annas* severally of *mouzahs Gunniporebeja* and *Pemburinda*," as a security for the sum of 26,050 Company's rupees, expressly excepting from the operation of the deed the 8 *annas* of *Tajpore Ruttunpore* and certain *Brumuttur* and other lands devoted to religious or charitable purposes.

Before the execution of this mortgage, and as early as September, 1858, some of the other sharers in the estate had commenced proceedings to effect a *butwara*, or partition, of the whole estate, under the provisions of Regulation XIX. of 1814. The usual proceedings were had, not, as appears from the collector's proceeding, dated the 31st of July, 1862, without disputes between the co-sharers, and objections on the part of *Gopal Narain Singh* in particular. The partition was finally made by the last mentioned proceeding, which was duly confirmed by the superior revenue authorities. Its effect as regards *Gopal Narain Singh* was to allot to him, to be held in severalty, and in lieu of his undivided moiety of the whole estate, the whole of *mouzah Pemburinda*, the whole of the principal *mouzah* of *Tajpore Ruttunpore*, with a 2 *annas* and 15 *gundas*, share of its dependency *mouzah Mudwee*, the whole of *mouzah Moustafapore*, or *Joysingpore*, a *dakhila*, or dependency of *Gunniporebeja*, and thirty-six *beegahs* and odd *cottahs* of other land in the last-named principal *mouzah*.

Gopal Narain Singh was duly put into separate possession of these parcels.

He did not, however, long remain in possession.

[His Lordship here enumerated the execution sales of the allotted land(1).]

In the meantime the Appellant had proceeded to foreclose his mortgage. The proceedings taken for that purpose began on the 12th of December, 1863, and the final order for foreclosure was obtained on the 12th of December, 1864. Their Lordships think it is established by the evidence that all the purchasers under the execution sales, except the *Mohunt*, whose purchase was subsequent to the foreclosure, had due notice of these proceedings.

The Principal *Sudder Ameen's* decree gave to the Appellant the whole of *mouzah Pemburinda*, the whole of *mouzah Moustafapore*, 8 *annas* of *mouzah Tajpore Ruttunpore*, and 193 *beegahs* and a fraction of *mouzah Mudwee*, to which quantity, for reasons which are not now impeached, he reduced the Appellant's claim.

The decrees under appeal disallowed the Appellant's claim to any portion of the two latter parcels, and gave him only one half of the share in *Pemburinda*, which he claimed as against the Respondent *Ramoodeen Chowdry*, and only 8 *annas* of *Moustafapore*.

The principle for which the Appellant

(1) Of G. S.'s right, title, and interest in *mouzah Pemburinda* on the 24th of December, 1862, to *Hurreshur Chowdry* and others; his right, title, and interest in *mouzah Tajpore Ruttunpore* on the 23rd of December, 1862, to *Moulvie Mohamed Ahsen* and *Kashi Pershad Singh*; his right, title, and interest in *mouzah Moustafapore* on the 8th of December, 1864, to *Ramonoograh Sahoy*; his right, title, and interest in the portion of *Mudwee* which was allotted to him, on the 7th of February, 1865, to *Mohunt Parsoo Ram Doss*.

contends, and that on which the Principal *Sudder Ameen* proceeded, is that the mortgagee is entitled to whatever was allotted to the mortgagor on the partition in respect or in substitution of his undivided 8-*anna* share in *mouzahs Gunniporebeja* and *Pemburinda*, which was the subject of the mortgage, and that this includes all the parcels now in dispute.

The principle on which the High Court has proceeded, and for which the Respondents contend, is, that the Appellant can recover nothing which is not expressly named in and covered by the mortgage deed, and consequently that he can take no part of *mouzah Tajpore* and its dependencies, and only an 8-*anna* share of *mouzah Pemburinda*, and an 8-*anna* share of *Moustafapore*, the latter being the only portion of *mouzah Gunniporebeja* which is in dispute.

It will be convenient to consider, first, what in such a case would be the rights of the mortgagee against the mortgagor; and, next, whether the Respondents stand in any better position than the mortgagor.

Now, what was the subject of this mortgage? It was an undivided moiety in two out of three villages forming a joint and undivided estate. The sharers, however, do not appear to have been members of a joint and undivided Hindu family, but to have enjoyed their respective shares (at all events their shares in *Gunniporebeja* and *Pemburinda*) in severalty. It is therefore clear that the mortgagor had power to pledge his own undivided share in those villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.

The partition which actually took place in this case was not one which had for its sole object the division of the joint estate by metes and bounds, an object which might be effected by the private agreement of the parties. It had for a further object the apportionment of the public revenue assessed on the whole estate, so as to relieve each proprietor from the obligation to pay that revenue in *solido*, and to make him responsible only for the amount to be charged on his separate and defined share. To such a partition the state necessarily became a party, for the protection of the revenue, and it was one which could only be effected by the machinery of the Regulation. The provisions of Regulation XIX. of 1814 appear to their Lordships to have been carefully designed to secure a fair partition of the estate to be divided. The division is to be made, in ordinary cases, by a public officer (the *ameen*) acting under the orders of the collector. Even if, under the 22nd section, the terms of the partition are proposed by the parties, or referred by them to arbitration, the law still requires the intervention of the *ameen*, before whom the accounts are to be produced and verified, and in whose presence and subject to whose inspection the division is to be made. When the terms have been so settled they must be sanctioned by the collector, and afterwards by the superior revenue authorities. The partition, after it has been so sanctioned, is declared by sect. 20 to be final, subject to the power reserved to the Governor-General in Council, by sect. 25, of directing a fresh apportionment of the revenue in cases of proved error or collusion at any time within ten years after the confirmation of the partition.

Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and, for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed.

It appears, however, to have been settled by decisions, and upon the construction of

the Regulations, first, that no such partition can be disturbed by a Civil Court; and secondly, that a mortgagee who has not perfected his title by foreclosure, and the consequential decree for possession, can neither compel a partition nor be a party to the *butwara* proceedings. And this latter point has been the foundation of one of the principal arguments addressed to their Lordships by the learned Counsel for the Respondents.

It was argued that, as the mortgagee could not be a party to the *butwara* proceedings, so, upon general principles of jurisprudence, he could not be held to be bound by them; that, consequently, he was at liberty to enforce his rights against an undivided share in every parcel specified in the mortgage deed to whichsoever of the co-sharers such parcel might have been allotted, but that he could not claim more. The objection that, in such a case, he must either forfeit part of his security or pursue his remedy against those with whom he had no privity of contract was met by the suggestion that the co-sharers thus injuriously affected would, upon the principle of implied warranty such as exists in this country on a title acquired by partition or exchange, have a remedy over against the mortgagor, even if the consequence of that were the re-opening of the partition. And it was further argued that, if the contention of the Appellant concerning a partition by *butwara* were correct, it must be equally true of a partition by private arrangement; and that in either case an unequal partition might be effected by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee.

Upon this it is to be observed that fraud would be a substantive ground for relief, and that, if the fraud supposed were effected by private arrangement, the mortgagee would have a clear remedy against all who were parties to it in the Civil Court.

In the more improbable case of such a fraud being effected by means of *butwara* proceedings, his remedy might be more difficult by reason of the finality of the partition, and the incapacity of the Civil Court to entertain a suit to disturb it. But without entering into these nice questions, which do not directly arise on this appeal, their Lordships deem it sufficient to observe that the finality of such a partition cannot be greater than that of the purchase of an estate at a sale for arrears of the public revenue; and that even in this latter case Courts of Justice have found the means of relieving the person injuriously affected by fraud. (See the case of *Nawab Sidhee Nuzur Ali Khan* and *Rajah Ojoodyaram Khan* (1)). In such cases, however, the alleged fraud is the foundation of the suit, and it is difficult to see upon what principle, in the absence of that or some equivalent cause of action, the mortgagee, who could not have sued the co-sharers for a partition, could have any remedy against them or their separated shares, which, under the *butwara*, had become distinct estates. And if he does not claim to have such a remedy, but is content to claim, as the subject of his security, that which his mortgagor has received in substitution of the original pledge, it is still more difficult to see what right the mortgagor can have to resist such a claim, or to say, I, being in possession of the new estate, insist on your being limited to the old.

In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made.

A distinction has, however, been taken between the parcels in the possession of the Respondents, *Ramoodeen Chowdry* and *Ramanoograh Sahoy*, and those in the possession of the *Mohunt* and of the Respondents *Mahomed Ahseen* and *Kaski Pershad Singh*, on the ground that the latter are portions of the *mouzah Tajpore*

(1) 10 Moore's I. A. C., 540; 2 P. C. J., p. 198.

Ruttunpore, which was expressly excluded from the security. It is certainly possible to conceive cases in which, the security not covering the undivided share in the whole estate, it might be difficult to determine which of the lands allotted in substitution of that share represented the mortgaged premises. No such difficulty, however, exists in the present case, inasmuch as the whole of *Tajpore Ruttunpore* was allotted to *Gopal Narain Singh* on the partition. He was already entitled to an 8-*annas* undivided share in this *mouzah*, which, being excluded from the mortgage, is not claimed by the Appellant. But it follows from this that whatever portion of this *mouzah* was allotted to him in excess of those 8 *annas* must have been so allotted in substitution of his interest in the *mouzahs Gunniporebaja* and *Pemburinda*, and, therefore, became subject to the mortgage. Their Lordships, therefore, are of opinion that, if all the parcels in dispute were still in the possession of *Gopal Narain Singh*, he would have no defence to the Appellant's claim in respect of any of them.

The only remaining question is, whether the Respondents other than the representatives of the mortgagor are in a better position than he would have been. They were all mere purchasers at execution sales of his right, title, and interest (the *Mohunt* purchasing at a date subsequent to the final foreclosure), and could acquire no higher rights than he possessed at the date of the purchase. In respect of such purchases, the question whether they were made with notice of the Appellant's title is not very material; but if it were, there is no doubt that they were made with such notice. Not only was the mortgage deed registered, but all the Respondents, except the *Mohunt*, whose title had not then accrued, seem to have been served with notice of the foreclosure proceedings, and might have claimed the right to redeem. They had, also, notice of the partition. To say that they were deceived by the description of the mortgaged premises is to affirm, not that they had no notice of the Appellant's superior title, but that they mistook its legal effect.

Their Lordships are therefore of opinion that the decree of the Principal *Sudder Amen* was right as against all the Respondents; and they will humbly advise Her Majesty to reverse all the four decrees under appeal; and, in lieu thereof, to make a decree dismissing all the four appeals, and affirming the decree of the Principal *Sudder Ameen* with the costs of the proceedings in the High Court. The Appellant must also have the costs of these appeals.

18th December, 1873.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal

BUNWAREE LALL SAHOO* *Appellant,*

versus

MOHABEER PROSHAD SINGH, KUMLA PROSHAD SINGH, RAM TUHUL SINGH, and DEENOBUNDHOO SINGH ... *Respondents.*

Act XI. of 1859, s. 5—Attachment—Sale for Arrears of Revenue.

Act XI of 1859 is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of former Statutes, whereby the Crown was empowered to sell estates for non payment of revenue

S. 5 of the said Act applies to estates which are under attachment issued under Act VIII. of 1859, and which are in the hands of a manager appointed on the application of the judgment debtor for the purpose of liquidating the debts Such attachments are not superseded by the appointment of such manager.

The words "arrears of estates under attachment" apply to cases where a portion only of an estate is under attachment, as well as to cases in which the whole estate has been attached.

THEIR LORDSHIPS, without calling upon Mr. *Leith*, Q. C., and Mr *E Macnaghten*, who appeared for the Respondents, proceeded to give judgment, which was delivered by

THE RIGHT HON SIR JAMES WILLIAM COLVILE:—

* 1 Macpherson's I. A, 89; 12 B. L. R, p 207.

These cases, in which the parties are the same and the facts are the same, turn upon a point of law which admits of being very shortly stated. The Plaintiffs bring their suit for the purpose of setting aside a sale for arrears of Government revenue. The Plaintiffs are the owners of separate shares of the estate in question. Certain decrees had been obtained against the Plaintiffs, and attachments had been issued under Act VIII. of 1859, some years prior to the sale in question. Upon the application of the Plaintiffs themselves, a *surburakur* or manager was appointed for the purpose of liquidating the debts. It does not appear to their Lordships that anything turns upon the appointment of this *surburakur*. It was, indeed, argued in the Court below, though scarcely contended for here, that the appointment of the *surburakur* superseded the attachment. Their Lordships are of opinion that the attachments were not so superseded, but were in force.

That being so, the estate being thus under attachment, with the exception of one portion belonging to a party of the name of *Gooroodoyal*, the question arises whether or not the provisions of sect. 5 of Act XI. of 1859 apply to this case? This enactment provides, "that no estate, and no share or interest in any estate, shall be sold for the recovery of arrears or demands of the descriptions mentioned below, otherwise than after a notification in the language of the district, specifying the nature and the amount of the arrear or demand, and the latest date on which the payment thereof shall be received, shall have been affixed, for a period of not less than fifteen clear days preceding the day fixed for the payment, according to sect. 3 of this Act, in the office of the collector or other officer duly authorized to hold sales under this Act in the Court of the Judge within whose jurisdiction the land advertised lies, and in the Moonsiff Court and Police *Thanna* of the division in which the estate or share of an estate to which the notification relates is situated." There is no question that this notice was not in point of fact given. The only question that arises is, whether this section applies to the sale of this estate, and in order to determine this it is necessary to read to the end of the section. The arrears or demands described below are: "First, arrears other than those of the current year or of the year immediately preceding. Secondly, arrears due on account of estates other than that to be sold." "Thirdly, arrears of estates under attachment by order of any judicial authority, or managed by the collector in accordance with such order." The arrears for which the estate in question was sold were neither of the first nor of the second descriptions; the only question is whether they fall within the third.

Now in this case the estates were not held under attachment by the collector of the district, and it has been argued that this provision applies only to the case of estates being held under attachment by the collector. But their Lordships are of opinion that to place such a construction upon the words of the Act would unduly limit their plain meaning, and it may be observed that this is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of the former statutes, whereby the Crown was empowered to sell estates for non-payment of revenue. The words of the Act are, "arrears of estates under attachment by order of any judicial authority." These words would *primâ facie* apply to all attachments by judicial authority under Act VIII. of 1859, which had been passed some two months before in the same session of the Legislature; and it is difficult to suppose that the Legislature having passed that Act should in a subsequent statute referring to attachments intend to omit a reference to attachments which their previous legislation had regulated.

But it has been said that the second portion of this sentence must limit the construction of the first. That the words "or managed by the collector in accordance with such order" must refer to attachments as well as to the mere management by the collector of estates; but it appears to their Lordships that no such construction necessarily follows. They think that the first part of the clause, "arrears of estates under attachment by order of any judicial authority," should

be read by itself, and thus would have the general significance which I have before expressed. The terms "managed by the collector in accordance with such order" would refer to cases in which the collector may manage estates by an order of judicial authority, which may or may not be an order for an attachment. By this construction both parts of the sentence would cohere; and it does not appear to their Lordships that the latter words narrow the plain and obvious meaning of the former.

An argument has been drawn from sect. 17 for the purpose of limiting the meaning of the words in sect. 5; but their Lordships would observe in the first place, that sect. 17 refers to a different subject matter. It refers, not to notices to be given, but to certain cases in which estates are not liable to sale at all. The words relied upon are these: "and no estate held under attachment, or managed by a revenue officer in pursuance of an order of judicial authority, shall be liable to sale for the recovery of arrears of revenue accruing during the period of such attachment or management, until after the end of the year in which such arrears accrue." It may be that in this section the words "held under attachment," may refer to "held under attachment by a revenue officer;" and it may be observed that where the Legislature intend to express this meaning they have used apt words; they have used the words "held under attachment by a revenue officer;" but the circumstance of their having used those words in this section, and having omitted them in the former, tends to strengthen the inference that their meaning in the former was different from what it was in the latter section. The words of the Act being plain, it is not necessary to speculate upon the reasons which may have induced the Legislature to pass them; but if such reasons were to be sought, one has not far to go for them. A creditor obtaining an attachment under Act VIII. had an inchoate interest in the land; his debtor could not alienate it, and no judgment creditor, even if his judgment were prior, who obtained subsequent execution, would have any rights against him. It may be said that the estate was virtually in the custody of the law. That being so, the judgment creditor had an obvious interest in knowing whether or not the revenue was paid; in other words, in knowing whether or not the estate in which he had an interest was forfeited. It may well be that the Legislature may have thought that, under those circumstances, he was entitled to be informed whether the estate was or was not liable to forfeiture, in order that he might step in, as he might under sect. 9 of the same Act, and pay the revenue and prevent the forfeiture.

It has been further argued that the words "arrears of estates under attachment" must refer to estates the whole of which are under attachment, and that if any portion or any share of an estate, however small, is not under an attachment, the clause does not apply. In their Lordships' opinion, this would be to place again an unduly narrow construction and to limit the meaning of plain words. It appears to their Lordships that an estate any portion of which is under attachment cannot be said to be free from attachment, and is, in fact, subject to attachment. The reasons why the Legislature should direct information to be given to a creditor would apply as much to the case of the creditor having a lien on a small, as to one having a lien on the whole or a large part of the estate.

Entertaining this view, their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that this judgment be affirmed and the appeal dismissed, with costs (1).

(1) It is worthy of notice that Act I. of 1845, sect. 5 (upon which sect. 5 of Act XI. of 1859 has been modelled), provides in the case of intended sales for the recovery of "arrears of estates under attachment by order of any judicial authority" (saying nothing of the collector) special notifications nearly the same with those which are required by Act XI. of 1859, sect. 5.

19th December, 1873.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BABOO DOORGA PERSHAD, BABOO BHEEMUL DASS, WOOMOY CHAND, *alias* CHUTTUN BABOO, SON and Heir of the late MONEE LALL, and MUSSUMAT KUNDUN KOOMAR, Mother and Guardian of JAIWANT SAHOY, a minor Son of MONOHUR DASS, and Heir of MAHABEER PERSHAD, (Deceased) (Defendants) } *Appellants*,

versus

MUSSUMAT KUNDUN KOOWAR, (Plaintiff) } *Respondent*.

Hindu Law—Partition—Division—Status of the Family.

In all cases of division of joint property, not carried out by a partition by metes and bounds, the question whether the status of the family has been thereby altered, is a question of intention of the parties, to be inferred from the instruments which they have executed and the acts which they have done to effect such division.

An *ikrarnamah*, which did not recite a previous status of indivision, and did not in terms declare that the parties thereto should thenceforth be an undivided family, was construed nevertheless to mean that the parties would thenceforth hold and enjoy the property, which was the subject of it, in severalty.

Appovier v. *Rama Subba Aiyan* (1) followed.

During the argument, Mr. John *Cutler*, who appeared for the Respondent, being referred to by the Court, declined to admit the correctness of the decision of the High Court on the subject of the inapplicability of the Jain law. He was not called upon to address the Court, but at the close of the argument for the Appellants their Lordships' judgment was pronounced by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The Respondent in this case is the childless widow of *Monsobirt Dass*, who was the son of one *Showkee Lall*, and the Appellants are the descendants of the three sons who, with *Showkee Lall*, constituted the family of the common ancestor.

The family must be presumed to have been originally joint. The suit was brought by the widow, claiming as heiress of her deceased husband his share of the property in question. The family are *Agurwallas* by caste, but *Jains* in religion, and as the suit was originally framed she claimed to be entitled to the property of her late husband whether the family was divided or undivided, under the law regulating successions among the *Jains*. The third and fifth issues settled in the suit raised this question; and the Principal *Sudder Ameen* decided those issues, as well as those upon which the determination of this appeal depends, in favour of the widow.

Upon appeal the High Court held, first, that there was no sufficient evidence in the cause to shew that the law of succession among the *Jains* was different from that of the ordinary Hindu law, governing the particular province in which the property was situated, which in this case is the law of the Mitacshara; but, secondly, that in the circumstances of the case the Plaintiff was under that law the heiress of her husband, and entitled to recover the property in dispute. Mr. *Cutler*, who appeared for the Respondents, did not altogether give up the first point; but as their Lordships have formed an opinion that the judgment of the High Court is correct upon the second, they will assume that it was equally correct in respect of the law regulating the succession of this family. The question then is reduced to this: was

* 1 Macpherson's I. A., 55; 13 B. L. R., 235;
(1) 11 Moore's I. A., 75; 2 P. C. J., 218.

this family at the time of the death of *Monsobirt Dass* an undivided Hindu family in such a sense that, according to the law of the Mitacshara, his widow was entitled merely to maintenance, and his share passed by survivorship to the nearest male members of his family; or was it so separate in estate that by the operation of that law the widow was entitled to succeed to her husband?

It is an undisputed point in the case, that the members of this family in October, 1851, that is, in the lifetime of *Monsobirt Dass*, executed an *ikrarnamah*, and that thereafter, if not before, the property was managed and enjoyed in conformity with the provisions of that instrument.

The learned Judges of the High Court have held that, upon the authority of the case of *Appovier* v. *Rama Subba Aiyan and Others* (1), the family must be taken to have been separate in interest and title, and therefore that the widow was entitled to succeed. The learned Chief Justice, it may be inferred from his judgment, would have been, independently of that case, of this opinion upon the construction of the *ikrarnamah*. The other learned Judge, Mr. Justice *Jackson*, seems to have had serious doubts whether that instrument did operate as a division of the family, but conceived himself bound, as we read his judgment, by the authority of the case in the Privy Council.

The authority of that case is of course binding upon us here; and the only question is, whether the present case is distinguishable from it. It is not necessary to go through the whole judgment, as Mr. *Leith* called upon us to do, or to consider with nice criticism whether this or that proposition is or is not stated in words stronger than were necessary. The broad point which their Lordships conceive to be decided by the case, is that there may be division of a joint and separate Hindu family, and of the joint property without a regular partition by metes and bounds. Lord *Westbury*, after stating that the term division is capable of a twofold application, that there may be a division of right, and there may be a division of property, says, "Thus after the execution of this instrument there was a division of right in the whole property, although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition." In another passage he says, "We find, therefore, a clear intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition." And again, speaking of the legal effects of the deed, he says, "It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subjectmatter." The fair inference from the decision seems to their Lordships to be, that inasmuch as there may be a division of the kind there spoken of, viz., a division which, though not carried out by a partition by metes and bounds, would nevertheless alter the status of the family, the question in every particular case must be one of intention, whether the intention of the parties to be inferred from the instruments which they have executed, and the acts they have done was to effect such a division.

The decision of this case must turn upon the application of these principles to the *ikrarnamah*, and their Lordships are of opinion that the construction which the learned Chief Justice put upon that instrument is substantially correct. The family at the time of the execution of the instrument appears to have been in that state which so often gives rise to very difficult questions in Courts of law, and of which we had recently a very remarkable instance, namely, the question, whether the family is joint or separate; and if joint, in what degree and in what particulars the different members of it possess

(1) 11 Moore's I. A., C., 75; 2 P. C. J., p. 218.

separate property? It is clear that some members of this family before the date of the *ikrarnamah* had been carrying on business separately and on their own account. There was also a *kotee* in which they were jointly interested, and there seems to have been a number of landed estates, some of them standing in the name of one member of the family, and some of them standing in the name of another. That state of things may, however, afford an argument in favour of the contention of either party. On the one hand it may be said that in executing the *ikrarnamah* the members of the family desired only to make clear what was to be joint, and what was to be separate. On the other hand it may be argued that the object of the *ikrarnamah* was to establish beyond all future question the undivided status of the family.

The learned Chief Justice appears to have assumed that the instrument was merely declaratory of the antecedent state of the family. Their Lordships do not think it necessary to decide that question, as to which there may be some doubt, because they entirely agree in an observation which he subsequently makes, to the effect that if the instrument did not declare that to have been the state of the family, yet upon the true construction of it, it created such a state. However, there are passages which support the view of the Chief Justice as to an antecedent division of interest. The document begins by stating, "We four co-sharers being in possession of equal shares, viz., of one-fourth each, without contention from any one, appropriate and enjoy the profits thereof in proportion to our respective shares." Those words appear to their Lordships to point to an appropriation and enjoyment of the profits inconsistent with that which is the normal state of enjoyment of a joint and individual Hindu family. It then goes on to say, "Now, with a view to avoid future complications, in consultation and agreement among ourselves, we have under our signatures executed four *chittas* with regard to the said *kotee* up to 24th of the month of *Kowar* of the year 1259 *Fuslee*, and four schedules with regard to houses and shops, both ancestral and purchased, mangoe and *mahawa* orchards; and also four schedules regarding silver articles, tent, &c., articles for assemblies and conveyance, &c., and all the partners have retained one of each." The deed thus proceeds: "We have executed this deed to have matters entirely above board, and to have names enrolled in the Government record in respect of the estates. It is desirable and very necessary for us declarants, according to this deed, to have the names of all the parties enrolled for equal shares." Upon this it may be remarked that there could be no actual necessity, if they continued as a joint family, "to have the names of all the partners enrolled for equal shares, viz., one fourth in the name of me, *Lalla Mukhun Lall*, one fourth in the names of us, *Lalla Mahaber Pershad*, and *Mundhur Dass*," and so on. There is not much, if any, evidence on the record as to what was done in order to procure a mutation of names, or to carry out this stipulation of the deed; but if it were carried out in the way proposed, that appears to their Lordships to be strong *primâ facie* evidence of the intention to hold the undivided shares as the separate property of each co-partner. It may not be conclusive, but at all events it is strong *primâ facie* evidence of such an intention. It is confirmed, in their Lordships' opinion, by what appears upon the face of the *butwara* proceedings, in which the present Respondent, the Plaintiff, is named as the heir of her late husband, and representing his interest in the proceedings taken for a formal partition by metes and bounds of certain properties between the whole of this family on the one side, and certain co-sharers in those properties on the other. The deed next proceeds to deal thus with the *kotee*: "Now also by amicable settlement the business of the *kotee* will continue to be carried on jointly and in partnership in the same manner as carried on heretofore. We will amicably transact all matters connected with the *kotee* in consultation and agreement among ourselves, and will keep appropriating and enjoying the profits thereof in proportion to the aforesaid shares, viz., equal one-fourth share each." It then provides for any estates which may

be purchased out of the moneys of the *kotee*.

The Principal *Sudder Ameen*, upon the inspection of the accounts, has found (and the learned Judges of the High Court agree with him) that the accounts were kept in a way from which it is to be inferred that when the accounts of the *kotee* were balanced each of the four partners was entitled to his separate share of the profits realised; or, in other words, that the accounts were kept as they would be kept between four ordinary partners, and not as they would be kept as between members of a joint and undivided Hindu family.

The deed then provides that certain silver articles, tents, carpets for assemblies, and conveyances, shall continue as before, in possession of all four sharers. Their Lordships do not think that that is a very unusual stipulation as to certain articles of property, even in cases in which partition is carried out formally, and, as to the greater part of the property, by metes and bounds. Therefore they can infer from that stipulation no intention contrary to the intention which the learned Judges of the Court below have imputed to the parties in framing this deed.

Their Lordships, after carefully considering the whole deed and the evidence in the cause, have come to the conclusion that this case is undistinguishable from that in the 11th *Moore*; that the real intention of the parties to the *ikrarnamah* was to hold and enjoy the property which was the subject of it, in severalty; and that the decree of the Court below is correct.

It is to be regretted, no doubt, that the parties who make such arrangements should not declare on the face of the deed what their intention is, and that, if they are an undivided family, it is their intention thenceforth to cease to be so. On the other hand, it is to be observed that there is no statement upon the face of the deed in question here that the status of indivision had continued up to its date.

On the whole, their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal, with costs.

16th, 17th, 23rd, 24th, 28th, 29th, January, and 18th, March, 1874.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

RAJAH MUTTU RAMALINGA SETUPATI, Zemindar of Ramnad, the Adopted Son of the late Zemindar RAMASWAMI SETUPATI, and Survivor of RANEE SETUPATI PARVATAVARDANI NAUCHIAR, late Zemindar of Ramnad, (Co-Plaintiff, deceased) ... ... — *Appellant*,

versus

PERIANAYAGUM PILLAI, Guardian of RAMANADA PANDARAM, a Minor, Heir to AMBALAVANA PILLAI, late (Defendant, deceased) — *Respondent*.

Right of appointment of—Custom—Onus Probandi.

The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them. The only law as to *Mohunts* and their office, functions, and duties is to be found in customs and practice which are to be proved by custom.

A *Zemindar* claiming a customary right of confirmation of the election of a *Mohunt* must prove the custom.

A *kararnamah* taken in troubled times from the guardian of an infant *Mohunt*, acknowledging the right of the *Zemindar* to control and remove the *Mohunt*, is of little, if any, weight, as evidence of the custom.

The superintending authority over, and the right to visit religious endowments and prevent and redress abuses in their management; exercised by the old rulers of the country, passed to the British Government, and was exercised by it before Regulation VII. of 1817 of the Madras Presidency, which merely defined the manner in which that power was thenceforth to be exercised.

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* 1 Macpherson's I. A., p. 209.

18th March, 1874.

THEIR Lordships took time to consider their judgment, which was now delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

The question raised in this appeal relates to the right of the *Zemindars* of the large and important *zemindary* of *Ramnad* in the *Madura* district, either to appoint, or to confirm the election of, the *pandaram* or head of the celebrated and richly endowed *pagoda* of *Rameswarem*.

The possessions of this temple are estimated by the Appellant to be of the value of £200,000.

The plaint of the *Ranee Zemindar* (now represented by the Appellant, the present *Zemindar*), filed so long ago as the year 1857, sought to oust the original Defendant, *Ambalavana Pillai*, from the office of *pandaram* which he *de facto* held.

It alleged that the *Zemindar* was the *dharmakarta* or trustee of the *pagoda*, and had the right to conduct the management of it. It directly also asserted her right to appoint the *pandarams*, and concluded with a prayer for a decree to the effect that the *Zemindar* should conduct the management of the *pagoda*, and that the Defendant *pandaram* should be removed from the management, and pay over the money in his hands to the *Zemindar*.

The Plaintiff also charged the *pandaram* with misappropriation of the property, and the prayer for his removal was based on this charge, and also, though vaguely, on the ground of his not having been appointed to, or confirmed in, the office by the *Zemindar*.

The charges of misappropriation were not sustained by the evidence and have been abandoned; so also has the claim of the *Zemindar* to be placed in the direct management of the *pagoda*, and to have its funds placed in his hands. And the single question argued at their Lordships' Bar, and to which issue the cause was brought by consent in the High Court is, whether the *Zemindar* has established the right to appoint or to confirm the election of the *pandarams* of this great *pagoda*, and was entitled to a decree for the removal of the Defendant from the office of *pandaram* because he was not so appointed or confirmed.

The early history of the *pagoda* is obscured by time, and its foundation cannot be shewn. But it is evidently an ancient temple of great renown, which has long attracted pilgrims from all parts of *India*. It is situate on an island in the extreme south of *India*, connected with the lands of the *zemindary* by a causeway. The *Rajahs* of *Ramnad* were the guardians of this causeway, and had thence acquired the title of *Setupati*, or *Lord of the Causeway*.

It is asserted on the part of the *pandaram* that the *pagoda* of *Rameswarem* was an independent endowment, in which the *Rajahs Setupati* had no rights of patronage, or control, other than the general authority they assumed as the rightful or *de facto* rulers of the district, to prevent abuses in the management of its affairs, and to see that its laws and usages were properly observed.

The first records in the evidence are some inscriptions on stones found in the walls of the *pagoda*. The earliest inscription is on a *mandapam*, and states that the *mandapam* was erected by *Muneramo Nathan* "as a place to halt for the god *Ramesar*, who was attached to this *pagoda*, founded by *Mall* or *Vishnu*." Its date is in the *Salivahana* era 1520, which corresponds with the Christian year 1598. It is evident from this and other inscriptions that the *pagoda* was an ancient temple at this time.

Subsequently, in the year of the *Salivahana* era 1607, the *Rajah* of *Ramnad* made a gift of five villages, and in 1609 another gift of eight villages to the *pagoda*. These grants, as the dates shew, formed no part of the original endowment of the *pagoda*, and no condition is found in them creating or reserving any rights of patronage or interference in the affairs of the temple. There is evidence of similar gifts of villages from other *Rajahs*, among them the *Rajah* of *Sivagunga*, shewing that the *pagoda* had been endowed by other donors than the *Lord of Ramnad*. Indeed, of the seventy villages belonging

to the *pagoda*, thirteen only are proved to have been given to it by that *Rajah*. The right, therefore, now claimed by the *Zemindar* of *Ramnad* is not shewn to have an origin in the foundation or subsequent endowment of the *pagoda*.

It may be observed, before further considering the evidence, that the case on both sides is singularly deficient in materials to elucidate the constitution of the community or brotherhood attached to this *pagoda*, the duties of the *pandarams*, and whether they are selected from a particular family or class. The claims of the *Zemindars* also have been put forward in the most uncertain way. They at one time asserted a right to be chief managers, and directly to appoint the *pandarams* as sub-managers, but that claim was not strongly urged by Mr. *Mackeson* at their Lordships' Bar. He mainly contended, in his elaborate argument, for the right to have the *pandarams* presented to the *Zemindars* for confirmation when nominated or elected by others. It is obvious, however, that there is a great distinction between a right to appoint and one to confirm; and if the latter only is insisted on, it still might be expected that some definite information would be given as to the manner of electing the candidate to be presented for confirmation. The absence of such evidence may perhaps be accounted for by the fact that the claim it was at first attempted to sustain was the right of direct appointment.

It is not, however, unimportant to observe that it appears to be the common practice in the *Madras* Presidency for *pandarams* to appoint their successors. (See Mr. *Norton's* Leading Cases, pp. 592-3.)

But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them.

That principle was laid down by this Committee in an appeal involving the succession to the office of *Mohunt* of a richly endowed *mutt* in *Rajgunge* in these terms:—"It is to be observed that the only law as to these *mohunts* and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony." (See 11 *Moore's* Ind. Ap. Ca., 428; 2 P. C. J., p. 307.)

In this case the burden of proving that the right he claims is supported by usage lies upon the *Zemindar*, and the question to be decided is, whether he has sustained it.

It was contended on his behalf that the *Zemindar* of *Ramnad* is *dharmakarta* of the *pagoda*, and that it must be inferred from this title he had the power he claims. But the right to bear this title, and the functions belonging to its holder, are among the disputed questions involved in the general controversy between the parties. The title "*Dharmakarta*" may have a definite signification, but their Lordships observe, in the proceedings of this record, it is used in different senses, sometimes to denote a trustee who appoints the *pandaram*, or head manager, and sometimes the manager himself. In the long contention which took place between the *Zemindar* and the *pandaram* in the collectorate, as to the titles by which each was to address the other, the collectors refused to allow either to assume this title. Their Lordships, upon the imperfect information disclosed by the record, will therefore abstain from using this appellation, and will not attempt to define what the title as regards this *pagoda* indicates, or to whom it belongs; but will proceed to consider the substantial issue they have to determine, viz., whether the *Zemindar* has established the right, under whatever name, to make or confirm the appointment of *pandarams*.

It has been already stated that he has failed to shew that such a right is derived either from the original foundation or any subsequent endowments of the *pagoda* by his predecessors.

The Counsel for the *Zemindar* strongly relied on statements found in certain depositions as affording proof of the direct appointment and removal of *pandarams* by the *Rajahs* of *Ramnad* prior to the

Christian year 1793; and if these statements were admissible and trustworthy, they would afford strong support to the *Zemindar's* case. The depositions were taken in 1815, on the death of *Pandaram Ramanada*, who had held the office from 1793. On his death *Venkatachellum* claimed to be his successor, alleging that he had been appointed by his predecessor according to custom. Objections were made to Mr. *Peter*, the Collector of *Madura*, against his appointment, upon the ground that he had not been nominated by the dying *pandaram*, but had been put forward after his death by certain persons attached to the *pagoda*. The collector required the head *tahsildar* to make inquiries as to the fact and time of *Venkatachellum's* appointment, and several depositions, the authenticity of which is not questioned, were taken by him, bearing on this matter. The statements in question appear to have been made at this time, but there is no satisfactory evidence to shew they were obtained by any competent or independent authority. It is suggested that they were taken by the *tahsildar*, but there is no proof of this, and the *tahsildar's* report is not forthcoming On the other hand, the form of the documents leads to the inference that they were not so taken. They are addressed "to the Company's *Circar*," signed by the deponents, and attested by two native witnesses, from which it may be inferred that they were written statements obtained on behalf of the *Zemindar*, and sent to the *tahsildar* to be forwarded to the collector. Their Lordships think that such statements ought not to be received as proof of an important right, and that they were properly rejected as inadmissible by the High Court.

The first appointment of which there is trustworthy evidence occurred in 1793. In that year *Muttu Ramalinga*, then *Setupati* of *Ramnad*, appointed *Ramanada* to be *pandaram*.

Mr. *Nelson's* "Manual of the *Madura* Country," compiled by order of the *Madras* Government, describes the disturbed state of *Ramnad*, and the rest of *Madura* at this time, and for some years previously. A British force had been employed against the *Setupati* to enforce the rights of the *Nabob* of the *Carnatic*, and the district had afterwards passed under the direct authority of the British Government. This appointment of *Ramanada* was near the period of the transition of the sovereign power from the *Nabob* to the British Government. It appears from the authority above cited that, in 1792, *Muttu Ramalinga* shewed symptoms of rebellion against that Government, and in 1795, he was deposed, and his sister, the *Ranee*, installed in the possession of the *Raj*. It was with this *Ranee* the permanent settlement was made in 1803 (1).

The *Pandaram* appointed by *Muttu Ramalinga* in 1793, was only five years old, and he took from this child a *kararnamah*, which is much relied on by the Appellant.

It commences thus:—"As you have been pleased to appoint me for the management of the affairs of the *pagoda* at *Rameswaram*, I will cause *puja* to be duly performed in the *pagoda*," &c.

The instrument also contains the following passages:—

"In case of my dealing friendly with the enemies of the *zemindary* you may remove me, and appoint another person in my room. . . . . If I act improperly in these affairs, I shall submit myself to the orders of the *Zemindar*."

This appointment, and the *kararnamah* which followed it, would, under ordinary conditions, be entitled to great weight, but when the disturbed state of the district and the age of the *pandaram* are regarded, the transaction loses much, if not all, of its force as evidence of the right claimed.

Ramanada filled the office of *pandaram* until his death in 1815. After this date much valuable evidence is afforded by the proceedings of the collectors.

The permanent settlement, as already stated, was made with the *Ranee* in 1803; but this settlement did not include the villages belonging to the *pagoda*, which had long been held free from tribute. Some years before 1815, both the *zemindary*

(1) See Part IV., p. 154.

and the *pagoda* had been under attachment. It was contended that the *pagoda* had been attached as part of the *zemindary*; but, although the orders of attachment are not set out, enough appears on the record to negative this suggestion. It was not until after the *zemindary* had been attached in consequence of a disputed succession, that the *pagoda* was placed under attachment on account of the alleged mismanagement of the *pandaram*.

Such was the state of things in 1815, when *Venkatachellum* claimed to be *pandaram* on the nomination of his predecessor. Two documents appear on the record, both dated 19th July, 1815, and addressed to the collector; one from the dying *pandaram Ramanada*, stating that he had appointed *Setu Ramanada* (*Venkatachellum*), whom he describes as "a relation of mine by blood, and a descendant of our family," to be his successor; and another from *Venkatachellum* announcing his appointment, praying for instructions for his guidance, and that the attachment of the *pagoda* might be removed.

The *Rance Setupati* disputed this appointment. In a letter of the 3rd August, 1815, she prays the collector to prevent his being invested with the *parivattam* cloth, and the other emblems of office. An inquiry was thereupon directed to ascertain whether *Venkatachellum* had been appointed by the dying *pandaram*; and before receiving any report from the *tahsildar*, the collector, on the 9th August, directed that officer to inhibit the installation of *Venkatachellum* as *pandaram* "until further orders."

This temporary injunction was, however, removed by the same collector by an order of the 27th of July, 1816, directing the *tahsildar* that *Venkatachellum* should be installed as *pandaram* with all usual ceremonies according to custom, and he was installed accordingly.

It was contended for the Appellant that the order suspending the installation was made by the collector as the representative of the *Zemindar*, whilst the *zemindary* was under attachment, and that the order authorizing it was a new appointment of *Venkatachellum* in the same right.

Their Lordships are unable to concur in this view of the acts of the collector. They think the proper construction to be placed on his action in the matter is, that the orders first suspending, and then directing the installation, were made by him as a public officer on the part of the Government, and not in virtue of any right derived from the *Zemindar*. It also appears to them that the last order did not profess to be, and was not, an original appointment, but was an act of the collector to give effect to the title derived from the nomination of the former *pandaram*. They are consequently of opinion that *Venkatachellum's* title to the office must be considered to rest upon the nomination of his predecessor, and not upon any appointment or confirmatory act proceeding from the *Zemindar*.

It will be convenient to consider what powers the Board of Revenue and the collectors possessed, or *de facto* exercised in relation to religious houses.

The proceedings upon the accession of *Venkatachellum*, above described, took place before Regulation VII. of 1810 was passed. But it is evident that before that regulation the British Government, by virtue of its sovereign power, asserted, as the former Rulers of the country had done, the right to visit endowments of this kind and to prevent and redress abuses in their management.

There can be little doubt that this superintending authority was exercised by the old rulers. Mr. *Nelson* in the *Madura* Manual says: "The principal *pagodas*, with their enormous establishments, their officiating priests, &c., were managed by a *dharmakarta*, or trustee and manager for life, who, as stated above, was usually a monk and *guru*." He had said just before —"The manager of the great *pagoda* at *Madura* seems to have been always a *pandaram* or *saiva* monk." Mr. *Nelson* evidently designates the manager, and not the person appointing him, as *dharmakarta*, who might be a monk or *pandaram*, in which case he would probably be known by the latter title. He then describes the duties of the manager:—"He collected and disbursed the revenues derived from the lands granted to the *pagoda* by the King and others, and from fees and offer-

ings; appointed the officiating *Brahmans* and servants," &c.

He then says:—"The *dharmakartas* held but little communication one with another, and recognised no earthly superiors except the King himself. Each was independent of all control, and acted altogether as he pleased. This freedom led naturally to gross abuses, and the King was compelled occasionally to interfere in the management of some of the churches." (Part III. chap. 7, p. 162.)

The King here spoken of was the ruler of *Madura;* but there is little doubt that the *Setupatis* of *Ramnad*, although the vassals of the *Pandya* of *Madura*, exercised sovereign power within their own territories. Mr. *Nelson* says:—"There is, therefore, a considerable amount of evidence which goes to support the claim to high antiquity put forward by the *Ramnad* royal family. And, seeing that *Rameswarem* has been resorted to annually by large bodies of pilgrims, and that this would have been simply impossible unless some strong-handed prince or princes were ruling over the country in the neighbourhood, I think it may be pretty safely concluded that the principality of *Ramnad* had been in existence for many centuries before *Sadeika Sevan* (who seems to have lived in the sixteenth century) was made *Setupati*." (Manual, p. 111.)

It appears, therefore, to be highly probable that the *Setupatis* in the days of their power exercised control over the *pagoda*, not, however, in virtue of any proprietary right of patronage, but as the rightful or *de facto* rulers of the district. The powers they enjoyed as Sovereigns, whatever they may have been, have now passed to the British Government, and the present *Zemindars* can have no rights with respect to the *pagoda* other than those of a private and proprietary nature, which they can establish by evidence to belong to them.

That the new rulers, at an early date, exercised a controlling supervision and authority over the temples very clearly appears from a letter written in 1803, by the Board of Revenue to Mr. *Hurdis*, the Collector of *Madura*, of which the following extracts are printed in the Manual (Part IV., chap. 5, p. 130):—

"The subject of *devastanum* lands is of great importance to the happiness of the people, and the attention paid to the interests of the *pagodas* by the immediate officers of the Government has been attended with the most beneficial consequences to the people in different parts of the peninsula."

After saying that the Governor-General had directed that the collector should proclaim the restoration of the lands resumed from the *pagodas* by the late Government, the letter proceeds thus:—

"The administration of these lands forms a distinct question. The extensive abuses found to prevail with respect to these lands, with which the *pagodas* of *Dindigal* were endowed, render it expedient that the lands as affairs of the *pagodas* of *Madura* be conducted in the same manner as those of *Dindigal, under the immediate care of the collector*."

It is abundantly clear from this letter that long before Regulation VII. 1817, the British Government not only assumed the power to superintend the management of the property and affairs of the *pagodas* throughout the Peninsula, but exercised its authority through the agency of the collectors.

The preamble of the Regulation of 1817, after stating that large endowments had been granted by former Governments as well as by the British Government and individuals for the support of temples, and that the produce of such endowments were, in many instances, misappropriated, declares it to be "the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor." It then enacts that the general superintendence of all endowments should be vested in the Board of Revenue, and prescribes the duties to be performed by them to prevent misappropriation of the funds. It also authorizes the Board to appoint local agents, and declares that the collector of the district shall be *ex officio* one of such agents. (Sect. 7 and 8.)

The Counsel for the Appellant, whilst admitting that the proceedings of the collectors subsequent to this Regulation might be equivocal with regard to the

character in which they acted, strongly insisted that the acts of those officers prior to it could only have proceeded from, and must therefore be referred to, the rights of the *Zemindar* vested in them under the attachment. This contention is, however, entirely disposed of, when it is established that at an early date the power of superintendence was intrusted by the Government to the Board of Revenue, and the collectors. The Regulation, in fact, merely defined the manner in which that power was thenceforth to be exercised.

The general authority of the collectors as agents of the Government being thus shewn, the ground is cleared for considering the question which was so much discussed on the argument, whether the collectors in the various proceedings found in the record were acting under such general authority, or, as the Appellant asserts, in virtue of the rights of the *Zemindar*.

From 1815 until 1828, during the whole of which time both the *zemindary* and the *pagoda* were under attachment, there is no doubt that the *pagoda* was managed by the *pandaram* under the control of the collectors, even in minute details, but the Counsel for the Appellant did not establish to their Lordships' satisfaction the inference he sought to draw from this evidence, that the collector's interference arose from his representing the *Zemindar's* interest. On the contrary, considering that the *pagoda* had been attached for the alleged misconduct of the *pandaram*, and having regard to the powers of superintendence entrusted to the collectors as agents of the Government, both before and under the Regulation of 1817, they think that their interference ought to be referred to the exercise of these powers. This view is supported by the reports of the collectors made during a subsequent attachment to be presently adverted to.

The long litigation respecting the succession to the *zemindary* ended in 1828, when a judgment of His Majesty in Council established the title of *Ramaswami Setupati* to the *zemindary* of *Ramnad*.

The attachment which had so long existed was thereupon removed. It appears from an order of the collector, dated the 21st of April, 1829, addressed to *Ramaswami Setupati*, that on this removal the *pagoda* was ordered to be delivered over with the *zemindary* to the *Setupati*, and for some time he appears to have assumed to control the management of it, as the collectors had done. The Appellant's Counsel urged that this delivery of possession to the *Zemindar*, besides being in itself strong evidence in his favour, throw light on the proceedings of the collectors throughout the time of the attachment. If the orders relied on had not been corrected, they might have been rightly so regarded; but they were, after full inquiry, superseded by subsequent orders hereafter referred to.

On the 21st of April, 1830, *Ramaswami Setupati* died, having devised the *zemindary* to his two daughters. Both being minors, the management of the estate became vested in the Board of Revenue, acting as the Court of Wards, and so remained until 1846, when, on the death of the minors, the *zemindary* was restored to their mother, *Ranee Setupati*, who was the original Plaintiff in the present suit.

Whilst the estate was under the care of the Court of Wards, a manager was appointed on behalf of the minor *Zemindars*. Disputes appear to have arisen between this manager and the *pandaram*, in consequence of the latter being kept out of possession of the *pagoda*, and the manager assuming the control of it.

The then collector, Mr. *Vivash*, being appealed to by both, investigated their complaints, and on the 20th of September, 1832, made a report to the Board of Revenue, which is well worthy of attention.

In that report, paragraph 2, Mr. *Vivash* says:—

"The *devastanum* and *chuttrums* of *Rameswarem* were assumed by Mr. *Peter*, with the sanction of your Board, in consequence of mismanagement by the *pandaram*, and entrusted to the superintendence of the head *tahsildar* of *Ramnad*, and subsequently to the control of the sub-collector, who continued to manage the *devastanum* affairs until the *Ramnad zemindary* was made over to *Ramaswami Setupati*, the *Zemindar*, in the year 1829. The *Rameswarem Devastanum* was entrusted to the *Zemindar's* management at

the same time, as a temporary measure, in consequence of the sub-collector having been appointed to another part of the district, and the *Zemindar* was the only responsible person to whom I could with propriety and safety entrust the management pending the determination of your Board as to provisions for the future *devastanum* management."(1)

This statement confirms the view their Lordships derived from the evidence, that, under the attachment, the collectors acted as the agents of the Government in superintending the *pagoda*. It also shews that when, on the discharge of the attachment in 1889, the *pagoda* was entrusted by Mr. *Vivash* to the *Zemindar's* care, it was not so done because of any right belonging to him as *Zemindar*, as the Appellant alleges, but as "a temporary measure" in the absence of the sub-collector: the *Zemindar*, being a responsible person selected by the collector, to have the care of it until the Board had decided upon the future management.

This view is confirmed by the statements of fact contained in other parts of the report. Paragraph 3 states that the *pandaram* appointed in 1815 was not allowed, as his predecessor, exclusive control, but, "was ordered jointly with the *Circar* servants to conduct the *devastanum* affairs."

Again, paragraph 4, says:—"The *Ramnad Zemindar*, or rather the manager on the (minor) *Zemindar's* behalf, urges his right to the management. . . . . It appears to me unnecessary to dwell upon this claim, as the *Rameswarem devastanum* has never been managed by the *Zemindar* since the date of the permanent *sunnud*; and before that period it is universally admitted that the *pandarams* in succession conducted exclusively the *devastanum* affairs."

It may be allowed that this latter statement ought not to be relied on as proof of the fact said to be admitted, but what the collector says of the practice since the permanent *sunnud* would be derived from official records and experience.

Mr. *Vivash* further reports that, in his opinion, the supervision of the *Zemindars* would be useful to check abuses, and his recommendations are contained in paragraphs Nos. 5 and 6:—

"I think, therefore, that the *pandaram* might, without objection, be placed in immediate management of the *devastanum* of *Rameswarem* and its revenues, that the expenditure and the *sibbundy* be arranged agreeably to a list, fixed with reference to the usual disbursements, and that the *Zemindar* be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses; and that periodical accounts of receipts and disbursements may be rendered to the *huzur*, for the purpose of preparing which, a *huzur goomastah* may be employed at *Rameswarem*."(1)

"Concurring with my predecessor, that control over the *devastanum* expenditure and the *devastanum* affairs, is necessary to preserve its revenues from spoliation, and to enforce a due performance of the necessary and usual ceremonies; as the country of *Ramnad* is under the management of the *Zemindar's* family, I would recommend that the *Zemindar* be nominated to this duty, because they are people of integrity and responsibility, and would, I have no doubt, discharge the duty of supervision with advantage to the interest of the *devastanum* and their own credit."(1)

It appears that this report was laid before the Governor in Council, and a letter was thereupon written, and transmitted through the Board of Revenue to the collector, approving of his proposed measures, and directing them to be carried into effect.

The collector afterwards sent an order to the manager of the *zemindary*, under the Court of Wards, directing him to put the *pandaram* in possession of the *pagoda*. The manager having hesitated to obey it, the collector issued the following peremptory order:—

"To the Guardian of *Ramnad*.

"I have received and perused the *Arzi* No. 14, addressed by you on the 23rd instant, to the effect that the *pagoda* of

(1) 1 Mac. I. A., p. 213.

(1) 1 Mac. I. A., p. 214.

Rameswarem and the villages attached to it, should not be put in the possession of the *pandaram*, and that your man and the *pandaram's* man should jointly hold the management. Having examined the documents, &c., connected with the above matter for several days, I wrote to the Board the circumstances under which the said *pandaram* held the said *pagoda* and the villages attached thereto, for a long time prior to the attachment by the *Circar*. In accordance with the orders issued in this matter by the Government and the Board, you were ordered to allow the *pandaram* to hold the said *pagoda*, &c. You should do so immediately. The delay is unfair. You wrote that your servants also should be employed together. This will create a great disturbance. Therefore the custom must be followed up. Nothing can be done contrary to the custom. However, if the said *pandaram* misbehave for the future, it will be then taken into consideration. If you do not give him possession immediately, the *Circar* officers shall be sent to put him in possession." (1)

(Signed) *R. J. Sullivan*,
Acting Collector.

28th November, 1832.

Nothing can be more decisive than this action of the collector on the question of the character in which he was acting. So far from relying on the right of the *Zemindar*, he acted in direct opposition to the claims of his guardian.

The *pandaram (Venkatachellum)* having thus been restored to full possession of the *pagoda*, the manager for the *Zemindar* again put forward his claim to the management, and on this occasion he impeached the validity of the title under which the *pandaram* had held the office since 1815, asserting the *Zemindar's* right to appoint the *pandaram* as well as to manage the *pagoda*.

This new dispute was referred to the then collector, Mr. *Wroughton*. His report upon it is dated the 7th of January, 1834. It appears that he examined the depositions sent to the collectorate in 1815, and other documents, and he records the facts which, in his opinion, are adverse to the claims made on the part of the *Zemindar*. He also reported in favour of the title of the *pandaram Venkatachellum* to the office.

The Board of Revenue upon this report made a minute on the 30th of July, 1835, that there existed no ground for questioning the validity of the appointment of the *pandaram*.

One of the objections urged by Mr. *Mackeson* to the judgment of the High Court was that the Judges had given too much weight to the reports of the collectors, which they described as "quasi judicial proceedings." It is to be observed, however, that it is the duty of the collectors, under sect. 10 of the Regulation of 1817, to ascertain and report to the Board the names of the present trustees, managers, and superintendents of the temples, and by whom and under what authority they have been appointed or elected, and whether in conformity to the special provisions of the original endowment by the founder, or under any general rules. They are also, under sect. 11, to report all vacancies, with full information to enable the Board to judge of the pretensions of claimants, and whether the succession has been by descent, or by election, and if so, by whom. The report, therefore, of Mr. *Wroughton* was entirely within his province, and the line of his duty.

Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded upon them.

Whilst protesting against the weight given by the High Court to Mr. *Wroughton's* report, Mr. *Mackeson* invoked the authority of the collector's opinion contained in the last paragraph of it, in aid of his contention that the appointment was

(1) 1 Mac. I. A., p. 215.

invalid without the *Zemindar's* confirmation.

The paragraph is as follows:—

"It appears generally from the documents and witnesses produced on both sides that it has been the established custom that the dying *pandaram* nominates one of his disciples, and that the election is reported for the *Zemindar's* sanction and approbation, who thereupon issues orders to the *stalathars* of the *pagoda* to shew him the usual respect, and to obey his orders. At the time the present *pandaram* was nominated, the *zemindary* was in dispute, and held under the attachment by the collector, so that the orders which would have, under other circumstances emanated from the *Zemindar* were passed by the collector. The orders were dated 23rd July, 1816, to the late head *tahsildar*." (1)

The opinion of Mr. *Wroughton* is clearly against the claim of the *Zemindars* to nominate to the office, and it may be doubtful whether he intends to support their pretension to a right of confirmation in the sense of a power entitling the *Zemindar* to reject the person elected, and to treat the *pandaram* who enters upon the office without his confirmation as an usurper.

But however that may be, their Lordships have already said that the opinions of the collectors are not to be treated as having judicial authority. They also think that if the opinion of Mr. *Wroughton* really is to the effect contended for, it is not well founded. They have already commented on the effect of the orders passed by the collector in 1816.

It is very probable that the *pandarams*, on their election, were presented to the *Setupati*, not for the confirmation of their title, but to obtain from him, as the great chieftain of the district, a recognition of it, and to secure his protection and support.

In consequence of the recommendations contained in the reports of the collectors (1832 and 1834) rules were drawn up for the superintendence of the *pagoda*. They were to the effect that the *pandaram* was to be the manager, but an officer of the *Zemindar* was to superintend the management, reporting to the *Zemindar*, who was to send in the reports to the collector. It was expressly declared that this officer should treat the *pandaram* with great respect.

This state of things again led to frequent disputes. Mr. *Blackburne*, the collector, writes to the Board that he had received no less than forty-two recriminatory complaints in eleven months from the manager of the *zemindary* and the *pandaram*. In consequence the *pagoda* was again placed under attachment; and the collector, on the 17th of September, 1836, addressed orders to the *pandaram* and the manager, stating that, as they gave vain trouble, and did not act up to the Board's orders, the management would be kept under attachment on behalf of the *Circar* until they came to an amicable settlement.

In April, 1837, the disputants came to a formal compromise, and the *pandaram* promised to submit to the superintendence of the manager, and do certain things in conjunction with him. The *raseenamah* drawn up on this occasion was strongly relied upon by the Appellant's counsel. Taken by itself, this agreement would certainly appear to recognise the manager as superintendent in right of the *Zemindars*; but, having regard to the recommendations in Mr. *Vivash's* report, paragraph 5, that the *Zemindar* should be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses, their Lordships think that the acknowledgment must be referred to the power entrusted to the *Zemindar* as the nominee of the Government. Even if it had been shewn that some power of superintendence resided in the owners of the *zemindary*, it would not at all follow that the right to interfere in the appointment of *pandarams* belonged to them.

Pandaram Venkatachellum continued in office until his death in November, 1854, having filled it since 1815.

Before his death he appointed as his successor, *Chockalingam Pillai*, who continued in office until his death, in February, 1857. He appointed *Chidambara Pillai* to succeed him, who died shortly after-

(1) 1 Mac. I. A., p. 217.

wards, having first nominated *Ambalavana Pillai*, the original Defendant in this suit, to be his successor.

It results from a review of the whole mass of evidence in this case that there is no instance of the appointment of a *pandaram* by the *Zemindars* satisfactorily proved, except that of the child by *Muttu Ramalinga*, in 1793, nor of any *pandaram* having been kept out of his office, or ejected from it, because the *Zemindar* had not confirmed his appointment.

In the absence of proof of the actual exercise of either of the rights claimed, the rest of the evidence, for the reasons already given, is in their Lordships' opinion wholly insufficient to maintain them. They are therefore of opinion that the Appellant has failed to establish his pretention to oust the *pandaram* from his office, because he was not appointed to, or confirmed in it by him or his predecessors.

In the result they will humbly advise her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

30th & 31st January, and 3rd February, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RANEE MEWA KUWAR (Plaintiff)* ... } *Appellant,*

versus

RANEE HULAS KUWAR (Defendant) ... } *Respondent.*

Agreement defining Shares of parties in Immoveable property—Deed of Compromise—Limitation—Cause of Action—Act XIV. of 1859, s. 1. cl. 12—Estoppel.

An agreement by way of compromise of disputed title to immoveable estate, under which shares are allotted to the parties thereto, gives to each party a cause of action founded not merely upon contract within the meaning of Act XIV. of 1859, s. 1, cl. 10, but upon the title which is acknowledged and defined by the agreement, and a suit brought to recover a share of the estate is governed by s. 1, cl. 12.

Those who rely upon a document as an estoppel must clearly establish its meaning; if there is any ambiguity the construction may be aided by looking at the surrounding circumstances.

3rd February, 1874.

THEIR Lordships reserved their Judgment, which was now delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is a suit brought by *Ranee Mewa Kuwar*, the grand-daughter of *Rajah Ruttun Singh*, against *Ranee Hulas Kuwar*, the widow of *Khyratee Lall*, who was a grandson of the *Rajah*, to recover an 8¼ *annas* share of three houses and an *imambara* situate in the City of *Lucknow*. The Appellant claims 4¼ *annas* in her own right, and 4¼ as the representative of her deceased sister, *Chattur Kuwar*.

The claim arises in this way:—The property in dispute, which is in *Oudh*, belonged, with other considerable property in *Rohilcund*, to *Rajah Ruttun Singh*, who died in 1851. It is said that he became a Mahomedan, and that, according to *Hindu* Law, his ancestral property thereupon vested in his son, *Dowlut Singh*, the father of the Appellant and her sister. *Dowlut Singh* died before his father, and in consequence of his having so pre-deceased him, and having no male issue, the property of the *Rajah Ruttun Singh* would have descended to the grandson *Khyratee Lall*, whose widow, *Hulas Kuwar*, is the Defendant and present Respondent, unless the conversion of the *Rajah* and the consequent vesting of the estate in *Dowlut Singh* was established. The Defendant raised a further question, namely, that the property of *Rajah Ruttun Singh* had been confiscated by the King of *Oudh*, and had, after the *Rajah's* death, been granted by the King as an act of grace to his widow, *Ranee Raj Kuwar*, and that on her death it descended to *Khyratee Lall* as her legal heir. It appears that questions arising out of this alleged conversion to Mahomedanism of the *Rajah*, and respecting the

* 1 Macpherson's I. A., 157; 13 B. L. R., p. 312.

confiscation, were contested between the widows of the deceased *Ruttun Singh* and of his son, *Dowlut Singh*; and after their deaths the controversies were renewed between *Khyratee Lall* and the Respondent and her sister. After these controversies, and avowedly to put an end to the disputes, a compromise was effected between the parties, the terms of which are found in what is described as a deed of agreement of the 21st July, 1860. It is essential to the determination of the questions in this appeal to consider what is the effect of this agreement and of a subsequent one which was entered into at a latter period of the same year, namely, on the 12th of November.

The first agreement is made between the contending parties, *Khyratee Lall*, and his cousins, *Ranee Chattur Kuwar* and the present Appellant, *Ranee Mewa Kuwar*, the daughters of *Dowlut Singh*. It is this: "We," describing the parties, "do hereby declare that, regarding the dispute which existed for all the houses, lands, and property left by *Rajah Ruttun Singh*, deceased, whether moveable or immoveable, ancestral, or self-acquired, in the custody of the Court of Wards, situated in the district of *Bareilly*, *Pilibhit*, *Shahjehanpore*, *Badaon*, &c., and in the province of *Oudh*, we have, whilst in the perfect enjoyment of our senses, and without being under any kind of compulsion or coercion, come to amicable terms in the presence of Mr. *John Inglis*, Collector of *Bareilly*, and agreed to regard the whole property as if it were one rupee, and to divide it into the following shares: 7½ *annas* as the share of *Khyratee Lall*, 4½ *annas* as the share of *Ranee Chattur Kuwar*, and 4½ *annas* as the share of *Ranee Mewa Kuwar*." That is an agreement that the whole property left by the *Rajah Ruttun Singh*, as well that in *Rohilcund* as that in the province of *Oudh*, shall be divided in those shares. Then comes a provision for a division of the property, according to those shares, by a partition by metes and bounds. That part of the agreement is this: "According to these rates the whole of the property shall be divided amongst the above, agreeably to a *punchait* to be convened for the purpose. That we shall not retract from this proposed division;" and then declaring that it should be a final agreement between them. It is undisputed that this agreement relates to the whole of the property of *Rajah Ruttun Singh*, as well that in *Oudh* as in *Rohilcund*. In fact that is the case on the part of the Respondent as well as that on the part of the Appellant. Both agree that this agreement was intended to settle the disputes relating to the whole of the property left by the *Rajah*. Now there is no evidence to be found in the record of an actual partition of the property, either in *Rohilcund* or in *Oudh*, pursuant to the terms of this agreement; but it is said on the part of the Respondent, the Defendant, that by the subsequent agreement, to which I have alluded, of the 12th November, 1860, there is an acknowledgment on the part of the present Appellant and her sister whom she represents, that a partition had taken place of the whole property, as well the property in *Oudh* as in *Rohilcund*, an acknowledgment which binds them by way of estoppel; and that, under those circumstances, the present claim of the Appellant to a share of the houses in *Lucknow* must be defeated. This document is in ambiguous language, and some care is required in considering what is the effect of the language used in it. It may here be said that those who rely upon the document as an estoppel,—the nature of an estoppel being to exclude an inquiry by evidence into the truth,—must clearly establish that it does amount to that which they assert. Now the document is this: "We *Khyratee Lall* in person," and the Appellant and her sister by their attorneys,—"the principals, being heirs of *Rajah Ruttun Singh*, deceased, do hereby declare that: Whereas our case regarding rendition of accounts and division of the property left by *Rajah Ruttun Singh*, now in charge of the Court of Wards, was pending before *Moulvi Mahomed Khyrooddeen*,"—and other persons, naming them, and describing them "as members," and their Lordships understand that they were a committee of persons, or a *punchait*, appointed to make a partition. The document goes on, "the same has now

been amicably adjusted and divided amongst ourselves, according to our specific shares,"—that is, the shares mentioned in the first agreement,—"under the auspices of Mr. *John Inglis*, Collector of *Bareilly*, and the division, under the blessings of Providence, having been made accordingly regarding the whole property, *viz.*, cash, furniture, villages, (mortgaged and free from mortgage), houses and shops, cash deposited in banks and treasury, other property moveable of every description, and books, we have received our respective shares. Now there is not the slightest dispute amongst us left unadjusted, and unsettled, and there is not a fraction of such property which has not been divided amongst us. We have therefore filed this *razeenamah* acknowledging division of property and settlement of accounts in the Court of the above-mentioned deputy collector that it may prove of use hereafter." There are undoubtedly words in this agreement which, taken by themselves, are sufficient to comprehend the whole of the property which was the subject of the first agreement; but the words which occur in the commencement of the agreement appear to their Lordships to be the governing words of the instrument, as far as the property included in it is concerned, and those words are: "Whereas our case regarding rendition of accounts and division of the property left by *Rajah Ruttun Singh, now in charge of the Court of Wards.*" Now the only property which could have been in charge of the Court of Wards was the property in *Rohilcund*. Notwithstanding therefore the large words to which I have referred, viz., "Now there is not the slightest dispute amongst us left unadjusted and unsettled, and there is not a fraction of *such* property which has not been divided amongst us," their Lordships think that the reference made in that wide clause by the words "such property" limits its application to the property described in the commencement of the agreement, namely, the property "now in charge of the Court of Wards." Undoubtedly there is some room for the contention that the words "now in charge of the Court of Wards" were not intended to limit the agreement to property which was really in the Court of Wards, but were inserted by mistake and by misapprehension of the parties who might have thought that the property in *Oudh* was in charge of the Court of Wards of the district of *Bareilly*. Their Lordships do not fail to notice that property was described as being in the custody of the Court of Wards in the first agreement, but there the description is not confined to property in the Court of Wards, but the words "and in the province of *Oudh*" are inserted, apparently for the purpose of shewing that the agreement was intended to comprehend lands in that province as well as those in *Rohilcund*. There are no such words in the agreement of November, and upon the whole their Lordships think that that agreement may properly be confined to the lands in *Rohilcund* which were really in charge of the Court of Wards.

It will be observed from what has been already said that their Lordships have felt that this document is ambiguous, and this being so, the construction of it may be aided by looking at the surrounding circumstances. If it had appeared that the Appellant had had possession for a long number of years of some property which had belonged to *Rajah Ruttun Singh* in *Oudh*, and the Respondent and those she represents had been in possession of other property which had belonged to the *Rajah*, it might have been inferred that a partition had been made by agreement, and that the parties were content to hold what they had so agreed to take without any formal partition by a *punchait*. But upon looking at the circumstances which were relied upon by the Respondent's counsel, Mr. *Cave*, to support that presumption, it appears to their Lordships that they fail to do so. The first circumstance relied on was that in addition to the four houses which are the present subjects of dispute, there was a fifth house, which it was said, had belonged to *Rajah Ruttun Singh*, and had been in the possession of the Appellant and her sister and her sister's husband. But the evidence when examined really fails to make out that that house was a part of the property of *Rajah Ruttun Singh*. On the contrary, there is a great deal of

evidence to shew that it was the separately acquired property of *Dowlut Singh*, the father of the Appellant, and was no part of the estate of the *Rajah*. The title to that house is, at least, left in doubt, and it was for the Respondent, if she relied upon the circumstance of the Appellant's having the ownership and possession of the house as presumptive proof of the partition, to have shewn clearly that it formed part of the property of the *Rajah*.

The other circumstance strongly relied on was that there had been an acquiescence of nine years, from the date of the agreement in 1860 to the commencement of this suit, in the possession of the four houses now claimed remaining with the Respondent. But, again, upon investigation their Lordships think that there was no acquiescence from which they could safely presume there had been a partition. It seems that upon the death of the Appellant's sister, *Ranee Chattur Kuwar*, the Appellant brought a suit against her husband, *Oudh Beharee Lall*, to recover from him her sister's 4½ share in the houses now in dispute. That suit was commenced apparently in the year 1866. The defence to it was that *Beharee Lall* was entitled to the property in another right,—it is not necessary to say what right he set up. The present Appellant succeeded in that suit in the Lower Court, and also upon appeal in the High Court of the North-west Provinces. Now in that suit she claimed, as against her deceased sister's husband, her sister's share in this very property. It seems incredible if she was aware she and her sister had no right to this property, and that it had gone under a partition to *Khyratee Lall*, that she should have instituted that which would have been, so far as regards this property, an entirely useless suit. It is perfectly true that nothing which occurred in the progress of that suit can be evidence against the present Respondent, who was no party to it; but the suit is so far material and relevant that the present Appellant, having obtained a decree against the sister's husband, *Oudh Beharee Lall*, endeavoured to execute that decree by obtaining possession in due course of law of the houses, and was resisted by the present Respondent, who was then in possession of them. These facts seem to negative anything like acquiescence on the part of the Appellant in a supposed partition by which these houses were allotted and assigned to be held in severalty by the Respondent or by *Khyratee Lall*, whom she represents.

Under these circumstances the case simply comes to the question of the right of the Appellant under the agreement of July, 1860. That agreement assumes that the parties were severally claiming, by virtue of some right of inheritance, the property of the *Rajah Ruttun Singh*; that there were questions between them which might disturb the rights which each claimed, and it was better instead of a long litigation to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares, and shall be divided according to those shares. A partition according to those shares has never taken place, and the Respondent is in possession of the entirety of the houses in *Oudh* and the *imambara*. Unless therefore the title of the present Appellant is barred by limitation she has, in their Lordships' opinion, a right to a decree for the shares of those houses assigned to her and her sister whom she now represents by the agreement.

Their Lordships in coming to this conclusion have arrived at an opinion in accordance with that of the Judicial Commissioner from where this appeal comes to Her Majesty. The Judicial Commissioner states that he has no doubt that the agreement of November, 1860, did not include the property in *Oudh*. He says, "I shall have to refer again to the agreement effected by the disputants in July, 1860. I deem it necessary to record my concurrence in the ruling of my predecessor in regard to the deed of November, 1860. It is clear from the terms of that document that it referred solely to that portion of the property of the late *Rajah Ruttun Singh* that was situated within the jurisdiction of the collector of *Bareilly*. It sets forth that 'Whereas our case regarding rendition of accounts and division of the property left by *Rajah*

Ruttan Singh, now in charge of the Court of Wards, was pending before certain arbitrators, an amicable adjustment has been made and the whole property divided.' The property situated in the province of *Oudh* and claimed in the present suit was not under the charge of the Court of Wards of the *Bareilly* District, and could not therefore have been included in the division referred to in this document." So far, therefore, their Lordships entirely agree with the judgment of the Judicial Commissioner. The way the case came before him ultimately was this,—the Civil Judge of *Lucknow* having at first decided, contrary to the above view of the Judicial Commissioner, that the agreement of November, 1860, did include the *Oudh* property, and was an estoppel, was overruled by a former Judicial Commissioner, Sir *George Cowper*, who remanded the case for an inquiry as to the possession of the houses. The Civil Judge on this remand seems to have thought he must inquire who had had possession during the last twelve years, and finding that the Respondent and her predecessors had been in possession for more than twelve years, he held that the suit was barred by the *Statute of Limitations*.

The Judicial Commissioner, when the case came before him on final appeal, held that the claim of the Appellant was based on the agreement of July, 1860, and that limitation only ran from that date; but he thought the limitation of six years was applicable to the suit. The judgment of the Judicial Commissioner was that the case of the Appellant rested upon the agreement of July, 1860, and that so resting upon a contract the case was within the 10th clause of sect. 1 of Act XIV. of 1859, and barred by it, inasmuch as the action was not brought within six years from the date of that agreement. Now their Lordships are of opinion that the 10th is not the clause which is applicable to the present claim, but that the suit is really brought for the recovery of immoveable property, and that the clause which properly applies to it is clause 12 of sect. 1. The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the Appellant to prove her title, and not all her case. It therefore seems to their Lordships that the suit is not founded on contract or for a breach of it, but that it is a suit for the recovery of immoveable property "to which no other provision of the Act applies," and so within clause 12; consequently, in their opinion, the proper limitation of the suit is twelve years, and it has not been contended at the Bar that if that be the period of limitation the present suit is barred.

For these reasons their Lordships, agreeing in the view of the merits of the case taken by the Judicial Commissioner, but differing from him as to the effect of the *Statute of Limitations*, must humbly advise Her Majesty that his judgment ought to be reversed, and that a decree ought to be made that the Appellant is entitled to the possession of the 8½ *annas* share of the properties in *Oudh*, the subject in dispute in the suit. The Appellant to have the costs in *India*, and of this appeal.

5th February, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THE PORT CANNING LAND, INVESTMENT, RECLAMATION, & DOCK COMPANY, LIMITED, a Company Registered under Act XIX. of 1857 (Plaintiffs)* ... } *Appellants*,

versus

A. SMITH, ESQUIRE, CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE TOWN OF CANNING (Defendant) } *Respondent*.

Debentures—Interest—Agreement to purchase future Interest in Immovable Property—Registration.

A. held debentures of *B.*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B.*; the rent of which lots was to be set off against the interest on the debentures. *A.* notified to *B.* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B.* consented to *A.*'s proposal, and at the same time informed *A.* that the selected lots exceeded the the value of his debentures, and that he must pay the difference. *A.* made no reply to this communication.

A. afterwards sued *B.* for interest on the debentures:—

Held, that *A.* was not entitled to interest, the contract being complete, and the indication by *B.* of the difference in quantity not amounting to an introduction of a new term into the negotiation.

A correspondence between *A.* and *B.* amounted to a contract for a purchase of a future interest in immovable property:—

Held, that such correspondence did not require registration under the *Indian Registration Act* XX. of 1866.

* 1 Macpherson's I. A., p. 124.

AT the close of the argument their Lordships' judgment was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is an appeal from a judgment of the High Court of Judicature at *Fort William* in *Bengal*. It arises in an action brought by a land company, called the *Port Canning Land, Investment, Reclamation, and Dock Company*, against the Defendant, the chairman and representative of the Municipal Commissioners of the Town of *Canning*. The action is brought upon some debentures of the municipality which were given to the land company, and the claim in the action is for two years' interest, the interest being payable by half-yearly payments, from the 1st of January, 1867, to the end of December, 1868. The Plaintiffs have undoubtedly a perfect *primâ facie* case upon the debentures for that interest. The defence set up on the part of the municipality is, that there was an agreement come to between the land company and the municipality by which it was agreed that the debentures should be exchanged for land at the time when the debentures matured, which was a period of five years after their date, and that meanwhile, the exchange being alleged on the part of the municipality to have been completely contracted for, a quit-rent should be paid for the land equivalent to the interest which was accruing upon the debentures—the intention of the parties being that the interest should be extinguished by that agreement to pay the quit-rent.

The question in the appeal is, whether a complete and perfect agreement was come to between the parties to that effect. The case has been ably argued on both sides, with the result, which very often follows in a case properly argued, of reducing the point to be decided to a very narrow issue. The whole depends upon the correspondence; and the question is, whether the agreement relied on by the Defendants is established by some of the letters of that correspondence.

The company was formed, as appears by their prospectus, which has been referred

to, for the purpose of obtaining land in *Port Canning*. The municipality appear to have considerable land in that town, and were desirous of making it a place of trade. They raised money by issuing debentures; but they gave the holders of those debentures the election to exchange them for land. That right of election is found in a notice which was issued by the municipal commissioners when they invited tenders for the loans upon these debentures. The 5th article of that notification is this:—"Debenture holders are to be entitled to convert their debentures, to the extent of one-half of the entire loan raised, into leasehold titles to lands in the town within a period of two years from the issue of the debentures, at the rate of Rs. 600 of loan for one *beegah* of ground. Such privilege of conversion to be given to debenture holders in order of the dates on which applications for such conversion are received by the commissioners. The leasehold title so conferred to be for sixty years on a rental of Rs.30 per *beegah* per annum." Then a further option is given: "Such leaseholders to be further allowed to convert their leasehold into freehold tenures by a cash payment at the rate of Rs.600 per *beegah*, provided such privilege be claimed within four years from the 1st of January next."

The Plaintiffs, the land company, agreed to subscribe 2½ lacs of rupees and 200 rupees. That subscription was evidently made by them with the intention of exchanging the debentures they would obtain for land; for by a letter of the 18th of March, 1865, written before the debentures were issued, the company declared their desire to take land in lieu of them to the full amount of the loan.

Very soon after the debentures were issued, a correspondence commenced between the company and the municipal commissioners, with the object of effecting the conversion. The letters on both sides are unbusinesslike. Letters are written and left without an answer, and then a fresh departure is made without reference to preceding letters. That correspondence, in the way in which it has taken place, no doubt imposes some difficulty upon those who have to construe it; but, as I have already said, after the matter has been threshed out it really appears that the point is a very simple one. The first letter relating to the conversion, after the issue of the debentures, is on the 5th of January, 1866. It is a communication from the commissioners to the company, and is a spur to the company to exercise their option, if they mean to do it, of taking land. It is this: "Dear Sirs,—Mr. *Kilburn* having applied to have certain lots out of the following numbers assigned to him on freehold title in exchange for debentures, viz., Nos."—naming several numbers,—"I shall feel obliged by your intimating what lots amongst these numbers your directors desire to select and retain for the company, so as to enable me to inform Mr. *Kilburn* what lots will be available to him for redemption." It seems no answer was given, but there was some intermediate correspondence respecting an alteration in the debentures, which it is immaterial to consider. The next letter is again from the commissioners to the Company, of the date of the 18th September, 1866. "Gentlemen, I am directed by the chairman to request that you will give your immediate attention to the following:—On the 13th of March, 1865, the *Port Canning Company* through you applied distinctly to have lots assigned to them in lieu of the debentures which are to be given for the amount subscribed by them to the loans. You applied specifically for lots,"—naming them—"and asked for other land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations, to such an extent as may be the equivalent of said amount of loan." "This is a distinct and formal intimation that the *Port Canning Company* avail themselves of the privilege allowed to debenture holders by Article V. of the published conditions of the loan." The commissioners thus directly intimate to the company the construction they put upon their letter, viz., that they had elected to take land to the full value of their debentures. The letter goes on:—"No formal letter was sent to the *Canning Company* on receipt of their application placing the specified lots at their disposal; but on the 5th of

January, 1866, the secretary to the municipal commissioners wrote to the secretaries of the *Canning Company*, requesting that they would intimate what lots they required among certain numbers specified in the letter, as Mr. *Kilburn*, another debenture holder, had applied for lots, and the commissioners could not tell Mr. *Kilburn* which of the lots were available until the *Canning Company* had made their selection. No reply was received from the *Canning Company* to this request, but in April, 1866, the secretary to the commissioners addressed Mr. *W. C. Stewart*, acting on behalf of the *Canning Company*, on the subject. To this letter also no reply was returned." Then they refer to another letter having been written—"The lots applied for by *Port Canning Company* in commutation of their debentures have always been considered as transferred and held at the disposal of the *Port Canning Company*; and it now only remains for the leases to be completed and debentures to be sent into this office to the value of Rs.204,928, being the amount of the loan which these lots represent under the 5th Article of the published conditions of the loan." Then the letter goes on to urge the completion of the exchange —"I am further directed to request that your company will, without further delay, select such other available lots as may be required to make up the redemption of the entire sum subscribed by them to the loan, and to give notice that the commissioners repudiate any liability to pay interest on the amount subscribed by the *Canning Company*, or to repay the loan, except in the shape of grants of land, as applied for by the company in their letter of the 13th March, 1865." There is thus a most distinct intimation on the part of the municipal commissioners that they hold and treat the *Port Canning Company* as having applied for an exchange of the whole of their debentures for land; that the company have only selected lots which amount to a part of the whole amount of their debentures; that they require the company to select the other lots and send in their debentures; and expressly give notice that from that time they do not consider themselves liable to pay interest.

Then come the two important letters, which cannot be fully understood without referring to this previous correspondence. The letter of the 20th of December, 1866, is from Mr. *Schiller*, who represents the *Land Company*, to the commissioners:—"Sir, with reference to the debentures held by the *Canning Company*, which I agreed to exchange for land,"—thus in answer to the letter, the effect of which I have given, which refers to an agreement, this letter also refers to the exchange as a thing agreed on,—"with reference to the debentures held by the *Canning Company*, which I agreed to exchange for land, I now beg to propose that such exchange be deferred till their due date." That proposal, as Mr. *Benjamin* says, is an application for an indulgence. The commissioners were pressing for an immediate exchange and that interest should stop, and this is a counter-proposition:—"I know I have agreed to that, but, if you will consent, I wish to have the exchange postponed until the debentures become due." And then comes this proposal of what the company will do, so that the commissioners shall be under no loss, and shall not be liable to the interest in the meantime: "This will involve the payment of interest by the municipality to the *Port Canning Company*;"—of course this would be so; for the debentures being still extant interest would be payable upon them;—"but the latter is prepared to declare upon the lots they will receive in exchange for debentures, and to pay a quit-rent thereon equivalent to the interest payable on their debentures. The municipality will thus lose nothing, and the arrangement will be a convenience to the *Canning Company*." They really say this: If you will, for our convenience, postpone the exchange of the debentures for land till the debentures become due, you shall be no loser; we shall not receive the interest, for we agree to pay you a rent which will be equivalent to it, and therefore one will extinguish the other. That is a distinct proposition. The fair meaning and substance of the whole letter is, we have agreed to take lots to the full amount of the debentures; and if you will consent to the exchange being postponed until the debentures become

due, we will not call upon you for the payment of interest in the meantime, and we are now willing to make the selection. But the selection lay with the company; it might be for their interest to make it then, or it might be more for their interest to make it at a future time. The answer comes on the 14th of March, 1867, from the commissioners:—"Dear Sirs, with reference to the letter from Mr. *Schiller*, dated the 20th of December, 1866, copy of which is on the other side, I am instructed by the chairman of the municipal commissioners of *Canning* to state that they agree to the proposal contained in that letter." That proposal I have already interpreted, and there is a distinct acceptance of it. Then they add, "and to request that you will at once declare the lots which your company will receive in commutation of the debentures taken by your company, so that the commissioners may know exactly the lots which they are bound to hold for the company." The agreement was perfect,—that there should be an exchange; that the time of exchange should be postponed till the debentures became due, no interest being payable in the meantime, and the company being at liberty to select the lots they desired to take. Their Lordships think that the latter part of the letter as to the selection of the lots is not a part of the contract requiring further affirmance to bring the parties to a complete agreement, but relates to the execution of that which they had agreed upon. The two following letters, which it was Mr. *Cowie's* object to make a part of the agreement (his contention being that it was not perfected by the previous ones), appear to their Lordships to be only an attempt to carry it into execution. There is a selection of lots on the part of the *Port Canning Company*, and an intimation from the municipal commissioners that the company had made a selection which was not in accordance with the contract. The letters are the letter of the 2nd of April, and the answer of the 22nd of August. They really amount to this:—The letter of the *Land Company*, professing to carry out the agreement, says:—"We have selected these lots, which are the lots we are willing to take in pursuance of the agreement of exchange for the debentures, and which we think are about the amount of the debentures." The commissioners' answer is, "Well, we have no objection to your having those lots, but we are bound to tell you that you cannot have them for the debentures you now hold, because their value is half a *lac* more than the amount of those debentures, but we have no objection, if you will return debentures and pay quit rent upon the value of the additional lots, that they shall go to you." That proposal has never been accepted; but the non-acceptance of that proposal, and its being left in an imperfect state, both parties being at liberty to refuse, the one to take, and the other to give in exchange the further quantity of land, cannot affect the previous agreement to exchange the debentures then held by the company for lots equivalent in value to their full amount. That agreement was already made, and in their Lordships' view all that remained to be settled was the execution of it by the selection of the lots in accordance with the contract. The case is in this view extremely simple. It is an agreement to exchange, where on the one side the thing to be exchanged is already defined and specified, and where that which is to be taken in exchange is to some extent indefinite and requires a further act to ascertain it. Suppose *A.* and *B.* had agreed to make an exchange of this sort; *A.* agrees to give *B.* six cows, specific cows, in exchange for six horses which he is at liberty to select out of the stock then upon *B.'s* farm, the selection to be made at a future time; that is a perfect agreement for the exchange, and all that remains is that *A.* should select the horses on *B.'s* farm. There might be a dispute whether the horses that were upon the farm at the time of the agreement had not been removed, and others substituted; they might differ as to the horses which were intended to be taken in exchange; but that would not affect the agreement, but would be a question of the mode of performance of it.

A question was raised, whether the letters did not form an agreement which should have been registered under the

Indian Registration Act; but their Lordships think that the High Court was perfectly right in holding that the letters did not require registration. They do not amount to a lease or an agreement for a lease, but are evidence of a contract of a special character, not coming within any of the definitions found in the *Registration Act.*

On the whole, therefore, their Lordships think that the judgment of the High Court, which reversed the judgment of Mr. Justice *Phear*, is correct; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, with costs.

26th and 27th February, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces, Agra.

MAHOMED BAHADUR KHAN and MAHOMED ALI BAHADUR KHAN, (Plaintiffs)* ... } *Appellants,*

versus

The COLLECTOR of BAREILLY (on the part of Government) and others, (Defendants) ... } *Respondents.*

Limitation—Act IX. of 1859, s. 20—Forfeiture of Rebel's property.

Certain property, in the actual possession of a rebel, was confiscated by the Government in 1858. In a suit brought on 1st May, 1865 to recover the property, it appeared that the Plaintiffs were the sons and heirs of one *M.* who died in 1854, legally entitled to, though not in possession of, the property in question; that at the date of his death, and at the date of the confiscation, the Plaintiffs were minors, and that they came of age in 1861 and February 1864, respectively. *Held*, that the suit not having been brought within one year from the date of the confiscation was barred by sect. 20, Act IX. of 1859.

There is no saving clause in Act IX. of 1859 with respect to minors or parties under disability to sue, and such saving cannot be held to be implied upon any principle of equitable construction; nor can the saving clauses, contained in the general Limitation Act, XIV. of 1859, be imported into a special enactment.

Act IX. of 1859 is plainly retrospective in its operation, and applies to claims to forfeited property which had been confiscated before its passing.

THE decision of their Lordships was pronounced by

THE RIGT HON. SIR MONTAGUE EDWARD SMITH:—

The only question in this appeal, which comes before their Lordships in the shape of a special case, is whether the suit brought by the Appellants against the Collector of *Bareilly*, and the purchasers from the Government, to recover certain landed property in *Bareilly*, is barred by limitation. The Appellants claim the property as the heirs of their father, *Mohummud Tuffuzool Hossein Khan*, who died on the 22nd of April, in the year 1854. The special case states that it is to be assumed for the purpose of the case that the father of the Appellants was on his death entitled to the property sued for. That statement is made only for the purpose of raising the qustion which is for their Lordships' consideration on the Statutes of Limitation. It appears, however, upon the special case, that before and at the time of the death of *Mohummud Tuffuzool Hossein Khan*, one *Khan Bahadoor Khan* was in the actual possession of the property. That person became a rebel, and in May, 1858, his property was seized by the Government as forfeited on the ground of his rebellion. At the time of their father's death, and of the forfeiture of the property, the Appellants were minors. The elder Appellant became of age in 1861, and the younger in February, 1864. The present suit was brought on the 1st of May, 1865, and at that time the elder

* 1 Moo. I. A., p 167; 13 B. L. R., 292

Appellant had been, as appears from these dates, of age for four years, and the younger Appellant for upwards of a year.

The Acts of Limitation which is relied on by the Government is Act IX. of 1859. That Act was passed for the special purpose of providing a Court for the adjudication of claims by innocent persons upon the property of rebels which had been forfeited to the Government. It established a special Court, consisting of three Commissioners, and suspended the action of all other Courts in respect of such claims. Special modes of proceeding are established, and various clauses in the Act relate to that special course of procedure. But there are provisions in the Act which relate not surely to the Court so established and the procedure under it, but are of a general character, and apply to the property forfeited in whatever Court the claims may be made regarding it. One of those clauses is clause 16, which provides, "Whenever any person shall have been convicted of an offence for which his property was forfeited to Government, no Court has power in any suit or proceeding relating to such property to question the validity of the conviction." Sects. 17 and 18 are also clauses of a general nature, and so it appears to their Lordships is clause 20, which contains the limitation on which the Government rely. The clause is this:—"Nothing in this Act shall be held to affect the rights of parties not charged with any offence for which upon conviction the property of the offender is forfeited in respect to any property attached or seized as forfeited or liable to be forfeited to the Government; provided that no suit brought by any party in respect to such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates."

It was suggested that this limitation was meant to apply only to claims prosecuted before the Court of Commissioners established by the Act, and it was contended that the Act was of a temporary nature, and that its provisions fell with the purpose for which it was passed. But the Act is not made temporary by any enactment. It was in part repealed by the general repealing statute of 1868, that is Act VIII. of 1868, and the mode of repeal is significant. It is not altogether repealed, for the general clauses to which I have referred, including clause 20, are saved from the operation of the repealing Act. The repeal and saving are both found in the schedule to Act VIII. It is clear from their being thus saved that those clauses were at that time considered by the Legislature to be of a general nature, affecting claims to property which had been forfeited before whatever Court those claims might be prosecuted.

The words are perfectly plain,—no suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of the Act and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment; and that, although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any persons in respect of forfeited property.

Assuming then that the case is within the Act, their Lordships will consider the other objections which have been raised. The answer first put forward was that this limitation could be held only to apply to some right, title, and interest—using the words of the ordinary execution Acts—of the rebel himself. Now it is obvious that this cannot be the right construction of the Act. It would be a wholly insensible enactment if it were, because the Act assumes that the interest of the rebel is forfeited, and it is only in respect of claims other than his that this limitation could operate. The Act is declared not to affect the rights of parties in respect of the property seized. "The property" is the thing seized as forfeited, whether it be land or a jewel, and the right referred to is the right of an innocent party, other than the right of the rebel, in that property.

Another contention, which seems to

have been the only one urged in the High Court, as far as it appears from the judgment, is, that a saving with respect to parties under disabilities must be taken to be by equitable construction implied in this clause. Their Lordships however think it is impossible that any Court can add to the statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the general Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it.

It was said that the clauses in the general statute, Act XIV., 1859, relating to disabilities might be imported into this Act, but this cannot properly be done. Act XIV. is a code of limitation of general application. This Act is of a special kind and does not admit of those enactments being annexed to it. It is to be observed that if it could be done it would not assist the Appellants, because the limitation of Act IX. is one year only, and the saving in favour of minors in sect. 11 of Act XIV. would not bring them within time, as a year elapsed after they came of age before the bringing of the present suit.

One other objection requires to be noticed, that this Act was not retrospective. Undoubtedly Mr. *Doyne* was able to suggest cases in which hardship might arise to persons who would not have a full year to claim before they would be barred under the provisions of this Act, or even where the year might have elapsed between the date of the confiscation and the passing of the Act. Although hard cases may arise, their Lordships consider that the Act is plainly retrospective in its operation, and includes claims to forfeited property which had been confiscated previously to its passing.

Their Lordships are of opinion that the judgment of the High Court is right, and they must humbly advise Her Majesty to affirm it.

Mr. *Forsyth*:—One of the questions is: "Whether, if it shall be decided that the Appellants or either of them is barred by limitation, the Government Respondent shall have any and what costs of this special case."

After a discussion on this question,—

SIR MONTAGUE EDWARD SMITH said, According to the course of their Lordships' decisions the Government are entitled to the costs. Whether they will think that under the circumstances they should enforce payment of them from the Respondent is for their consideration.

4th and 5th March, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

BRINDABUN CHUNDER SIRCAR CHOWDHRY, and SRISH CHUNDER SIRCAR CHOWDHRY, (Defendants)* ... } *Appellants,*

versus

BRINDABUN CHUNDER DEY CHOWDHRY, and others, (Plaintiffs) ... } *Respondents.*

Sale for Arrears of Rent—Patni Tenure—Act X. of 1859, s. 105—Regulation VIII. of 1819—Regulation I. of 1820.

The provisions of Regulation VIII. of 1819 with respect to the sale of under-tenures for arrears of rent being applicable to sales under decrees for rent made under s. 105, Act X. of 1859:

* *Held*, that where a sale has been effected of a "*patni talook*" under that section, it must be pre-

* 1 Moo. I. A., p. 178; 13 B. L. R., p. 408.

sumed, in the absence of evidence to the contrary, that the tenure was one transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale; in other words it must be presumed to be a tenure such as is described in the preamble to Regulation VIII. of 1819, and the effect of the sale was to annul all incumbrances created by the *patnidar*.

THEIR Lordships' judgment was pronounced by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is a suit for possession and mesne profits of a *durputnee mehal* brought against the *Zemindar*. The charge is that the *Zemindar* in collusion with the heirs of *Rutnessur Roy*, who was said to be merely a *benamee* holder of the *putnee talook*, obtained a decree against them for Rs.5,156 as arrears of rent of the said *putnee*, and that under that decree he sold the *putnee*, and having purchased it in his own name entered upon the estate of the *durputneedar*, treating the *durputnee* as having ceased to exist upon the sale of the *putnee*.

With regard to the fraud their Lordships are of opinion that there is no sufficient evidence to satisfy a Court of justice that there was any fraud or collusion between the *Zemindar* and the heirs of *Rutnessur*, to allow the *Zemindar* to obtain a decree against *Rutnessur* for arrears of rent which were not actually due. A strong fact against the supposition of fraud was this, that the *Zemindar* originally sued the *durputneedars* for these arrears of rent. The *durputneedars* in that suit set up as a defence that *Rutnessur* was the *putneedar* and that they were merely the *durputneedars* of the *mouzah*, hence they said, the Plaintiffs' claim can be made against *Rutnessur* and his heirs, and not against us. Now if the *durputneedars* at that time thought that the action ought to have been brought against the *Maharajah* of *Kishnaghur*, for whom they said *Rutnessur* held the estate *benamee*, why did they not say so in their defence? They said, *Rutnessur* is the person liable for these arrears and you must sue him. Upon that the case went to trial in the Collector's Court; and the Judge who tried the case held that *Rutnessur* was the *putneedar*, and therefore that the Plaintiffs could not sue the *durputneedars*, and he dismissed the suit with costs, whereupon the *Zemindar* brought an action against the heir of *Rutnessur* for the arrears of rent, and it is that suit which is now charged as having been brought by collusion between the *Zemindar* and *Rutnessur* for the purpose of injuring the *durputneedars* by fraudulently obtaining a decree for rent which was not due, and then selling the *putnee* and avoiding the incumbrance of the *durputnee*.

There being, then, no fraud in the case, the question arises, whether, upon the sale of the *putnee*, under the decree for rent, it was sold free from the incumbrances which had been created by the *putneedar*, or, in other words, whether it was sold free from the *durputnee*. That depends upon the construction of sect. 105 of Act X. of 1859. That section enacts "If the decree be for an arrear of rent due in respect of an under tenure which by the title deeds or the custom of the country is transferable by sale, the judgment creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under tenures for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force." It has been held, upon the construction of those words, "according to the rules for the sale of under tenures," that the effect of Regulation VIII. of 1819, and I. of 1820, is applicable to cases of sales under decrees of rent made under this sect. 105; and then the question arises whether this was a sale for an arrear of rent due in respect of an under tenure which by the title deeds or the custom of the country is transferable by sale.

The Plaintiff in his plaint describes the tenure as a *putnee talook*, and his own tenure as a *durputnee*, and the point is, whether, under the description of "*putnee* and *durputnee*," it is to be presumed that the *putnee* tenure was one such as is described as the tenure denominated a *putnee*

by Regulation VIII. of 1819. In the preamble of that regulation—which, as contended for by the learned counsel, it must be admitted is not an enactment but merely a recital, it is said, "By the terms of the engagements interchanged it is, amongst other stipulations, provided, that in case of an arrear occuring, the tenure may be brought to sale by the *Zemindar*, and if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be answerable for the demand. These tenures have usually been denominated *putnee talooks*."

Their Lordships are of opinion that under the description "*putnee talook*" and "*durputnee talook*" it must be *primâ facie* intended that the tenure called a *putnee* tenure was a tenure transferable by sale, upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale. If so according to the terms of Regulation VIII. of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances. By sect. 8 of Regulation VIII. it is enacted, "Proprietors under direct engagements with the Government shall be entitled to apply in the manner following for periodical sales of any tenures upon which the right of selling or bringing to sale"—not the right of selling or bringing to sale free from incumbrances but—"upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure." Then, by sect. 11, the effect of such a sale is stated as follows: "It is hereby declared that any *talook* or saleable tenure that may be disposed of at a public sale under the rules of this Regulation for arrears of rent due on account of it, is sold free from all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said *talook* may have been held."

It appears therefore to their Lordships that this was the sale of a *talook* transferable by sale, and upon which the right to sell arrears of rent was reserved in the engagements entered into by the parties. Consequently, according to the effect of sect. 105 of Act X. of 1859 and sects. 8 and 11 of Regulation VIII. of 1819, and probably also of Regulation I. of 1820, the effect of the sale of the *putnee talook* was to destroy all incumbrances which had been created by the *putneedar*, and consequently to destroy the particular incumbrance which is mentioned in the plaint in this suit, namely, the *durputnee* of the Plaintiff.

Their Lordships, therefore, think that the suit was not maintainable, and that the learned Judges of the High Court did not probably give sufficient effect to the recital of the preamble of Regulation VIII. of 1819 and the enactments of that regulation, in holding that it did not appear that the *putnee* was a tenure upon which the right to sell for arrears of rents had been reserved by the contract of the parties.

Under these circumstances it appears to their Lordships that the decision of the High Court was not correct, and they will therefore humbly recommend Her Majesty to reverse that decision and to affirm the decision of the Principal *Sudder Ameen*, with the costs of this appeal.

6th March, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

TACOORDEEN TEWARRY, (Defendant)* ... } *Appellant,*

versus

NAWAB SYED ALI HOSSEIN KHAN and others, (Plaintiffs) ... } *Respondents.*

Onus Probandi—Execution of Deed of Sale by Pardanashin Lady—Suit to set aside Deed—Consequential Relief—Form of Decree.

In a suit by the heirs of a Mahomedan *pardanashin* lady to set aside a deed of sale executed by her, whilst living apart from her relations, in the house of the purchaser, who had occasionally acted as her *mukhtar*,—*Held* that some evidence to impeach the deeds should be given by the Plaintiffs before the onus of supporting it is thrown on the purchaser.

Where, in such a suit, the substantial relief prayed for is that the deeds should be set aside, the Court is not justified in substituting therefor a mere declaration of the Plaintiffs' title.

AT the close of the argument their Lordships' judgment was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This was a suit brought by the Respondents against the present Appellant, *Tacoordeen Tewarry*, for a confirmation of their possession of certain *mouzahs*; and their plaint, which declared that their suit was for that confirmation, also prayed that it might be done after a reversal of a summary proceeding, and, which is the most important part of their prayer, after setting aside a fraudulent and fabricated deed of sale set up by the Appellant. The deed which is sought to be impeached is of the date of the 23rd of July, 1861. The Respondents are the heirs of *Mussumat Koodrutoonissa*, a *purdanashin* lady, who some time before her death seems to have had some dispute with her relatives, and went to reside in the town of *Patna*. The Appellant, *Tacoordeen Tewarry*, was living in *Patna*; and in the course of the evidence given in this suit, it was stated by the witnesses on the part of the Plaintiffs, that *Mussumat Koodrutoonissa* went to live in his house, that she died there, and that he had acted on several occasions as her *mooktear*. The deeds which are impeached are a deed of sale of the *mouzahs* from the lady to *Tacoordeen Tewarry*, professing to be made in consideration of a sum of Rs. 39,501 (a large part of which, namely, Rs. 17,960, is stated to have been paid to a creditor of the lady), and a *mooktearnamah* for the execution of that deed.

When the case came before the Principal *Sudder Ameen*, evidence was gone into on both sides; on the part of the Plaintiffs to shew that they were in possession of the property, and also to impeach the validity of the deeds on the ground that they were forged and fabricated, and that there had been no real sale from the lady to the Appellant. The Appellant went into evidence to shew that he had been in possession of the property subsequently to the date of the alleged deed, during the lifetime of the lady, and had continued in possession up to the time of the suit, and also to shew that the deeds were really executed, and that the consideration money had passed. Upon a review of the evidence on both sides, the Principal *Sudder Ameen* came to the conclusion that the Plaintiffs were in possession of the property, and that the deeds were fabricated; and he made a decree confirming the Plaintiffs in the possession; and directing that the deeds should be set aside. The Appellant appealed to the High Court, and that Court disagreed with the Principal *Sudder Ameen* as to his finding upon the possession of the property. They

* 1 Moo. I. A., p. 192; 13 B. L. R., p. 427.

thought that upon the whole of the evidence the Respondents had not proved their possession, and in fact, that the possession was with the Appellant. Being of that opinion, they reversed so much of the Principal *Sudder Ameen's* decree as confirmed the Plaintiffs in their possession, holding that they had no possession which could be the subject of confirmation. The High Court then went into the consideration of the substance of the dispute; namely, whether the deeds were genuine deeds or not. In approaching that question they seemed to have assumed that they could only deal with it by way of declaration, and they came to the conclusion that they had power to declare the title to the estate, but could not give any substantive relief. Their Lordships think that they erred in coming to that conclusion; the plaint prayed that the deeds might be set aside, which is a prayer for substantive relief, and the Principal *Sudder Ameen* was quite right, when he came to the conclusion on the facts that the deeds ought to be set aside, in making a decree to that effect. However, the form in which the High Court considered the question does not really alter the substance of their decision. They, after a full and careful review of the evidence, came to the same conclusion as the Principal *Sudder Ameen;* namely, that these deeds had not been executed by the lady.

It was contended by Mr. *Bell*, that the High Court ought not to have thrown the *onus* of supporting the deeds upon the Appellant; and perhaps the mode in which the High Court treat this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the Plaintiff, in order to impeach the deeds he seeks to set aside; but the Court seem to have regarded this suit as if it were an action of ejectment brought by the Appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the Appellant to shew a better title. But although the Judges do not quite correctly state the principle of fixing the *onus*, their judgment is substantially right, because the Plaintiffs did not put their case before the Principal *Sudder Ameen* simply upon their title as heirs, and throw it upon the Appellant to prove a better title, but they did, by evidence, challenge the validity of the deeds. They called witnesses to shew the circumstances under which this lady lived, and to challenge proof of the consideration having passed which the deed alleges to have been given. It may be that the evidence is weak, but the Appellant accepted the *onus* which that evidence *primâ facie* cast upon him; and he went into his whole case, and gave the evidence that he thought would best support it. Upon a review of that evidence, the High Court came to the conclusion that it was utterly insufficient to establish the validity of the deeds under the circumstances of the case.

Now the circumstances of the case are, that this lady was a *purdanashin*, living apart from her relations; whether in the house of the Appellant or not may not be distinctly proved, but certainly in a place where she was without those natural advisers which a lady, when she was going to part with apparently the whole of her property, ought to have around her. She, whilst thus alone and unprotected, is supposed to have made a deed in favour of a person who, on some occasions, acted as her man of business. According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one, and fully understood by the lady whose property is dealt with. So far from giving satisfactory evidence on these points, the Appellant has failed to produce that which clearly was within his power, and which ought to have been given even in an ordinary case of a sale that is at all impeached. It is alleged that the deed of sale was executed by the lady herself, and also by a *mooktear* called *Mookoondee Lall*, who had a *mooktearnamah* from her for that purpose. The *mooktearnamah* is filed, and appears upon this record; but *Mookoondee Lall*, the *mooktear*, who is supposed to have executed this deed, is not produced as a witness. Again, the

execution of the *mooktearnamah* is supposed to have been verified by the *nazir* and three witnesses, the *nazir* having afterwards reported to the Principal *Sudder Ameen*, who registered the document. The *nazir* and those three witnesses have not been called. And, further, the writer of the deed of sale himself, who was present, according to the evidence, at the time when the deed was executed, is also kept out of the witness-box. The deficiency of this important evidence is attempted to be supplied by the testimony of witnesses who say they were present at the execution, but who, as compared with those who would have been the authentic witnesses of the transaction, are not at all fit to be relied upon. Their Lordships also agree with the High Court that there is not trustworthy evidence of the payment of the purchase-money, either by satisfying the alleged claim of a creditor of the lady, or otherwise.

The case on the part of the Appellant was attempted to be supported by the evidence of proceedings which had taken place in the lifetime of the lady in rent suits, and in a suit in which there was a contest between the lady and her relatives. Documents in those suits referred to the sale; and authenticity is endeavoured to be given to the transaction in consequence of the lady herself having recognised it. But there is an entire absence of satisfactory proof that those documents, which are said to contain confirmatory evidence of the transaction, were executed by the lady, or that, if she did execute them, their contents were known to her.

On the whole, therefore, their Lordships entirely agree with the substance of both the decisions below, that these deeds are not genuine, and ought to be set aside.

Their Lordships think that the decree of the Principal *Sudder Ameen* was correct in form as well as in substance. The High Court, acting on their opinion that they could only make a declaration of title, whilst professing to confirm (except as to the possession) the Principal *Sudder Ameen's* decree, really vary its terms, by inserting a general declaration that the Plaintiffs are the rightful owners of the property, instead of the specific order that the deeds should be set aside. They reversed the decision of the Principal *Sudder Ameen* with regard to the possession—a reversal in which their Lordships concur—and added what follows in their formal decree, "and that so much of the decree of the said Court as declares that the said Plaintiffs are the rightful owners of the said property be confirmed." Their Lordships think that as the plaint had prayed for substantive relief, namely, that the deeds should be set aside, the more correct form of decree is in the terms of that prayer.

Their Lordships will, therefore humbly advise Her Majesty to vary the decree of the High Court by striking out so much thereof as purports to confirm the decree of the Principal *Sudder Ameen*, and to order that in lieu thereof so much of the last-named decree as ordered the deed of sale and the *mooktearnamah* to be cancelled and set aside be affirmed.

6th, 7th and 23rd March, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

GONDA KOOER and another (Defendants) *... } *Appellants*,

versus

KOOER OODEY SINGH (Plaintiff) ... } *Respondent*.

Hindu Law—Widow—Accumulations.

Immovable property purchased by a Hindu widow with the profits of her husband's estate, there being no proof of any distinct intention on her part

* 14 B. L. R., p. 159.

to sever such purchases from the estate and appropriate it to herself, held to form part of her husband's estate.

Sreemutty Soorjeemony Dossee v. *Denabuodoo Mullick* (1) distinguished.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This suit originated thus:—*Chowdhry Mohur Singh* in 1862 brought a suit in the nature of an ejectment, claiming the whole of the property, real and personal, of *Chowdhry Nem Singh*, deceased, as his heir, against *Chowdhry Puddum Singh*, who claimed to hold it as *Nem Singh's* adopted son. This suit came by appeal before this Board, which held that the adoption of *Puddum Singh* had not been proved. The following is an extract from the judgment delivered in the appeal on the 14th of March 1869:—

"Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit that the Appellant is not the duly adopted son of *Nem Singh*, and that on the death of *Khoosal Kooer* (the widow of *Nem Singh*), *Mohur Singh*, the father of the Respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of *Nem Singh*, of which his widow died possessed. And they will recommend to Her Majesty that, with, this declaration, the cause be remitted to the High Court of *Agra*, to make such inquiries as shall be necessary to ascertain:—(i), What share of the estate of *Nem Singh* the said *Mohur Singh* was entitled to? and (ii) What part of the property claimed by the plaint was the estate of *Nem Singh*?"

The inquiries thus directed form the subject-matter of the present suit. As to the first, no question now arises, and the second alone has to be dealt with.

The issue on this subject, which the High Court of North-Western Provinces, in order to give effect to Her Majesty's order, settled and sent for trial by the Lower Court, is in these terms:—"What part of the property claimed by the Plaintiff was the estate left by *Nem Singh*, or added thereto by his widow by the outlay of his profits?"

It appeared that *Nem Singh*, who died in 1884, had inherited some property and had purchased some; and further that his widow, after his death, had purchased a good deal of property. The property in dispute consisted wholly of houses and lands. *Khoosal Kooer* left by will all the property which she had power to dispose of to *Puddum Singh*.

The right of the present Plaintiff *Kooer Oodey Singh*, who represents his late father, to all the property inherited or purchased by *Nem Singh*, was not denied; the only question arose as to that purchased by his widow. It was contended, on behalf of *Puddum* and of those who represented him, that his mother had made the purchases in question from property which she had derived from her father, that, consequently, it was her own, and that she had power to dispose of it by will. It was contended on behalf of *Kooer Oodey Singh*, that such purchases had been made from the profits or accumulations of the property of *Nem Singh*, and this was treated as the only question between the parties in the Court of the Principal *Sudder Ameen*, and in the High Court. The Principal *Sudder Ameen* came to no distinct conclusion in this question, and both parties made objections to his judgment. The High Court of the North-Western Provinces thus express themselves on the question.

"With respect to the averment that *Khoosal Kooer* had acquired a portion of the property by means of her own, it is sufficient to remark that there is no proof on the record as to the mode in which she obtained the fund for any such purchases, and that the presumption is that she made them from the proceeds of her husband's estate. If her father, said to have been wealthy, had given her the means of making purchases, more clear evidence that he did so should be forthcoming. Nor do we find that any such averment was distinctly

(1) 9 Moore's I. A., 123; 1 P. C. J., 563.

made when the suit was heard originally. This being so, we are of opinion that the Defendant's objection should be dismissed."

This judgment has been appealed against by the two widows of *Puddum Singh*, who have been permitted to institute this appeal, a settlement having been come to between the Plaintiff and the son of *Puddum Singh*.

It has not been here contended that the High Court was wrong in finding as a fact that the purchases were made by the widow out of the proceeds of her husband's estate. But a question has been raised at their Lordships' Bar which does not appear to have suggested itself either to the parties or to the Judges in the Courts below.

It has been argued that, assuming the purchases to have made by the widow out of the proceeds of her husband's estate, nevertheless, they do not form increments to that estate, but belong to the widow absolutely and are at her absolute disposal, either by gift in her lifetime or by will. It has been further argued that, even if the presumption be that such purchases are increments to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate, and to treat them as made in her own right, whereupon she acquires the power to dispose of them, and that such intention is proved in this case. The principal authority relied upon by the Appellant was *Sreemutty Soorjeemony Dossee* v. *Denobundoo Mullick* (1), where it was declared by this Board, varying the decree of the late Supreme Court at *Calcutta*, that the widow was entitled absolutely in her own right to all such interest and accumulations as, since the death of her deceased husband, had arisen from the one-fifth part of the accumulations which she had before been declared entitled to hold and enjoy as a Hindu widow in the manner prescribed by Hindu law.

Although the decree in that case as so altered made a distinction between the principal funds to which the widow was entitled as heiress of her husband, and the accumulations of income which had arisen therefrom since his death, and in terms treated her right to the latter as absolute and unqualified, it is nevertheless to be observed that there were no questions in that case as to any conflicting rights between her heirs and the reversionery heirs of her husband. The case, moreover, was governed by the law of *Bengal*, and the accumulations of income, to which the widow was declared absolutely entitled, were the produce of a reserve fund. Their Lordships cannot, therefore, regard this case as a conclusion, or even a direct authority upon the questions raised on this appeal.

In the present case their Lordships are of opinion that *Khoosal Kooer*, who always maintained the validity of her son's adoption as heir to her deceased husband and treated him as entitled to succeed to her husband's property, must be presumed to have intended to make her purchases as accretions to that property; nor do they see any evidence to rebut this presumption. It is true that she made a will in her son's favor, but it contains no specific gift of the property in question, and might well have been intended to apply to any property of her own which may have belonged to her as her *stridhan*. That the property in question was understood by *Puddum Singh* himself to be part of *Nem Singh's* estate is shown by the pleadings in the original suit, in which he claimed it as the adopted son and heir of *Nem Singh*. It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself, and to sever from the bulk of the estate such purchases as she had made, with the view of conferring them on her adopted son. Their Lordships accordingly see no sufficient ground for reversing the judgment appealed against, and will humbly advise Her Majesty that that judgment be affirmed, and the appeal dismissed with costs.

(1) 9 Moore's I. A., p. 123; 1 P. C. J., p. 583.

27th April, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BABOO LEKRAJ ROY and others (Plaintiffs)* ... } *Appellants,*

versus

KANHYA SINGH and others (Defendants) ... } *Respondents.*

Leave for Appeal—Stamp paid on an amount below appealable value, no bar.

A party who in observance of the rule of valuation prescribed by the stamp law of the country in which he sues, has paid stamp duty upon a sum lower than the appealable amount, is not thereby precluded from obtaining leave from the Courts of that country to appeal to Her Majesty in Council, if he can shew that the value of the property in dispute does reach the appealable amount.

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:

It was decided on the old stamp law, that a valuation made in conformity with that law, did not prevent a party from obtaining leave to appeal where the real value did not fall short of the appealable amount; and the new stamp law does not appear to be distinguishable from the old in this respect. The stamp duties imposed for fiscal purposes are calculated on a certain rule, fixed by law, but the right of appeal depends on the value, which is a matter of fact: and on this head the Court below appears to have been satisfied. Leave to appeal will be granted on the ordinary terms.

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* 1 Macpherson's I. A., p. 317.

7th & 8th May, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

CHEDAMBARA CHETTY (Plaintiff)* ... } *Appellant,*

versus

RENGA KRISHNA MUTHU VIRA PUCHAIYA NAICKAR, Zemindar of Marungapuri, (Defendant) ... ... } *Respondent.*

Champerty and Maintenance—Fraud—Novation—Undue Influence and Threats.

The three childless widows of a *Zemindar* instituted a suit against the rightful heir to their husband's estate, in which they unsuccessfully disputed his legitimacy. Previously thereto they had obtained advances of money from the present Plaintiff, and executed in his favor an agreement and a bond, whereby they secured to him the payment of large sums in case they recovered their husband's estate, and virtually gave to him the entire control of their suit. Subsequently they agreed with the rightful heir to compromise the suit, which compromise however was never acted upon, partly owing, it was alleged, to the subsequent conduct of the heir. At the date of the compromise, the heir, who had just attained his majority, and was without proper counsel or assistance, and acted under threats from the Plaintiff, a powerful and wealthy banker, that he would carry on the litigation against him *per fas aut nefas*, was induced contrary to his own judgment and sense of right, and without any evidence that the sum claimed was really due to the Plaintiff, to execute a bond in his favor, whereby he bound himself to pay a large sum of money claimed by the Plaintiff as being due from the widows; the Plaintiff on his part agreeing that he would treat such payment as a satisfaction of his claim against the widows, but meanwhile that he would retain the securities which he held from them.

In a suit brought by the Plaintiff against the heir to enforce the last mentioned bond,—*Held* that the bond was wholly invalid and fraudulent

* 1 Mac. I. A., p. 241; 13, B. L. R., p. 509.

as against the Defendant, and that as there was no privity of contract between the Plaintiff and Defendant independently of the bond, it could not stand as a security for anything which might be justly due from the widows.

Semble.—The transaction, even if valid, did not amount to a novation; for the Plaintiff never abandoned his claim against the widows, but only agreed to abandon his remedy against them, in case he obtained satisfaction of his claim from the heir.

Quære.—Whether the Plaintiff could have recovered from the widows, if they had been successful against the heir, the large sums of money secured by their bond and agreement?

The law of champerty and maintenance is not the same in *India* as in *England*. The English Statute with regard to champerty is not applicable in the mofussil in *India*. The Indian Courts in every transaction must decide upon the facts whether it is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive.

Fischer v. *Kamala Naicker* (1) distinguished.

8th May, 1874.

AT the close of the argument the judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

In this case the Appellant sued the Respondent, who was the *Zemindar* of *Marungapuri*, to recover the amount alleged to be due upon the bond marked A. The material portion of the bond is this:—[His Lordship here stated the material portion of the bond (2)]. The bond and the agreement referred to are Exhibit B. and Exhibit C. Their effect will be afterwards stated.

The Respondent was the younger brother of the late *Zemindar* or *poligar* of *Marungapuri*. He seems to have been treated as heir presumptive by his brother. Immediately upon his brother's death he was recognised by the authorities as the *Zemindar*; and, being a minor, he and his estate were placed under the guardianship of the Court of Wards. It is stated in the judgments, and, if the record in the former suit which has been recently before the Court is looked at, it amply appears, that the widows themselves also recognised in the first instance this boy as the heir. And even without going out of the record, it appears upon what is strictly in evidence in this case, that for two years they acquiesced in his recognition by the Government as heir, and received at the hands of the collector, who was exercising the power of the Court of Wards, certain sums by way of maintenance. In December, 1866, a change came over them. The Plaintiff in the suit then came upon the stage, and the agreement which is marked B. was executed on the 21st day of that month. It is an agreement of a very singular nature, and the material portions of it are these:—[His Lordship here stated them (1).] It appears, then, that these

(1) 8 Moore's I. A., 170; 1 P. C. J., 733.

(2) "With reference to the dealings which you had heretofore held with *Lekkamani* and others, widows of my elder brother *Tirumalai Poochai Naicker*, the late *Zemindar*, on account of their maintenance and court costs, as per a loan bond for Rs. 20,000, and an agreement for Rs. 100,000, the accounts being adjusted up to date, the sum which was found due by them, and which alone was assigned to be paid by me is Rs. 67,000. As I have undertaken to pay you the same, I hereby bind myself to pay you the said sum of Rs. 67,000 within the 30th of September of the current year, and get back this bond, and the bond and agreement above referred to. On failure to pay the money within the above prescribed time I bind myself to pay you on demand the said sum of Rs. 67,000 with interest at one-half per cent. per mensem, and receive back this and the aforesaid bonds."

(1) "As with reference to the moneys to be borrowed of you by executing loan bonds in view to meet the expenses incidental to suing out (our claims) in the Revenue and Civil Courts and before the superior authorities respecting our *semindary*, which is now held by the Court of Wards in their management on behalf of another to whom it is intended to be transferred, and to meet our maintenance expenses, we have agreed, of our own free will, to repay, on demand, the amount so borrowed of you, with interest at the rates provided for in such bonds, and in consideration of the aid you propose to give us in money and in exertions towards establishing our title to the said *semindary*, to pay you as allowance and gratuity, immediately after the *zemin-*

ladies having changed their minds, and determined to claim the estate as the heirs of the late *Zemindar*, for that purpose put themselves wholly into the power and into the hands of the Plaintiff; that they agreed to pay him on demand the moneys to be advanced with interest at the rates to be provided for in the bonds which the agreement contemplated they would give the Plaintiff for the advances when made; that they further agreed that if they succeeded in the suit they would pay him a *lac* of rupees and a moiety of the surplus collections, mortgaging the *zemindary* to secure those payments; that they would do nothing in the suit, or otherwise, without his consent, and that if they violated the agreement they should at once become liable to pay both the principal and interest due on the loan bonds, and also the *lac* of rupees and the amount of the surplus collections remaining with the Court of Wards on that day.

Under this stringent agreement, the suit No. 30, of 1868, was instituted in their names; but it is impossible to read the agreement and to know anything of the manner in which litigation is conducted in *India* without seeing that although the suit was carried on in the name of the ladies, the whole management of it was committed to the Plaintiff, and that he was, as was represented in the argument, the real *dominus litis*. It further appears that but one bond was executed by the widows under this agreement, viz., the bond which is dated the 26th of May, 1867, and purports to be a bond for securing the re-payment of the sum of Rs. 20,000 (the amount of the Plaintiff's advances up to that time), with interest at 12 per centum per annum. The principal, if not the only, question raised in the suit by the widows was the legitimacy of their husband's younger brother. The family being a joint Hindu family, he, if legitimate, was unquestionably entitled to the *zemindary* as the heir preferable to the widows. A further question was, however, raised by the collector, who defended the suit as guardian of the minor *Zemindar*, viz., whether the *polliem* was an hereditary estate at all, or one the succession to which, upon the death of the actual *poligar*, was determinable by Government. The suit being in that state, the boy, having attained the age of eighteen, which is the age fixed by the Regulations for the majority of a *Zemindar*, was put by the Court of Wards into possession of his estate, and made a formal Defendant; and immediately upon, or very shortly after that, the transactions which are in question in this suit took place. We find the dates given in the judgment of the Judge, Mr. *Davidson*, and there is no doubt about them. The Defendant was installed as *Zemindar* on the 23rd of July; on the 2nd of August, 1869, he had notice that he had been made supplemental Defendant to the suit. The suit was fixed for hearing on the 16th; and on the 11th, in anticipation of that hearing, certain commissioners were sent to *Marungapuri* by the Court, in order to examine the widows, who, of course, were *purdah* women. The widows seem then to have become de-

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dary is granted to us, one *lac* of rupees out of the incomes thereof, and a moiety of the surplus proceeds that may be transferred to us by the Court of Wards; you shall accordingly prosecute the claims, and shall, immediately after the said *zemindary* is granted to us, have the *zemindary* under the management of your own agent, disburse the maintenance amounts due to us as per agreement, the peshcush (revenue), and the establishment charges, and pay yourself from the surplus proceeds the *lac* of rupees above agreed to be paid to you, and we shall redeem the *zemindary* from your agent's management only after the said amount has been fully paid to you. In the meantime we shall not transgress the directions of your agent in the matter either of the said claim or of our household affairs, &c., or of the management of the *zemindary*. If, on the contrary, we fail so to conduct ourselves, we agree of our free will to pay you at once, without any objection, from out of our assets and those of our heirs, the principal and interest due on the loan bonds, the allowance of one *lac* of rupees agreed above to be paid, and the amount forming a moiety of the surplus proceeds remaining with the Court of Wards on that day. We further agree not to execute any bonds in the matter of this claim or debts to any body other than yourself."

sirous of settling and compromising their suit, and the terms upon which they were willing to compromise were finally embodied in a *razeenamah*. Those terms, however, did not include any subsidiary arrangement to be made in respect of the money which was due from them to the Plaintiff; the *razeenamah* only expressed that they were willing to consent to the dismissal of their suit upon the terms of their having assigned to them certain villages by way of maintenance, and each party paying his own costs.

As to what took place on the 11th and the subsequent days, there is a considerable conflict of testimony; but their Lordships, adverting to what was said by Mr. *Davidson*, the Judge, as to the credit due to the witnesses on either side, and particularly as to the manner in which the *Zemindar* gave his evidence, and to the fact that the finding of the learned Judge has been adopted by the superior Court, have no doubt that it is their duty, upon any matter of fact upon which the testimony is conflicting, to adopt the finding of the *zillah* Judge. It must, therefore, be taken as found, that on the 12th, when the first negotiation for the compromise took place, there were present on that occasion not only the *vakeels* and agents of the nominal parties to the suit, but certain persons acting on behalf of, or as agents for, the Appellant; that the latter then contended that the compromise could not be carried into effect without their principal's consent; that a large sum of money was due from the ladies to him; that something was to be paid to him in respect of his interest under the agreement, and that it lay upon the *Zemindar* to make those payments. It must therefore be taken to be found, that although *Lekkamani*, the principal widow, stated that the sum due to the Plaintiff was small, his agents made use of threats to the Respondent to the effect that unless he would make himself liable for moneys to the amount of Rs. 62,000, the consent of the Plaintiff to the compromise would be refused; that the case would go on, and would probably terminate in the loss of his *semindarg*. Their Lordships cannot doubt that such threats were used; that the note for Rs. 62,000 was given by the Respondent in consequence of them, and that that note was not given, as it has been once or twice represented in the argument, to *Lekkamani*, or anybody on *Lekkamani's* behalf, but was given to *Rungaiengar*, who was one of the persons acting on behalf of the Plaintiff.

The note having been thus given and obtained on the 12th, the *razeenamah* was signed by *Lekkamani* and the Respondent on the 13th. In the meantime a messenger had been sent from *Marungapuri* to bring the Plaintiff from *Shivagunga*, where he seems to have resided. It is stated that he was sent for on the 11th, but that he did not arrive untill the evening of the 14th. On the 15th there was a further transaction; the Appellant asserted that Rs. 62,000 was not sufficient satisfaction of his claims, and that he must have Rs. 67,000. As to what then took place there is again a considerable conflict of evidence. It is sworn by him and by his witnesses that some examination of his accounts was made; that by the account so rendered it appeared that he had actually advanced to the ladies Rs. 54,000, although a bond had been taken for only Rs. 20,000; that he estimated the compensation to be allowed for the further benefit which, if the suit had been successful, he might have derived under the agreement B., at the sum of Rs. 13,000 odd; that the 67,000 rupees were compounded of those two sums, and that the Respondent voluntarily executed the bond A. for that amount. On the other hand, the case made for the Respondent (which is deposed to both by him and his witnesses) is, that there was no rendering of accounts at all; that there was merely a demand for Rs. 67,000 instead of the 62,000 rupees; and that the Plaintiff himself then renewed the threats which had been previously made by his agents.

Some, but not all, of the witnesses say that he threatened, if his demand was not acceded to, not only to go on with the pending suit, but also to sue on the note of hand for Rs. 62,000. All, however, speak to threats to the effect that he would go on with the suit, that he would carry it through all the Courts up to this board,

and that the result to the young *Zemindar* would probably be the loss of his *zemindary* and the ruin which had fallen upon other *Zemindars;* they also swear that the Respondent in vain asked for time to consult the collector who had so recently been his guardian, and that, under the pressure so put upon him, he was induced to execute the bond for Rs. 67,000.

Their Lordships have already said, that when the evidence is conflicting, they must adopt the view which was taken of it by the Judge, Mr. *Davidson*. They must, therefore, hold not only that the Respondent acted under the pressure of the threats deposed to, but, upon the material question whether any accounts were rendered, that there was no accounting at all; that the sum for which the bond was given was an arbitrary sum fixed by the Plaintiff as the amount for which he would be content to allow the arrangement between the widows and the *Zemindar* to be carried out. It may be observed that the bond as drawn out is not altogether consistent with the story told by the Plaintiff himself, since on the face of it the Rs. 67,000, would appear to be the balance found to be due in respect of advances for maintenance and for costs; whereas upon the statement and admission of the Plaintiff himself, it included the sum of 13,000 and odd rupees, as a compensation for that contingent advantage which he was to derive under the agreement B., in the event of the success of the suit.

It may be well to state what afterwards took place before considering the legal effect of these transactions. On the 16th of August the suit came on for hearing; the *razeenamah* was then presented, but Mr. *Norton*, who had been counsel for the collector, as guardian of the infant, and who appeared on that day as counsel for the *Zemindar*, now adult, before the *razeenamah* was filed and acted upon, prayed for an adjournment. That was granted, and on the 31st of August the case came on for final hearing. Mr. *Norton* then, as Advocate-General, acting for the collector alone and not for the *Zemindar*, raised the question which was lately before their Lordships, and was then finally decided; viz., that the estate was not hereditary; that the nomination of the infant *Zemindar* as the next *Zemindar* was an act of state with which the municipal Court had nothing to do; and upon that plea, which must now be taken to be unsustainable, the Judge dismissed the Plaintiff's claim, directing her to pay all the costs. *Lekkamani* then appealed against that decision. No doubt, she might have acquiesced in the title of the *Zemindar*, and they might have privately carried out the arrangements, supposing they were to be carried out, upon which they had previously agreed. However, she saw fit to appeal; but by her appeal she sought only that the decree, instead of being the decree that was made, should be a decree framed in consonance with the *razeenamah*. In this she did not go beyond her rights. The Respondent appeared upon the appeal by his counsel, and treated the *razeenamah* as a thing altogether gone, and by which he was no longer bound. The High Court seems to have considered that that was so, and that the *razeenamah* was to be out of the case. They dealt with the ground upon which the suit had been dismissed, and finally decided, in a very elaborate judgment, which has since been confirmed by Her Majesty in Council, that there was nothing in that ground; that the estate must be taken to be an hereditary estate, and that the succession to it was to be determined by the Civil Courts according to the ordinary law of inheritance. They then gave the widow time to consider whether she would press her suit, and have the case remanded in order that the issue as to the legitimacy of the Respondent might be regularly tried. The widow elected to have that issue tried. The case was remanded, and the Respondent was found to be legitimate. The widow afterwards appealed against that decision to Her Majesty in Council, and her appeal upon that point was dismissed. Therefore the question of the legitimacy was fought out between the parties to the bitter end.

Now upon the transactions which took place between the 11th and the 16th of August, several questions have been raised. The issues settled in this suit were in

effect whether there was any consideration for the bond; and whether the bond had been obtained by such undue pressure and threats as were sufficient to vitiate the contract.

And the principal questions which have been argued at the Bar are, first, whether there was sufficient consideration for the bond; next, whether, if there were, there had not been a failure of that consideration; and thirdly, whether the plea impeaching the bond on the ground of pressure and threats, could be supported.

Upon the first point their Lordships will assume, at all events for the sake of argument, that if the transaction had been between parties dealing with each other at arms' length, and unaffected by any of the circumstances on which the third plea is founded, there would have been a sufficient legal consideration to support the bond.

Assuming, however, that there was a real substantial debt due to the Appellant from the women on an agreement to which no objection could have been taken; that there was a *bonâ fide* arrangement by which the widows were to have their suit dismissed; and that one term of that arrangement was that they should be relieved of the debt due to the Plaintiff,—their Lordships must observe that they agree with the Judges of the High Court in holding that the transaction would hardly amount to what is called a "novation." It was not a transaction by which the widows were altogether released from the debt which they had incurred to the Plaintiff, nor was the Plaintiff's position altered by reason of his having lost his remedy against them. It appears upon the face of the bond that he was to retain his securities against them until the bond was satisfied; and that the contract on his part was, in fact, rather an agreement to abandon his remedy against them on the payment of the Rs. 67,000, than an actual abandonment at the time of the transaction.

The question which has been raised as to the failure of consideration, if it were necessary to determine it, might present some difficulty. It is quite clear that the Respondent never got the benefit of that for which he stipulated; that circumstances prevented the *razeenamah* from being acted upon, and that in the events which afterwards took place he was exposed to have his title questioned and carried up to the Court of ultimate appeal, just in the same way as it would have been litigated had the *razeenamah* never been executed. On the other hand, there is, no doubt, a good deal of truth in the argument of Mr. *Mayne*, to the effect that the failure of consideration was in some degree due to the Respondent himself; and that if, when the widow had appealed from the first decision in her suit, and claimed the benefit of the *razeenamah*, he had joined in also asking for the benefit of the *razeenamah*, the whole transaction might have been carried out as the parties had originally intended it should be. It is, however, unnecessary to decide this question, since it appears to their Lordships that the Respondent is entitled to succeed on the other issue settled in this suit.

What was really the position of the parties? Here was a man who had originally nothing at all to do with this family. All the members of the family appear at first to have been agreed that this young boy was the true heir to the *zemindary*. The widows afterwards, then, either of their own mere motion, or at the instigation of the Plaintiff or his agents, determined to dispute that title. They next deprived themselves of all freedom of action with respect to the suit which they thought fit to bring, by giving the interest and the powers which are given by the agreement B. to the Plaintiff.

With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England*. The statute of champerty, being part of the statute law of *England*, has of course no effect in the *mofussil* of *India*; and the Courts of *India* do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts in *England*. On the other hand, the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the

argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. Now, looking at all the facts of this case, their Lordships think it is extremely doubtful whether the Plaintiff could have recovered on this agreement if the question had arisen between the widows and the Plaintiff after he had got the estate for them; whether, upon the principles laid down by Chief Justic *Peacock* and cited by Mr. Justice *Kemp* in this case in the 13th Weekly Reporter (1), the Courts might not have refused to enforce such an agreement. The principle laid down by the learned Judge was that although the law of champerty was not a law applicable to the *Mofussil*, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family affairs, by an agreement between him and the real heirs that if he should establish their claim he should be entitled to a share of the estate. Nor, in holding that such an agreement could not be enforced, would the Courts, as it seems to their Lordships, be running counter to what was decided by this Committee in the case of *Fischer* v. *Kamala Naicker;* for the judgment there assumes that if the agreement is something against good policy and justice, something tending to promote unnecessary litigation, something that in the legal sense is immoral, it cannot be supported. But it is not necessary for their Lordships to decide a question which has not arisen, viz., what would have been the rights of the Appellant as against the widow. It is sufficient for them to say that they are dealing with a person who had got up, or at all events intervened, in a suit with which he had no necessary concern; who had made himself *dominus litis* in that suit, and had acquired over the Plaintiffs in it the power of preventing them from doing what they felt to be right and just; and from interested and corrupt motives was exercising that power. The *Zemindar* must be taken to have been the legitimate heir; and even if the widows had *bonâ fide* entered into the litigation to dispute that legitimacy, it is perfectly clear that at the time when this transaction took place they had come to a better mind, and had satisfied themselves that the right thing as regarded the boy and as regarded the family was to acquiesce in his title, to admit his legitimacy, and to allow him to remain *Zemindar*.

Their Lordships think it would be contrary to every sound principle of justice and of policy to permit a person who had acquired this sort of irregular interest in a suit, and a power which cannot be safely conceded to any speculator,—to make his power of preventing a family arrangement so just and proper from being carried into effect, the means of extorting a large sum of money from the person whose title had been unjustly challenged. The case, however, does not rest here. The transaction was not one entered into between two persons, each of whom was capable of taking care of himself. Here was a boy of eighteen without proper counsel or assistance, for such of his servants as gave him any advice thought with him, that he should do nothing until he could see the collector; and his *vakeel*, who is represented as his legal adviser in the matter, disowns having given him any counsel, and has been treated as having failed in his duty in refusing that counsel. There is, moreover, clear evidence that he was threatened with the consequences of not immediately acquiescing in the Plaintiff's demand; that these threats were addressed by a powerful man to a boy, and were therefore likely to disturb his mind and render him incapable of acting as a free agent. Whoever has had to do with litigation in *India* must know that such threats are of far greater weight there than they would be in this country. This suit was one in which the legitimacy of the

(1) 13 Suth. W. R., 126.

Respondent was called in question; and the person threatening was a person conversant with law-suits,—a person of great wealth and great power; and we all know how easy it is in *India*, upon such an issue as that, to get up any amount of false evidence, and that it is not because a man has a true case that he is sure to bring it to a successful issue. Their Lordships think the Judges of the High Court have rather understated the case when they treated the threats as threats only of consequences perfectly legal; for (putting aside the threat as to suing on the note for Rs. 62,000, which is not so satisfactorily proved as the others) they think that the threats proved may well be taken to be threats of carrying on the litigation against the Respondent *per fas aut nefas*. In any case they were threats which overcame his free will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed was due, to execute the bond extorted from him.

That being their Lordships' view, they think, that the Court below was right in holding that the bond cannot stand against the Respondent. It is not necessary to go into the question which has been argued on both sides as to the power of the Court to make the bond stand as a security for what may really have been advanced. It is not necessary to consider whether in a suit brought to enforce a fraudulent deed against a person from whom something is justly due, a Court of Justice ought to exercise the power of saying that such a deed shall stand as security for what is really due; because in this case, but for the bond which was thus extorted from him, nothing was ever due from the Respondent to the Appellant, and there existed no privity of contract between them.

Upon these grounds their Lordships think that the decisions of the Courts below, now under appeal, were right, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal, with costs.

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266 & 328

9th May, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

GIRDHAREE LALL and RUNJEET PANDY, (Defendants)* ... } *Appellants,*

versus

KANTOO LALL and Others (Plaintiffs) ... } *Respondents;*

and

MUDDUN THAKOOR (Defendant)... ... } *Appellant,*

versus

KANTOO LALL and Others (Plaintiffs) ... } *Respondents.*

Hindu Law—Mithila—Son's Interest in ancestral Estate.

Ancestral property which descends to a father under the Mithila law is not exempted from liability to pay his debts because a son is born to him. Such exemption can only be pleaded when the nature of the debts incurred by the father is such as would free the son from the usual obligation of discharging his father's debts out of the ancestral estate.

A decree, properly obtained against the father, can be executed by sale of such ancestral estate, and the interest of the sons as well as of the fathers will be bound by it. A purchaser at such sale is not bound to inquire into the circumstances under which the decree was made.

THE facts of this case, so far as it is necessary to mention them, appear by the judgment, which deals with both appeals, and which was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This was a suit brought by *Baboo*

* 1 Moo. I. A., p. 321; 14 B. L. R., p. 187.

Kantoo Lall, the son of *Bhikharee Lall*, and by *Mussumat Doolaro Koonwaree* on behalf of *Mahabeer Pershad*, the minor son of *Lalla Bujrung Sahye*, the said *Kantoo Lall* and *Mahabeer Pershad* being grandsons of *Moonshee Kunhya Lall*, deceased, against a number of different Defendants, who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate. The first appeal arises out of the suit so far as it related to the first set of Defendants, *Baboo Girdharee Lall* and *Runjeet Pandy*, to recover possession of *talook Nawagawan* and *Akha Amanut Sarcar* in *pergunnah Chayen*, and to set aside a deed of sale which was executed by the fathers of the two Plaintiffs, dated the 28th of July, 1856. The fathers are both made Defendants in the suit; and it is stated by one of the witnesses, and is probably the fact, that *Bhikharee Lall*, the father of *Kantoo Lall*, is in reality the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers, and to recover possession of the whole property,—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal *Sudder Ameen* dismissed the suit. The High Court set aside that decision, and awarded to the Plaintiff, *Kantoo Lall*, one half of his father's share,—that is, one half of an eight *annas* share; but as to the other Plaintiff, *Mahabeer Pershad*, the minor son of *Bujrung Sahye*, they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

The property is situated in the *Mithila* district, and is governed by the Mithila law, which is very similar to the law administered under the *Mitakshara*. With reference to the *Mitakshara* upon this point, it may be well to read from the 11th *Moore's* Privy Council Cases, p. 89; 2 P. C. J., p. 219, a portion of the judgment which was delivered by Lord *Westbury* in the case of *Appovier* v. *Rama Subba Aiyan*, before the Judicial Committee. He says: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to a particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court (1), this suit was brought by *Kantoo Lall* and *Mahabeer Pershad* not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father (2). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the Plaintiff was not

(1) 12 Suth. Weekly Reporter, Full Bench Cases, 5.
(2) 12 Suth. Weekly Reporter, Civil Rulings, 478.

entitled to recover any portion of the estate as regards the first two Defendants.

It appears that the deed of sale was executed on the 28th of July, 1856. At that time a decree had been obtained against *Bhikharee Lall* at the suit of *Baijnath Chuckerbutty*, upon a bond executed by *Bhikharee* in his favour, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was therefore necessary to raise money to pay the debt of *Bhikharee Lall*, the father, and to get rid of the execution, whatever the effect of it might be.

The property descended from *Kunhya Lall*, who died in the year 1250. The eldest of the two Plaintiffs, *Kantoo Lall*, was not born until 1251. So that upon the death of *Kunhya Lall*, the property descended to *Bhikharee Lall* and *Bujrung Sahye* as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1251, before the deed of sale was executed, *Kantoo Lall* was born, and, by reason of his birth under the Mithila law, he had acquired an interest in that property.

Now it is important to consider what was the interest which *Kantoo Lall* acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died, and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of *Hunooman Pershad Pandey* v. *Mussumat Babooee Munraj Koonwaree* (1). Lord Justice *Knight Bruce*, who delivered the judgment of the Privy Council, says, "Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, as indeed the case above cited from the sixth volume of the decisions of the *Sudder Dewanny Adawlut*, North-Western Provinces, incidentally shews. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to shew that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice *Knight Bruce*:—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shewn that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a Court of Justice; there was nothing to shew that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion

(1) 6 Moore's I. A. C., 421; 1 P. C. J., p. 552.

either that the bond or the decree was obtained *benamee* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved that the purchase-money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate, and to recover possession of it with mesne profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase-money the sale would not be wholly void.

It appears, therefore, to their Lordships that the Plaintiffs are not entitled to set aside the deed of sale; that the judgment of the Principal *Sudder Ameen* with regard to it was correct, and that the High Court were mistaken in upsetting that decision, and awarding to the Plaintiff one-fourth of the estate, as being one half of the share of his father.

In addition to the case in the Privy Council, there is a case in the *Sudder* Court, of *Mussumat Junnuk Kishoree Koonwur* v. *Rughoonundun Singh*, reported in the Bengal *Sudder* decisions of 1861; in which it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to shew that the debt was illegal or contracted for an immoral purpose. The passage is at page 222. It is there said, "The sales for the reversal of which the present suit is brought divide themselves into three classes: first, sales made by order of Court in execution of decrees; secondly, sales made privately to satisfy decrees and bonds; and thirdly, sales made simply in order to raise money for some purpose or another. Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts under Hindu law can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the Plaintiff has been unable to shew that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these), immoral, and such as under Hindu law the son would not be liable for."

It appears, therefore, to their Lordships that the Plaintiff certainly is not entitled to set aside this deed; and if he were so entitled, it is very doubtful whether he has any particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide anything with regard to that point, inasmuch as they hold that the Plaintiff is not entitled to set aside the deed of sale.

THE SECOND APPEAL is by *Muddun Mohun Thakoor*. He is the fourth Defendant in the suit which was brought against him to recover possession of five *annas* share in *mouzahs Rajpore* and *Alinuggur*, &c. It appears that *Muddun Mohun Thakoor* purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to, in 6th *Moore's* Indian Appeal Cases, in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate. At page 423 of the report, Lord

Justice *Knight Bruce* says :—"The power of the manager for an infant heir to charge an estate not his own is under the the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shewn that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the Plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the Defendant. It appears to their Lordships, therefore, that the decision of the Principal *Sudder Ameen* as regards this portion of the case was also correct.

Under these circumstances their Lordships will humbly recommend Her Majesty that the judgment of the High Court, so far as it relates to the two portions of the estates purchased by the Appellants in these two appeals, respectively, be reversed, and that the decision of the Principal *Sudder Ameen* with regard to them be affirmed, and that the Respondents do pay to the Appellants respectively their costs in the High Court, and their costs of these appeals.

2nd June, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Recorder of Rangoon.

ALEXANDER WATSON, Manager to the Estate of CURRIE & Co. (Plaintiff)* ... *Appellant,*

versus

AGA MEHEDEE SHERAZEE, MIRZA MAHOMED ALLY SHERAZEE, and HADJEE MIRZA HOSSAIN SHERAJEE (Defendants) ... *Respondents.*

Agreement between Principal and Agent —Account Current—Limitation—Act XIV. of 1859, sec. 8—Reference to a Commissioner to take accounts by consent of parties, different from the ordinary reference under Art. 181, C. P. Code—Re-opening of a clear finding of fact by such Commissioner.

An agreement between a principal and his agent commenced with an admitted balance, and clearly contemplated the existence of an account current containing mutual items of debit and credit. The agreement contained a stipulation that on the adjustment of the accounts the principal should be

* 1 Moo. I. A., p. 346.

bound to pay such balance as might be found due from him. The account was kept accordingly as a continuous account, and contained several items which brought down the mutual dealings to March, 1868. The agent sued in February, 1871, to recover the balance due to him on the account:—

Held, that the case fell within the 8th section of Act XIV. of 1859, and was not barred by limitation, even as to the items which were dated more than three years before the institution of the suit.

In a suit for an account it was ordered by consent of the parties that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of certain merchandise, or the value of such merchandise, delivered, or otherwise, with full powers for the purposes of the investigation; and that if questions of law should arise and could not be settled or disposed of before the commissioner, they were to be submitted to the Court:—

Held, that this reference was different from the ordinary reference to a commissioner to examine accounts under Art. 181 of the *Code of Civil Procedure*.

Whether it would be competent to the Court to re-open a question of account against a clear finding upon a question of fact relating to the account and made by the commissioner upon the evidence properly before him, *quære*.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The question raised by this appeal is, whether any, and if so, what amount is due from the Respondents, who are either general partners as timber merchants at *Rangoon*, in the province of *Pegu*, or were engaged as co-adventurers in the working of the forests in that country, to the late firm of *Currie & Co.*, which carried on business as merchants and agents at *Rangoon*, and apparently also at *Moulmein*.

The question arose between the Respondents and the Appellant, who had been appointed the manager under the provisions of sect. 242 of Act VIII. of 1859, with power to sue on behalf of certain judgment creditors of *Currie & Co.* who had attached the debt, if any, due from the Respondents to *Currie & Co.* *Currie & Co.* appear to have afterwards become insolvent, and their books to have passed into the hands of their general assignee, but it must be presumed that at the date of their insolvency the Plaintiff's title, under the attachments, to the debt, if any, had already accrued. The suit was commenced on the 28th of February, 1871. It appears by the proceedings that the course of dealing between the Respondents and *Currie & Co.* was regulated, at all events after that date, by the agreement of the 17th of May, 1867. It is impossible, their Lordships think, to read that agreement without coming to the conclusion that the course of dealing between *Currie & Co.* and the Respondents was the ordinary course of dealing between principal and agent; *Currie & Co.* being often in advance on account of their principals; and being, on the other hand, responsible for the proceeds of the timber sent down from the forests to them for the purpose of sale, and sold by them. The agreement, which starts with an admitted balance of Rs.44,000, clearly contemplates the existence of an account current between the two firms containing mutual items of debit and credit. The 9th clause of it contains a distinct stipulation that on the adjustment of the accounts the Respondents shall be bound to pay such balance as may be then found due from them. That was the state of things so long as these mutual dealings subsisted.

The suit having been brought on the 28th of February, 1871, the Defendants put in written statements. The first and second Defendants put in a joint statement, and the third Defendant put in a separate statement. They do not materially differ, except that the two last Respondents on the record raised a point which is now no longer insisted upon as material, namely, that the agreement having been executed only by the first Defendant, though under powers of attorney by them, they were not bound by it as by an agreement under seal. All the Respondents admitted that they were generally bound to *Currie & Co.*, by the agreement, and also that something, though a sum very far short of the Rs. 44,000, which was claimed by the Plaintiff, might be due to *Currie & Co.* on the balance of the account. The only issues that were settled in the suit were, first, whether the claim of the Plaintiff had been rightly made by regular suit, a question which has since been treated as immaterial; and secondly, what amount, if

any, was due by Defendants to Plaintiff on the cause of action alleged in the plaint. That being the state of the record, the parties on the 5th of April, 1872, agreed by their counsel that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of timber or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation; and that if questions of law should arise and could not be settled or disposed of before the commissioner, they were to be submitted to the Court. And the formal commission issued on the 19th of April to Mr. *Lockie*, the commissioner, by the Court, stated, "You are hereby appointed commissioner for the purpose of taking accounts, and in taking accounts you are to decide upon all questions of fact, whether the delivery of timber, or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation; and if questions of law arise and cannot be settled or disposed of before you, they are to be submitted to the Court, and to report to this Court on or before the 17th day of May, 1872."

The commissioner so appointed appears to have made a careful investigation, and the result of his report was this:—He says: "From the result of my examination it appears to me that the Defendants are indebted to Plaintiff in the sum of Rs. 24,898. 11*a* 5*p*., and it is a question for the Court to decide whether the commissions on renewals, &c., amounting to Rs. 9796. 6*a*. 9*p*., are due by Defendants as a fair charge on the account; also no further deliveries of timber than appears in *Currie & Co.'s* account have been proved by the Defendants. Mr. *Elmes*, counsel for the Defendants, it will be seen from the proceeding, reserved several objections in law, to which I would beg to refer the Honourable Court."

The question with reference to these commissions may be at once dismissed from consideration, because there is no longer any contention raised on the part of the Appellant that they ought to have been allowed; and the question now to be determined is simply whether the commissioner's report, which finds the sum of Rs. 24,898. 11*a*. 5*p*. to be the amount due, is to be upheld or not.

The points of law taken by Mr. *Elmes* are stated in the record in these words: "1st. That *Currie & Co.'s* accounts have not been proved lawfully, and cannot therefore be received in evidence as to any fact; 2nd. That the deed of the 17th of May, 1867, is not binding as against the second and third Defendants, since no authority under seal from either of them to execute it has been proved or shewn; 3rd. Mr. *Elmes* reserves all questions as to limitation affecting the several items charged for the consideration of the Court." Their Lordships think that it will be convenient to deal first with those questions of law, and to take them in their inverse order.

The contention as to limitation seems to have been that the suit having been commenced on the 28th of February, 1871, the Plaintiff's claim was barred, at least as to many items of the account, by the clause of Act XIV. of 1859, which prescribes a three years' limitation for suits for breaches of contract, money lent, and the like. It is unnecessary to consider whether after the consent order referring the question to the investigation of the commissioner, nothing having been said in the written statements about the claim being barred by limitation, and no issue on that point having been settled, the objection was not taken too late. For their Lordships are of opinion that the Plaintiff's claim does not fall within the three years' limitation. It appears to them that it would be a misapplication of the law to treat the claim as barred as to some, and valid as to other items of the account. They are of opinion that the account was one continuous account between principal and agent, with debits and credits on each side of it, and that the contract was to pay the balance of that account when it should be struck: and that the case therefore falls within the 8th section of Act XIV. of 1859, there being several items which bring the mutual dealings down to March or May, 1868. Therefore the objection that has been taken on the ground of the *Statute of Limitation* cannot prevail.

With respect to the second point raised by Mr. *Elmes*, that has not been insisted upon at the Bar to-day, and it is unnecessary for their Lordships to say more about it.

The other objection seems to be that upon which the decree of the learned Recorder of *Rangoon* is founded. It is, "That *Currie & Co.'s* accounts have not been proved lawfully, and cannot, therefore, be received in evidence as to any fact." In order to see whether the learned Judge was right in dismissing the suit on this ground, it is necessary to consider more particularly what was the course of the proceedings before the commissioner.

He acted in this way: he first took the evidence of one of the Respondents—*Aga Mehedee Sherazee*—who after several meetings and under an order of the commissioner produced the accounts of his firm. He also took the independent evidence of the bill collector of the *Bank of Bengal*, who produced certain promissory notes, fourteen in all, made by the Respondent *Aga Mehedee Sherazee*, and indorsed by *Currie & Co.*, and proved that those fourteen promissory notes had been taken up and paid by *Currie & Co.* As to every other item of the charge which the commissioner has allowed, he, upon the examination of *Aga Mehedee Sherazee*, and on the accounts produced by him as the accounts of his firm, found that they tallied with the like items in the books of *Currie & Co.*

In fact, the claim of the Plaintiff was proved wholly independently of *Currie & Co.'s* accounts, by those two witnesses and the accounts of the *Sherazees*. In one part of his judgment the learned Recorder states, and states correctly, that the accounts of *Currie & Co.* would have been, under the *Indian Evidence Act*, merely corroborative evidence. It follows therefore that the real result of his finding is, that inasmuch as by reason of the noncalling of the clerk who had made some of the entries, those accounts had not been satisfactorily proved and made corroborative evidence, he was bound to reject all the independent evidence,—that evidence which is the real foundation of the commissioner's finding,—and to come to the conclusion that the Plaintiff had failed to substantiate his case. That is a decision which cannot be supported.

Their Lordships desire also to observe that even if the learned Recorder had the power, which is a question afterwards to be considered, to go into these questions of fact, and had on sufficient grounds come to the conclusion that the commissioner's finding was based upon evidence improperly received, it would have been his duty to send the case back for further investigation rather than to dismiss the suit altogether; since even upon the accounts of the *Sherazees* which were in evidence, it appears that at least Rs. 4000 odd were due from them to the firm of *Currie & Co.* In their Lordships' view, it is unnecessary to consider whether the accounts might not have been treated as properly before the commissioner by way of corroborative evidence—whether, as Mr. *Brown* argued, it was not sufficient to shew that they were accounts regularly kept in the course of business, although the clerk who made particular items, and who might have been called, was not called to verify those items.

This being their Lordships' view upon the question on which the decision of the Court below has principally turned, the only remaining question is whether there are sufficient grounds upon which the *Sherazees* can, so to speak, surcharge the account as found by the commissioner, by taking credit for the sum of Rs. 14,000, being the last item in the account shewn by their books, and also for the supposed value, a value which can only be ascertained by subsequent investigation, of three rafts of timber alleged to have been received by *Currie & Co.*, for the proceeds of which, if they ever sold them, they have never accounted. The commissioner has found, as a fact, that no further deliveries of timber than appears in *Currie & Co's* account had been proved by the Defendants; and this raises a material question as to the powers of the commissioner, and the effect to be given to the consent order under which it was referred to him to take the accounts. It is contended on behalf of the Respondents that the reference must be taken to be not a reference to him as an arbitrator, but a mere reference under the 181st article of

the *Code of Procedure*, by which the Court is empowered to direct a commissioner to investigate the accounts and to make a report with which the Court can afterwards deal, treating it merely as evidence. It appears, however, to their Lordships that this particular reference, though not in the form of a reference for the final determination of a cause by an arbitrator, according to the provisions of the 312th and following articles of the *Code of Procedure*, is something higher than and different from the ordinary reference to a commissioner to investigate accounts under Article 181. In the first place it is made by consent, and the parties are bound by that consent, whatever may be the true construction to be put upon the order. A consent to such a reference under Article 181 does not appear to be made necessary by the Code. Nor can their Lordships construe the terms of the orders of the 5th and 19th of April, 1872, as importing anything but the agreement of the parties; and it was by no means an unreasonable agreement, that the commissioner, who was probably more conversant with mercantile accounts than the learned Judge, should decide the questions of fact, reserving any question of law which might arise to be disposed of by the Court. There is no proof upon the record of a formal exception taken to his finding upon any question of fact. The objections are all founded on matters of law, or on the improper reception of evidence, and of those objections their Lordships have already disposed.

Their Lordships, for these reasons, would feel very great difficulty in reopening, and would think it was hardly competent to them to reopen this question, against a clear finding upon a question of fact relating to the account and to the delivery of timber by the commissioner upon the evidence properly before him. But even if this were otherwise, they are by no means satisfied that there are grounds in the present case upon which they would be justified in directing any further investigation on this point. The claim rests on the evidence of *Aga Mehedee Sherazee*, and that evidence cannot, in their Lordships' opinion, be treated as satisfactory proof of the further delivery of timber to *Currie & Co.*, or of their receipt of the proceeds of that timber, or of their failure to account for such proceeds. On his first examination he said: "I was also told by them," he does not say by whom, "that Rs. 14,000 had been realised for timber on my account in January, 1868. There were also three rafts of timber delivered to *Currie & Co.* by the second Defendant, which do not appear in my books. I cannot speak personally as to the delivery of these rafts to *Currie & Co.* I made entries in my books from what *Currie & Co.* told me, not from accounts rendered by them." After the accounts were filed, he was again examined, and he then said, as to the first item: "I delivered 350 logs of timber to *Currie & Co.*, in 1867, and they sold them in the month of January, 1868. The proceeds are entered in my account filed on the 18th of February, 1868. I made the entry on my return from *Toungoo* at that time, according to the value of the timber, but I received no account sales. I cannot give any information about the three rafts of timber sent down from *Toungoo* by *Mirza Mahomed Ally*." On re-examination he said: "I delivered the 350 logs of timber to Mr. *Gair*. They were not delivered on account of any private transactions with Mr. *Gair*. Mr. *Gair* was acting on behalf of *Currie & Co.* I never got receipts for the timber delivered to *Currie & Co. Currie & Co.* ordered the 350 logs of timber to be taken to *Aga Mahomed Ismaile Bankshall*." The account, which he produced, contains this item: "For 350 logs of timber sold privately by Mr. *Gair* at *Aga Mahomed Ismaile Bankshall*, January, 1868, Rs. 14,000." Therefore as to the principal item, the only item in respect of which any ascertained amount is claimed, there is nothing but this loose evidence of the Respondent himself as to the delivery of the timber, and of his having been told by somebody connected with *Currie & Co.* that they had sold that timber; and that latter statement seems to be inconsistent with what he afterwards says, viz., that he made the entry on his return from *Toungoo*, according to the value of the timber.

It seems to their Lordships that if that transaction had really taken place, if 350 logs of timber had been delivered at *Rangoon* to *Currie & Co.*, and had been afterwards taken to or sold at *Aga Mahomed Ismails Bankshall*, it would have been easy for the Respondent to produce corroborative evidence of those facts, and that upon his unsupported testimony the commissioner was perfectly justified in treating that item as unproved. It is to be further remarked that the accounts which were sent by the official assignee have no bearing at all upon that item; because, as Mr. *Cowie* has shewn, they, for some reason or other, purported only to give the debit side of the account, and did not purport to shew the sums which had been received by *Currie & Co.* from the *Sherazees*. Again, as to the three rafts of timber, *Mirza Mahomed Ally*, who is said to have sent them down, was not called. There was no evidence whatever of the receipt of these three rafts of timber by *Currie & Co.*, and their Lordships think the Commissioner was justified in finding that there was no proof of their delivery.

Under these circumstances their Lordships think the judgment under appeal cannot be supported, and it will be their duty to advise Her Majesty to reverse that judgment, and to direct that in lieu thereof a decree be made in favour of the Appellant for the sum found due by the Commissioner, viz. Rs.24,898 11*a* 5*p*., with the costs of the suit below and the costs of this appeal.

4th & 5th June, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

RAJAH SRI CHAITANYA CHUNDRA HARISCHANDANA JAGADEVU BAHADOOR (Plaintiff)* ... — *Appellant,*

versus

THE COLLECTOR OF GANJAM, on behalf of the Governor of Fort St. George, and SRI NARAYANA MAHARAJA DEVU, Zemindar of Kolli Kota (Defendants) ... ... — *Respondents.*

Sale of mocasea Villages for arrears of Revenue along with the zemindary—Suit for Recovery of possession—Limitation—Act XIV. of 1859.

The *talook* of a *Zemindar* was sold in 1854 for arrears of revenue, and possession was given to the purchaser in 1855: it was subsequently represented by the *Zemindar* to the Government that fifty of the villages had been sold wrongfully, inasmuch as they were *mocasea* villages, which had been alienated from the *zemindary* and paid a quit-rent only to the *Zemindar*. In 1860 the Government ordered an annual payment to be made to the *ex-Zemindar* by way of compensation; but he did not accept it, and he sued in 1868 for the recovery of the villages:—

Held, that more than twelve years having elapsed since the sale and the dispossession, the Act XIV. of 1859 was a bar to the suit, notwithstanding the transactions between the Government and *ex-Zemindar*.

AT the close of the argument, the judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is a very clear case. Both the Courts in *India* have decided that the

* 1 Moo. I. A., p. 335.

claim of the Plaintiff is barred by the limitation of twelve years. He brought his suit, as the adopted son of the late *Zemindar* of *Hautghur*, to recover fifty villages which had belonged to the *talook* of *Hautghur*. That *talook* was sold by the Government for arrears of revenue. It is alleged by the second Defendant, who was the purchaser, that the fifty villages were sold with the rest of the *talook*. It is alleged on the part of the Appellant that those villages, although in some sense belonging to the *talook*, ought not to have been sold by the Government, inasmuch as they were not subject to revenue, but were *mocassa* villages, which had been alienated from the *zemindary*, and paid a quit-rent only to the *Zemindar*. That is the question upon the merits, if the merits could be tried. The sale was in 1854. The second Defendant was put into actual possession of the villages in 1855, and has remained in possession ever since. This suit was not brought until the 28th of September, 1868, which is more than twelve years after he was so put in possession. *Primâ facie* therefore, the *Statute* of *Limitation* is a bar. Mr. *Cowie* has endeavoured to shew that a fresh cause of action arose in consequence of some proceedings of the Government, by which it is said they made a new grant of these villages to the second Defendant, the present *Zemindar*, at an increased revenue of Rs.5000. But such a grant, supposing it to have been made, would not give a new cause of action, and cannot affect the time when the only cause of action arose to the present Appellant. The Appellant is suing under the title he had in 1854 and 1855, and he has no other title, and he does not allege that he has had any possession, or that the Government has given him possession since his first dispossession. It is quite unnecessary, therefore, to go into those proceedings, into which Mr. *Cowie* went in some detail, for the purpose of raising the point. It is sufficient to say that all that passed between the Government and the second Defendant, the present *Zemindar*, does not at all affect the question of limitation. The bar applies if the cause of action has not arisen within twelve years. It is quite clear here that it did not arise within that period; and therefore the judgments of the Courts in *India* are right.

Their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court of *Madras*, and to dismiss this appeal with costs.

9th June, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

TOONDUN SINGH (Plaintiff)* ... ... } *Appellant,*

versus

POKHNARAIN SINGH, TELUKDHAREE SINGH, and RAM PERSHAD SINGH and BISHEN PERSHAD SINGH (the two sons of KASHEE SINGH, deceased) (Defendants) ... } *Respondents.*

Purchase by managing member of a joint Hindu family at a Sale for arrears of Government Revenue—Construction —Act I. of 1845 section 21—Practice —Subsequent judgment on Review by the lower Court not affected by the Decision in appeal against the original judgments.

A purchase at a sale for arrears of revenue under Act I. of 1845 made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act; and the members of the joint family can sue to enforce rights acquired by them under such a purchase, as against the managing member, though he is the sole certified purchaser.

Where, after appeal brought, the Court below has passed a judgment in review in the same case, which has been sent up and notified to Her Majesty in Council, and put on record in the appeal case, it is

1 Mac. I. A., p. 342.

open to the Judicial Committee to pass judgment on the appeal, without prejudice to the subsequent judgment which was passed on review.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK :—

The point in this case has been reduced now to the question as to what is the proper construction to be put upon the 21st section of Act I. of 1845. The High Court expressed their opinion "that a purchase at a sale for arrears of revenue under Act I. of 1845 made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act, and that notwithstanding anything contained therein the members of such joint family may sue to enforce rights acquired by them under such a purchase as against the managing member, though he is the sole certified purchaser." Their Lordships entirely concur in that view of the construction of Act I. of 1845. It appears upon the record that this judgment was pronounced on the 20th of April, 1870, and that the appeal was preferred and allowed to Her Majesty in Council on the 14th of May, 1870. The judgment in review which has been sent up and notified to Her Majesty in Council, and put upon the record in this case, was passed on the 29th of August, 1871, after the appeal was preferred. It does not appear that any appeal has been preferred against the judgment which was pronounced in review; and under those circumstances their Lordships, being aware that such a judgment has been passed, will humbly recommend Her Majesty to affirm, with the costs of this appeal, the original decree passed by the High Court, so far as it finds the properties in question to be part of the joint family estate, but without prejudice to the subsequent judgment which was passed by the High Court in review, or to any proceeding which may be taken thereunder. That will leave all the questions open as to carrying it out.

12th & 13th June, and 3rd July, 1874.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Madras.

THE MADRAS RAILWAY COMPANY (Plaintiffs)* } *Appellants,*

versus

THE ZEMINDAR OF CARVATENAGARUM (Defendant) ... ... } *Respondent.*

Duty of Zemindar—Ancient Tanks—Negligence—Statutory Powers—Liability for Damage occasioned by overflow of Tanks.

The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved upon *Zemindars*. Such *Zemindars* have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such *Zemindars* with regard to their tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed.

Such a *Zemindar*, if the banks of any tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby.

Withers v. *The North Kent Railway Co.* (1) approved. *Rylands* v. *Fletcher* (2) distinguished.

3rd July, 1874.

THEIR Lordships having reserved their judgment, it was now delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER :—

The *Madras Railway Company* claimed in this suit damages against the Defen-

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* 1 Moo. I. A., p. 364; 14 B. L. R., 209.
(1) 27 L. J., Ex., 417.
(2) L. R., 3 H. L., 330.

dant, the *Zemindar* of *Carvatenagarum*, for injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The Defendant denied that the injuries complained of resulted from the bursting of the tanks; he asserted that if they did so arise, the bursting was caused by no act or negligence of his, but by *vis major*, or the act of God. He further pleaded in these terms:—

"The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in *India*, and particularly in this district and in the *zemindary* of *Carvatenagarum* and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said *zemindary* is a hilly district, and the *ryots* will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

"The Defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time."

He also contended that the damage arose through want of proper care on the part of the Appellants in the construction of their works, but this contention was abandoned. It was found by both Courts, and it is not now disputed, that the works of the Plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were:—

1. Whether the injuries complained of were the result of *vis major*, or the act of God, or other influences beyond the Defendant's control.

2. Whether Defendant is liable for any, and if so what, damages sustained by the Plaintiffs.

The evidence given in the cause may be summarized as follows:—It was shewn that the tanks of the Defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner, that the banks were properly attended to and kept in repair, that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years; but that an improved description of sluice, of recent introduction, would be still more efficacious. That at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the deputy inspector of the railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the Defendant as exceeding any fall of rain for twenty years; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off, that the banks of the tanks were overflowed, and finally carried away.

Upon these facts the Acting Civil Judge of the Civil Court of *Chittoor* found for the Defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent. This judgment was affirmed by the High Court on appeal.

The Appellant now contends that the judgment of the High Court should be reversed on two grounds:—

1st. That the Defendant, by storing up water on his land, rendered himself liable in damages, should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2nd. That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support

of the first contention is *Fletcher* v. *Rylands* (1), which it becomes necessary to examine. In that case the Plaintiffs, the owners of a mine, sued for damages the Defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works into the Plaintiff's mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the Plaintiffs were entitled to damages against the Defendants. The grounds of this judgment are stated very clearly and shortly by the then Lord *Chancellor* (Lord *Cairns*), and Lord *Cranworth*. The Lord *Chancellor* says :—

"The principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners and occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used ; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground ; and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving or by interposing some barrier between his close and the close of the Defendants, in order to have prevented that operation of the laws of nature. . . . On the other hand, if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities, and in a manner not the result of any work or operation on or under the land ; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing, they were doing at their own peril ; and if, in the course of their doing it , the evil arose . . . . of the escape of the water and its passing away to the close of the Plaintiff, and injuring the Plaintiff, then, for the consequence of that, in my opinion, the Defendants would be liable."

Lord *Cranworth* thus states the principle of the decision :—

"If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his perils. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.*"

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in *Vaughan* v. *Taff Vale Railway Company* (1), where it was held by the Exchequer Chamber that a railway company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by statute. Chief Justice *Cockburn* observes, "where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." This view is fortified by the consideration that the Legislature may

(1) Law Rep. 3 H. L. 330.

(1) 5 H. & N. 679.

be presumed not to have conferred special powers on persons or companies without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a waterworks company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity: *Blyth* v. *Birmingham Waterworks Company* (1).

On the other hand, in *Jones* v. *Festiniog Railway Company* (2), it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived.

It has been argued on the part of the Respondent that the case of *Fletcher* v. *Rylands* (3), decided on the relations subsisting between adjoining landowners in this country, has no application whatever to *India*. Though that case would not be binding as an authority upon a Court in *India* not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim, *sic utere tuo ut alienum non lædas*, expressing a principle recognised by the laws of all civilised countries, it does not afford a rule applicable to circumstances of the same character in *India*—they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Mahomedan law, by regulations of the *East India Company*, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of *India*. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of *India*, and upon the settlement of the country has, in many instances, devolved on *Zemindars*, of whom the Defendant is one. The *Zemindars* have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the Defendant in this case is in a very different position from the Defendants in *Fletcher* v. *Rylands* (1).

In that case the Defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord *Cairns* "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the Defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the Defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. See *Withers* v. *North Kent Railway Company* (2).

The second ground on which the Appellant relied was not so clearly stated; their Lordships understood it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the Defendant.

It should be observed that the question

(1) 27 L. J. (Ex.) 212.
(2) Law Rep. 3 Q. B. 733.
(3) Law Rep. 3 H. L. 330.

(1) Law Rep. 3 H. L. 330. (2) 27 L. J. (Ex.) 417.

of negligence was little, if at all, argued in the High Court. The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron *Alderson*: "Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party;" and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

18th, 19th & 20th June, and 24th July, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GANENDRO MOHUN TAGORE (Plaintiff)* ... } *Appellant,*

versus

RAJAH JUTTENDRO MOHUN TAGORE, OPENDRO MOHUN TAGORE, DOORGA PERSHAD MOOKERJEE, BROOJENDRO BHOOSUN CHATTERJEE, and CHUNDER MOHUN CHATTERJEE (Trustees) (Defendants) ... } *Respondents.*

Will—Proviso for Cesser—Conditional Limitation—Breach of Condition—Residence.

P C T, a *Hindu*, died, leaving an only son *G M T*, and having made a will in English form, whereby, after declaring that he had already made sufficient provision for *G M T* and that he was to take nothing under the will, he gave all his property to trustees, as to the personalty upon trust "to collect and get in the same (save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use)," and after paying debts and such legacies as were not by the will postponed in payment, to invest the residue, and pay out of the income certain annuities, and the postponed legacies as they became due, and to pay the unexpended surplus of such income to the person who for the time being should be entitled

* 1 Mac. I. A., p. 387; 14 B. L. R., p. 60.

to the beneficial enjoyment of the real property or the profits thereof; and as to the realty, upon trust until the debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities if the personalty should be inadequate, and subject thereto to pay the residue to the person for the time being entitled to his real estate under the limitations thereinafter contained "for the absolute use of such person." The testator further directed that the trustees should hold the estate generally for the use and benefit of such person so far as was consistent with the trusts and provisions of the will: that out of the income, after paying the necessary costs of managing the estate "including the expense of the establishments in the *mofussil*, and *Calcutta*" such person should receive Rs. 30,000 per annum; and that, as soon as the legacies and annuities were paid and had fallen in, the trustees should convey the real estate unto and to the use of the person or persons who should be entitled to the beneficial interest therein. The testator then devised (subject to the devise to the trustees) his "real property" and also his "library, horses, carriages, farmyard, furniture of the *boitokanah*, jewels, gold, and silver plates, &c.," to *J M T* for life, and to the sons of *J M T* successively in tail male, with subsequent limitations over in the English form. The will then contained the following proviso:—

"Provided always, and I hereby declare that, if any devisee, or tenant for life.....shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in *Calcutta*, the said *boitokanah* house, and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed" as if the person committing any breach of such conditions had then died. The testator died in August 1868; and shortly afterwards *G M T* brought a suit to set aside the trusts and limitations in the will, except so far as they were for the payment of debts, legacies and annuities, in which suit the final order of the Privy Council of 9th August 1872, declared all the limitations subsequent to the life-interest given to *J M T* to be void and inoperative; and further declared that *J M T* was entitled to a life-interest in the realty, and also in the personalty directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made and to the provisions in the will not declared to be void, and also, until the legacies and annuities fell in and were satisfied, to Rs. 2,500 a month out of the realty, and also to the surplus rents of the same and the surplus interest of the personalty; and that upon the failure or determination of the life-interest of *J M T*, *G M T* was entitled as heir-at-law to the real and personal property.

The proviso for cesser was not among the provisions of the will which were declared void. *J M T* was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the *boitokanah* house: and *J M T* who had a family dwelling-house of his own, used, up to November 1869, to attend at the *boitokanah* daily for the the transaction of business. In November 1869 *J M T* quarrelled with his co-trustees, and ceased to go to the *boitokanah*. In April 1870 he demanded from the other trustees that possession of the *boitokanah* should be given to him, and upon their insisting on the right to occupy the portion of the *boitokanah* used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favor: the trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J M T* should enter into possession; and the trustees were ordered to deliver to him possession of the *boitokanah*, except the portion of the ground floor occupied for the business of the estate. After obtaining this decree, *J M T* found that the *boitokanah* was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, *J M T*, in December 1871, brought a suit to compel them to effect the necessary repairs: the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently repairs were begun which were completed in October 1872.

In a suit by *G M T*, alleging that *J M T* had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the *boitokanah* house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the Plaintiff was entitled to take advantage.

Held that as the clause provided for the cesser and determination of the life-interest of *J M T* in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened.

Held that the clause could not be construed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and *J M T's* estate perfected by a conveyance.

But *held*, on the evidence, that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872 was not unreasonable.

Where in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition, exclusive residence is not supposed to be meant; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence, is a sufficient compliance with the condition.

24th July, 1874.

THEIR Lordships having reserved their Judgment, it was now delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH :—

The questions in this appeal arise upon a clause in the will of the late Hon. *Prosono Coomar Tagore*, making provision for the cesser of the estate of the persons entitled under the limitations of the will in the event of non-residence in his *Boitokanah* house.

The will by which the testator devised his estates, after the determination of the life estate given to *Juttendro Mohun Tagore* (the first Respondent), to *Juttendro's* sons successively in tail male, with subsequent limitations over, according to English forms of limitations, underwent much consideration in the Courts in *India* and in this tribunal. The final decision, speaking generally, was that the limitations in tail and subsequent limitations were contrary to Hindu law, and void, and that upon the expiration of the first life interest the Appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will and to some of its provisions. The testator expressly declared that his son, the Appellant, should take nothing under his will. He devised all his real and personal property to four trustees (of whom *Juttendro* was one) in trust to get in the personalty, with an exception thus expressed:—" Save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use." Upon trust, after paying debts and legacies, to invest the residue and pay out of the income divers annuities and the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of his real property or the profits of it. And as to the realty, upon trust, until his debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities, if the personalty should be inadequate, and subject thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereinafter contained "for the absolute use of such person;" and he further directed that the trustees should hold the estate generally for the use and benefit of such person, so far as was consistent with the trusts and provisions of the will. The testator directed that out of the income, after paying the necessary costs of managing his estate, "including the expense of the establishments in the *Mofussil* and *Calcutta*," the person for the time being entitled to the beneficial enjoyment or surplus income of his real property should receive Rs. 2500 a month, or Rs. 30,000 a year. As soon as the legacies and annuities were paid, and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be entitled to the beneficial interest therein.

The will, after mentioning numerous legacies and annuities, contains the specific limitations of the realty, which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a *talook* in *Zillah Rungpore*, subject to a *jumma* of Rs. 40,555, and of the *Boitokanah* house, land, and premises where he usually resided. He then devises (subject to the devise to the trustees) his "real property," and "also library, horses, carriages, farmyard, furniture of the *Boitokanah*, jewels, gold and silver plate, &c.," unto and to the use of *Juttendro* (the Respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows :—

" Provided always, and I hereby declare that if any devisee or tenant for life, or

entail, or otherwise, or any person entitled to take as heir by descent, or adoption, or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited, as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall after attaining his majority cease to keep up in a due state of repair, and to use as his residence in *Calcutta*, the said *Boitokanah* houses and premises where I now reside, and make use and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and immediately thereupon the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person so permitting or suffering the said property, or any portion thereof, to be sold for arrears of Government revenue, or so ceasing to keep up in state of repairs, and to use as his residence my said *Boitokanah* house, had then died."

It was contended in the former suit by the Appellant that *Juttendro's* life estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this tribunal that there was no uncertainty, for his interest was to begin at once. It is said in the judgment:—

"Their Lordships read this will, alike according to its words and substance, as giving a life interest subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid."

The testator died on the 30th of August, 1868. This suit was brought by the Appellant on the 18th of November, 1872, to have it declared that the interest of *Juttendro* had ceased by reason of his non-compliance with the clause relating to residence, and that the Appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the Bar.

1. That the limitations to take effect on the determination of *Juttendro's* interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach of it. 2. That the condition would not attach until *Juttendro* became entitled to a conveyance from the trustees on the death of the last annuitant: and 3. That, if this were not so, there had been in fact no breach of the condition.

On the first point their Lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life interest of the Respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the Appellant would be entitled to succeed as heir.

On the second point, it was contended for the Respondent that, having regard to the other causes of forfeiture, and specially that for non-payment of the Government *jumma*, which far exceeded in amount the annual payment of the Rs. 30,000, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end and the donee's estate was perfected by a conveyance.

It was urged, on the other hand, by the Appellant's counsel, that the clause should be read distributively. They contended also that *Juttendro*, according to the language and substance of the decisions of this tribunal, had a present life interest subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was observed that *Juttendro* had actually recovered the possession of the *Boitokanah* house in a suit against the trustees, so that if the Respondent's contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the

estate, except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their Lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it, nor is it necessary for them to do so, since they agree with the judgment of the High Court in favour of the Respondent on the third point, viz., that there has been no breach, in fact, of the condition.

Boitokanah appears to mean a house, or the part of a house, used for sitting or reception rooms, where entertainments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the *Zenana*, are usually the outer rooms.

The manner in which the testator himself used the *Boitokanah* house, is thus found by the High Court:—

"It appears from the evidence that the testator possessed a family dwelling-house as well as the *Boitokanah*, the two houses being completely distinct, and, indeed, situated on different sides of the same street: that some time before his wife's death he ceased to sleep in the family dwelling-house, after having complained of defective ventilation in his sleeping chamber there; that, thenceforth he slept at the *Boitokanah;* that subsequently, during his wife's life, he took his mid-day or principal meal in the family dwelling-house and his evening meal in the *Boitokanah*; that after his wife's death he took both meals in the *Boitokanah*, but the mid-day meal was taken in native fashion and was cooked at the family dwelling-house, and the evening meal was taken in European fashion and was cooked at the *Boitokanah;* that he gave his native or strictly *Hindu* entertainments in his family dwelling house, and his European entertainments at the *Boitokanah;* that the testator's family idols were always lodged and worshipped at his family dwelling-house and never at the *Boitokanah;* and that, at the *Boitokanah*, all the affairs of his estate were conducted and the necessary establishment kept up and lodged."

The opinion of the High Court on the nature of the residence imposed by the condition, is thus expressed:—

"We think it is to be gathered from the will that the testator never intended the *Boitokanah* to be occupied as a dwelling-house in the ordinary sense of a *Hindu* dwelling-house." And again, "We are of opinion that the residence intended by him was an occupation for the purposes of transacting business and of receiving male friends and visitors, and if the occupant of the house for the time being so desired (but not otherwise), for entertaining male friends with hospitality: and we are further of opinion that such an occupation does not require that either the occupant or the ladies of his family should sleep in the house."

Their Lordships think that, in the main, the High Court have properly construed the clause; and they understood the Appellant's counsel not to dispute this construction, but to contend that the evidence shewed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument, as to the meaning of the word "residence." The principle, if any can be said to result from them, seems to be that where in a condition of residence no manner or period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition. In one case Lord *Eldon* seemed to think a condition imposing residence generally, was so vague that it was doubtful whether it could be enforced; and he held that, at all events, slight and rare instances of actual residence by the donee were, when the house was kept open by servants living in it, sufficient to satisfy so general a direction: *Fillingham* v. *Bromley* (1). In a case, *Rex* v. *Sargent* (2), where residence was a necessary qualification for the office of bailiff of a borough, Lord *Kenyon* said:—

(1) 1 T. R. 530.
(2) 5 T. R. 466.

"It never can be contended that in order to constitute a residence in any place, it is necessary to reside any given number of days, or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience."

The words of the present clause are, "*cease to use* as his residence in *Calcutta*." It was not disputed that a reasonable time must be allowed to the donee after the testator's death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 28th of August, 1868, and the Respondent did not, it would appear, use the *Boitokanah* in any sense as a residence, until some large repairs were completed in October, 1872. During this interval of time he visited the house, and transacted the business of the estate there as one of the trustees, and *durwans* paid by the trustees were kept in it.

The first question is, whether in the interval referred to, the Respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his counsel to justify the delay are (1), The pendency of the great suit brought by the Appellant to defeat his title altogether, which was begun in August, 1868, and finally disposed of on appeal to Her Majesty in July, 1872; (2), His inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May, 1870, and ended in March, 1872; and, (3), The unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the Appellant who disputed in the suit referred to the Respondent's right to possession, and would, if his suit had been successful, have ejected the Respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne profits, should now be heard to claim the estate on the ground that the Respondent did not take possession during the time covered by this litigation. But, without saying that the Appellant is estopped by his own conduct from taking advantage of the condition, their Lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The Respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the trustees. The result of the suit he brought against the trustees was that he was declared to be entitled to the possession of the whole house. Their Lordships cannot but think he might reasonably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an office when the manager was his own servant, but the inconvenience to the Respondent might be great when a clerk appointed by the trustees was installed within the precincts of the residential part of the house.

But a stronger ground to justify the delay existed in the state of the house and its want of repair. Mr. *Allan*, the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and rebuild a portion of the east wall at a cost of Rs.6200. But further extensive repairs were required. The trustees having hesitated to do them, the Respondent requested *Mackintosh & Co.* to survey the house, who made a report to him that "the building throughout is urgently in need of repair." This report he sent to the trustees, with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the Respondent, who, upon this refusal, commenced in December, 1871, a suit against them, and in March, 1872, obtained a decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November, 1872, at a cost of Rs. 14,000. Mr. *Allan*, the surveyor, says "the Rs. 14,000 was necessary to make the house safe.

The house was entirely out of repair, and some portion of it very dangerous."

The Respondent entered into possession in October, 1872, before the repairs were entirely completed, and their Lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the Respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their Lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th of November, 1872, immediately after the completion of the repairs, in favour of the Respondent; but as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their Lordships, to prevent future litigation, desire to state that on this point also they think the view of the High Court is correct.

The Respondent, who appears to adhere more strictly than the testator to Hindu usages, has no doubt continued to take his meals and sleep in the family house, where the other members of his family live; but this mode of living is not of itself inconsistent with such a residence in the *Boitokanah* house as the testator, in imposing the condition on his Hindu descendants, must be supposed to have contemplated. It appears upon the evidence that, since the Respondent entered upon possession the house has been constantly kept open, new furniture has been added to the old, the library taken care of, and not only *durwans* but menial servants have lived in the house. The Respondent himself frequently, if not daily, went to the house, and usually spent several hours there. It appears, also, that he transacted all affairs of business there, and on some occasions received visitors in rooms properly furnished for their reception. These acts appear to their Lordships, having regard to the nature of a *Boitokanah* house and to Hindu usages, to amount to the use of it as a residence.

It was strongly urged by the Appellant's Counsel, that any entertainments the Respondent might give ought to take place in the *Boitokanah*, and it was said he had always given them at his family dwelling-house. The omission, however, to use the *Boitokanah* for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments, their Lordships cannot hold that the Respondent is in any way obliged to give them, although, in case he thinks fit to do so, he would best comply with the testator's will by using the *Boitokanah* house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been removed from the *Boitokanah* to the family dwelling-house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family house, and were so kept there for greater safety; but the language of the condition in no way confined the use of the jewels to the residence in the *Boitokanah*.

Their Lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November 1872, and within twenty months from that date their Lordships are able to report upon the appeal to Her Majesty. This instance shews that appeals from *India*, if prosecuted with vigour, may now be speedily determined.

In the result, their Lordships will advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal, with costs.

24th June, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Bengal.

MEER MAHOMED HOSSEIN (Defendant)* ... } *Appellant.*

versus

A. J. FORBES (Plaintiff) *Respondent,*

Enhancement—Conversion of Coinage—Special Appeal.

In a suit for enhancement it appeared that the rent reserved under a *sunnud* of A.D. 1775 was 2599 *Azeemabadee* rupees, and that in lieu thereof from the time of the permanent settlement the sum of 2107 *Sicca* rupees had been paid until the year 1836, when the said *Sicca* rupees were converted into the statutable equivalent of 2248 Company's rupees:—

Held, that this amounted to an agreement between the parties from a period antecedent to the permanent settlement, that the rent paid was the equivalent of the 2599 *Azeemabadee* rupees, and there being no right of enhancement under sect. 15 of Act X. of 1859, such rent could not now be increased on the ground of error in the original calculation under which the 2599 *Azeemabadee* rupees had been converted into 2107 *Sicca* rupees.

Even if there had been any evidence of error the High Court could not, on that ground, in special appeal, alter the decree of the lower Court.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The Appellant, the Defendant in the suit, represents the grantees of a *talook* under a *sunnud* which was made in 1775 of certain lands, the rent reserved at that time being *Sanwat Azeemabadee* rupees 2599. The Plaintiff represents a person who purchased the *zemindary* in which the *talook* was situate at an auction sale; and he, as representative of the *Zemindar*, claimed in the first instance to enhance the rent to the present value of the lands. He sought to raise the rent of 2599 *Azeemabadee* rupees to 8465. 2. 0. Company's rupees. The High Court held that under Act X. of 1859 he was not entitled to enhance. Act X. of 1859, sect. 15, says: "No dependant *talookdar*, or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the *ryots*, who in the provinces of *Bengal*, *Behar*, *Orissa*, and *Benares* holds his *talook* or tenure (otherwise than under terminable lease) at a fixed rent which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in sect. 51, Regulation VIII., 1793, or in any other law to the contrary notwithstanding." They found that from the time of the permanent settlement down to the time when *Sicca* rupees were converted into Company's rupees in 1835, the Defendant and his predecessor had paid 2107 *Sicca* rupees, in lieu of 2599 *Azeemabadee* rupees. That rent could not be changed now even if it could be shewn that the calculation under which the 2599 *Azeemabadee* rupees were converted into 2107 *Sicca* rupees was erroneous. It would be impossible now to go back to the grant of 1775 and to say that the 2107 *Sicca* rupees, which has been the rent paid from the time of the permanent settlement, is now to be changed because it originated out of a grant by which 2599 *Sanwat Azeemabadee* rupees were reserved. The High Court held that this was not an enhancement of the rent, but merely a valuation of the old rent of 2599 *Azeemabadee* rupees, and therefore they allowed the *Azeemabadee* rupees to be converted into Company's rupees according to a fresh calculation.

The Judge found that there had been no change except the conversion. He says, "Both parties having been called upon to adduce evidence on these points," those were the two issues which the High Court had sent down to be tried, "the Appellants have filed *dakhillas*, or receipts, from 1241 M. S. to 1264 M. S., with the exception of 1262 M. S., and which have been attested by *Moonshee Jowahir Ali* on their behalf.

* 2 Cowell's I. A. p. 1.

Those documents shew how much they paid in each year, and to a certain extent prove that the *jumma* has not been changed during those years." The receipts shew that the *jumma* was paid in Company's rupees, and therefore to alter the amount of Company's rupees now you must go back beyond the permanent settlement to shew that these Company's rupees, which have been paid for more than the last twenty years, were too small an amount as compared with the 2599 *Azeemabadee* rupees reserved in 1775. He says, "Attested copy of an *urzee* of *Baijnath Singh* has also been filed in reply to a *perwannah* issued by the collector. He was *surburaker* of the property from 1243 to 1252 M. S. This paper shews that in May, 1828, or 1236 M. S., the rent of the *istemrar* was 2107 *Sicca* rupees." He says that this document shews that at that time, viz., May 1828, the rent was 2107 *Sicca* rupees. "From the copy of the *sunnud* filed in former suits the rent was fixed at 2599 *Sanwat* rupees; 8, 2½ *Sanwat Azeemabadee* rupees. The document above mentioned shews that the rent has been changed into 2107 *Sicca* rupees, 9, 10½ *Sicca* rupees; and again, according to the *batta*, allowed in *Sicca* rupees at the rate of Rs. 6. 10*a*. 8*p*. per cent., changed to the equivalent in Company's rupees of Rs. 2248. 1*a*. 8*p*. Beyond this equivalent in the rupees current at different eras, no change can be discovered of the rent of the *istemrar* having ever been really changed since the grant of the *sunnud* in A. D. 1795. The Respondent, Mr. *A. J. Forbes*, has submitted no evidence of any kind to shew the contrary, or to rebut the presumption that the land has been held at that rent from the time of the permanent settlement." He then goes on, and in a note at the foot of his judgment he says:—"With reference to the second issue, namely, the difference, if any, between the *Sanwat Azeemabadee* rupees and the Company's rupees, the claim for the excess having been dismissed, there is no necessity to go into the matter. Regulation XXXV. of 1793, sect. 14, which gives the different rupees current at the time, clearly lays down that 96 old *Patna Sanwats* are equivalent to 100 *Sicca* rupees of the 19th Sun, and to reduce *Sicca* rupees into Company's, the sum of Rs. 6. 10*a*. 8*p*. per cent. is allowed, *i. e.* Rs. 106. 10*a*. 8*p*. Company's rupees equal to 100 *Sicca* rupees." Then he says, "See *Muller's* Tables." Now the regulation to which the learned Judge refers is Regulation XXXV. of 1793. It recites that it was necessary that there should be no other coin in circulation or in use except the *Sicca* rupee of the 19th Sun, and they state the mode in which that was to be brought about. Having stated that *Sicca* rupees only should be received at the Treasury in payment of revenue, that they should be received in payment for salt, they prohibited parties from making contracts after a certain date in any other coin than the *Sicca* rupee, stating that if they entered into any such contract for any sum of money excepting *Sicca* rupees the contract should not be enforceable in a Court of Law. Then they say, "by the operation of these rules the various sorts of old and light rupees must in a course of time fall to their intrinsic worth compared with the *Sicca* of the 19th Sun, as they will produce no more in the mint, and to which they will necessarily be brought to be converted into *Siccas*, as they will be nowhere passable or in demand as coin from being nowhere a measure of value." Then after this regulation it appears that the 2599 rupees were, by arrangement between the parties, the one who was bound to pay the rent and the other who was entitled to receive it, converted into 2107 *Sicca* rupees. That was before the permanent settlement. The permanent settlement in this district was made in 1802. That is stated in the Respondent's case. The rent having been converted into *Sicca* rupees before the permanent settlement in 1802,—the permanent settlement was made with the Plaintiff's predecessor,—and the Government in fixing the amount of revenue which was to be paid under the permanent settlement looked to the assets of the estate, and they must have taken the assets of this estate as 2107 *Sicca* rupees, and estimated the revenue which the *Zemindar* would have to pay accordingly. The permanent settlement was fixed upon the basis

that the rent which was payable under the *pottah* was 2107 *Sicca* rupees, and from the time of the permanent settlement that is proved to have been the only amount paid in discharge of rent up to the time when the *Sicca* rupee was abolished. That rupee was abolished by Act XIII. of 1836. By sect. 1 it was enacted that "from the 1st of January, 1838, the *Calcutta Sicca* rupee shall cease to be a legal tender in discharge of any debt, but shall be received by the collector of land revenue, and at all other public treasuries, by weight, and subject to a charge of 1 per cent. for recoinage." Then it states that the new coin, which is called the Company's rupee, should be taken at the rate of 16 new or Company's rupees for every 15 *Calcutta Sicca* rupees of due weight, that is to say, the Company's rupee was equal to $\frac{15}{16}$ths of a *Sicca* rupee.

From that time, then, the Defendant could not continue to pay his rent in *Sicca* rupees, because the *Sicca* rupees had been abolished, and it had been enacted that no tender should be made in *Sicca* rupees. It was therefore necessary to convert the 2107 *Sicca* rupees into Company's rupees, and that was done by adding the difference between the Company's rupees and the *Sicca* rupees, and from that time the 2107 *Sicca* rupees which had been paid from the time of the permanent settlement were converted into 2248 Company's rupees, which were paid from that time down to the time of the commencement of this suit.

It appears to their Lordships that if any question as to the value of the *Azeemabadee* rupees could have been entered into at all in the present suit the conduct of the parties in dealing with the 2599 *Azeemabadee* rupees for upwards of fifty years as being the equivalent of 2107 *Sicca* rupees would have been much stronger evidence which is given in this case by Mr. *Palmer* from the old almanac, or by Mr. *Judah* from *Prinsep's* tables, in which he stated that there was no actual valuation of the *Sanwat Azeemabadee* rupee. "He states the information will be found in *Prinsep's* tables, in which he also admit some errors are to be found; at the same time he states that those tables do not give the equivalent of *Sanwat Azeemabadee* in Company's rupees," they only give it in *Siccas*.

Now the Judge upon that evidence, finding that from the time of the permanent settlement down to 1836, 2107 *Sicca* rupees were the only rent which had been paid, and that from 1836 these *Sicca* rupees had been converted into 2248 Company's rupees, held that the Plaintiff was not entitled to recover from the Defendant at a higher rate than that which had been paid from 1835 to the time of the commencement of the suit as the equivalent of 2107 *Sicca* rupees, and dismissed the Plaintiff's suit. The High Court, however, thought that the Plaintiff was entitled, at this distance of time—notwithstanding the mode in which the parties had dealt with it, notwithstanding the fact that no *Azeemabadee* rupees had ever been paid as rent from the time of the permanent settlement down to the time of the commencement of the suit—to recover at the rate of 2599 *Sanwat Azeemabadee* rupees, to be converted into Company's rupees; and according to the evidence which has been given in the cause, they converted the 2599 *Sanwat Azeemabadee* into Company's rupees at a higher rate than 2248. The case was before the High Court upon special appeal, and therefore in strictness they had nothing to do with the evidence in the cause. There was no evidence upon which (even if they could have been allowed to do so by law) they could find that 2599 *Sanwat Azeemabadee* rupees were of a higher value than the 2248 Company's rupees into which they had been converted; but even if they had the power of doing that, and had done so, the parties had agreed from a period antecedent to the permanent settlement that the 2599 *Sanwat Azeemabadee* rupees should be converted into a different coinage, namely, the *Sicca* rupee at the rate which had been paid down to 1836, and which in 1836 had been converted into the statutable equivalent in Company's rupees.

Under these circumstances their Lordships think that the High Court was wrong in overruling the decision of the Judge who tried the issues, and they will therefore humbly recommend Her Majesty that the

decision of the High Court should be reversed, that the decision of the Judge of the lower Court should be affirmed, with the costs of this appeal and the costs in the High Court.

15th July, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

MOULVIE MAHOMED SHUMSOOL HOODA and Others (Defendants) * — *Appellants*,

versus

SHEWUKRAM, *alias* ROY DOORGA PERSHAD (Plaintiff) ... — *Respondent*.

Construction of Hindu Will—Alienation by Hindu Widow—Liability of Reversioner to repay Purchaser.

A *Hindu*, by a petition to the Collector of *Patna*, recited the deaths of his son, of his brother without leaving issue, his brother's wife, and his own wife, and then proceeded to dispose, as if by testament, of his property as follows. "Only D K, widow of my son, who, too, excepting her two daughters born of her womb, S and D, has no other heirs, is my heir. Except D K none other is, nor shall be, my heir and *malik*..... Furthermore, to the said D K, too, these very two daughters named above, together with their children who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and *malik*"

D K survived the testator: S predeceased him without issue: D survived him and then died leaving S R, her only son and heir. D K, in 1854, after the testator's death, sold part of the lands mentioned in the petition to M. for Rs. 41,000, of which Rs. 14,000 were devoted to pay off a mortgage thereon

In a suit by S R against M and D K, to protect his future right and title to the property sold by concelment of the deed of sale,—*held*, that the intention of the testator must be construed to have been that D K should not take an absolute estate, but that she should be succeeded therein by her two daughters (1). D K, therefore, could not convey to M an estate beyond her own life, and S R was entitled to a decree declaring his right to the property on the death of D K, credit being given to M for the Rs. 14,000 paid by him in respect of the mortgage, which otherwise S R would have had to redeem.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

In this case a Hindu widow lady, of the name of *Ranee Dhun Kowur*, in the year 1854 sold an estate to the Defendant by a conveyance in which she purported to give him an absolute title, what we should call in this country an estate in fee simple. Her grandson, on coming of age a great many years after, brings a suit for the purpose of having it declared in his favour that this lady had only the power to grant a life estate, and that after her death he was entitled to an estate in remainder.

The question depends upon the construction of a petition presented by *Roy Hurnarain* to the collector in the year 1830, which has been treated by both sides in this litigation, and by both Courts, as in the nature of a testamentary instrument. The state of the family of *Roy Hurnarain* at the time of his presenting this petition was this: There were living only the before-mentioned *Ranee Dhun Kowur* the widow of his son *Roy Kalika Pershad*, and her two daughters by that son, *Bebee Shitaboo* and *Bebee Dularee*, who at that time (1830) appear to have been unmarried. That being the state of the family, *Hurnarain* makes this, which must be now considered as a testamentary instrument. He first recites that the property of which he is about to dispose was ancestral property; he recites the death of his son *Roy Kalika Pershad*, and the death of his own wife, and he recites that

* 2 Cowell's I. A., p. 7; 14 B. L. R., p. 226.

(1) See *Prosunno Coomar Ghose* v. *Tarrucknath Sircar*, 10 B. L. R., 267.

the widow of his son, *Ranee Dhun Kowur*, was alive, that she has no heirs except her two daughters, *Mussumat Bebee Shitaboo* and *Bebee Dularee*, her daughters by his son, who would be her heirs. He then uses expressions which, if they stood alone, would, in their Lordships' opinion, shew that he intended to make an absolute gift to *Ranee Dhun Kowur*. The expressions are these: "and my wife too died before, only *Mussumat Ranee Dhun Kowur*, widow of *Roy Kalika Pershad*, my deceased son above mentioned, who too, excepting her two daughters born of her womb, *Mussumat Bebee Shitaboo* and *Bebee Dularee*, has no other heirs, is my heir." And then he further goes on to say, "except *Mussumat Ranee Dhun Kowur* aforesaid, none other is nor shall be my heir and *malik*." He proceeds, however, to again refer to the daughters of *Ranee Dhun Kowur*, whom he had before mentioned, it can scarcely be assumed without some purpose, for he goes on to say, "Furthermore, to the said *Mussumat Ranee*, too, these very two daughters named above, together with their children, who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and *malik*." There is, indeed, another translation of this document which has been referred to in another case, but inasmuch as this translation appears to have been agreed to by the parties, their Lordships think they must adopt it.

It has been contended that these latter expressions qualify the generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that *Mussumat Ranee Dhun Kowur* should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindu widow. In construing the will of a *Hindu* it is not improper to take into consideration what are known to be the ordinary notions and wishes of *Hindus* with respect to the devolution of property. It may be assumed that a *Hindu* generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a *Hindu* knows that, as a general rule, at all events women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in *India*, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate; whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial. It would appear that the testator uses the word "heir" as signifying the person who is to take immediately in succession to another; that he applies it to the *Ranee* as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the *Ranee*; and their Lordships think that, viewing the will as a whole, when he uses the expression "except *Mussumat Ranee Dhun Kowur* aforesaid, none other is nor shall be my heir and *malik*," it may be fairly construed as meaning that she shall take a life interest immediately succeeding him, without that interest being shared by her daughters or by any other person.

On the whole, therefore, although undoubtedly there is some difficulty in construing this testamentary document, their Lordships are of opinion that the Indain Courts have been right in construing it as not giving an estate of inheritance to the *Ranee* which she was able absolutely to alienate. If that be so, her daughters under this will take after her, and the question has been raised whether they take as joint tenants or tenants in common. The High Court appear to suppose that they would take as joint tenants, but inasmuch as one of these daughters died before the testator, this question becomes immaterial, because in either case the Plaintiff would

be the heir and would be entitled to institute the action.

It follows that the *Ranee* could not convey to the Defendant, who must be taken to have been a *bonâ fide* purchaser, having paid the full value (although he does not appear to have made any inquiries as to whether or not the *Ranee* did possess a power, unusual in Hindu ladies, of making a conveyance of an estate in fee simple), an estate beyond her own life, and that the Plaintiff is entitled to a decree to the effect that after her death the property belongs to him.

But then comes the question as to what terms this decree in his favour shall be subject to. The Court below in *India* were of opinion that he should only be entitled to recover the property after the *Ranee's* death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property for Rs. 14,000, which appears to have been an existing mortgage at the time of the conveyance in 1854. A further question, however, has been raised on the part of the Appellants. The Appellants say, that assuming this mortgage to have existed, and that there were some debts due at the time of the conveyance on the part of the testator, that then the widow would be enabled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated. They apprehend the law to be this: that *Ranee Dhun Kowur*, who may be considered as very much in the position of a Hindu widow, might have sold the estate absolutely if it could have been shewn (and the burden of shewing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator possessed an income of somewhere about a *lac* of rupees, *minus* the Government revenue of Rs. 20,000, leaving him an income in round numbers of about £8000 per annum. He is shewn at the time of his death to have owed a certain debt of Rs. 9000, which was subsequently increased to Rs. 22,000, and was paid off in another way; therefore we have nothing to do with that. He is also shewn to have owed a debt of Rs. 10,000 at the time of his death, that is £1000. A man with an income of £8000 a year is shewn on his death to have owed a sum of £1000, and it is pretended that sixteen years afterwards a necessity arises for selling a considerable portion of his real estate, to pay this debt of £1000, *plus* some £400 which had been subsequently contracted by the *Ranee*. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, their Lordships think it unnecessary further to dwell upon this point.

The only question that remains then is whether the Plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the Rs. 14,000. On the whole their Lordships are of opinion that the judgment of the High Court was right; that this mortgage of Rs. 14,000 subsisting upon the estate at the time of the sale, and having been paid by the purchaser, it is equitable that, when the Plaintiff reclaims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the Plaintiff himself would have to meet.

For these reasons their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that both appeals should be dismissed, and that there should be no costs. But in order to render the intention of the Court more clear, their Lordships will recommend that the following words be added to the declaration: "and to be put in possession of the said property after the decease of *Mussumat Ranee Dhun Kowur* on payment to the said Defendant of the sum of Rs. 14,000." The Appellant will have his costs of the application for leave to enter his cross-appeal paid out of the deposit; the remainder will be repaid to the Appellant's agents.

5th November, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

DHONENDER CHUNDER MOOKERJEE and Others (Defendants)* ... } *Appellants*,

versus

MUTTY LALL MOOKERJEE and Others (Plaintiffs) } *Respondents*.

Sale, Validity of—Purchase by Executor—Fiduciary Relationship—Trustee and Cestui que Trust—Suit for Administration—Subsequent Suit against Purchaser to set aside Sale.

D, a *Hindu*, died, leaving three sons, *S*, *S C*, and *R*, who on his death made a partition of his estate, and *S* covenanted with *S C* to discharge all claims made against the estate of *D*. In 1828, *B*, who claimed a portion of the share taken by *S C* on partition with mesne profits, filed a bill in the Supreme Court against *S C* and others as representatives of *D*, and obtained a decree for Rs. 2,00,000. Pending this litigation *S C* died, leaving six sons, *J*, *M*, *H*, *P*, *C*, and *S M*, and a will made before the birth of *S M*, by which he left all his property to his sons other than *S M*. On the death of *S C*, *J*, as one of the executors of his will, compromised *B's* suit so far as it related to the estate of *S C*, for Rs. 80,000; and afterwards, in the same capacity, sued the representatives of *S* to recover that amount and the costs in the suit brought by *B*, and obtained a decree for Rs. 1,70,000. In the meantime *H* died, leaving the Plaintiffs his sons and heirs, and his brothers *J*, and *M*, his executors. *J* renounced the executorship. *M*, on 3rd June 1854, as executor of *H*, executed a deed of assignment, by which he conveyed to *J* and *S M*, for Rs. 5000, the interest of the Plaintiffs in the decree obtained by *J*, and subsequently at a sale of property belonging to the representatives of *S* in execution of the decree, *J* himself became the purchaser. In 1857, in an administration suit, which had been brought by the Plaintiffs to compel *M* to account for the assets received by him from the estate of *H*, the Master was directed to take an account, which was accordingly done. In a suit brought by the Plaintiffs, the sons of *H*, against *J*, *M*, and *S M*, to set aside the deed of 3rd June 1854,—*Held*, that notwithstanding the renunciation of executorship by *J*, he stood in a fiduciary relation to the Plaintiffs, and the assignment being found to have been made for an inadequate consideration, was ordered to be set aside on the Plaintiffs paying the purchaser, *J*, the amount of the purchase-money.

A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This was a suit instituted by the sons of *Hurrish Chunder* against *Juggut Chunder*, and *Sreeman Chunder Mookerjee*, praying, amongst other things, that a certain deed of assignment, dated the 23rd of June, 1854, of the Plaintiff's shares and interest in a certain decree, which had been sold by *Mohes Chunder Mookerjee* to *Juggut Chunder Mookerjee*, might be declared as against them invalid and void as an absolute conveyance, "and that the said assignment might be decreed to stand as a security only for the sum of Rs.5000, and for anything further which might be found justly due from the Plaintiffs to the Defendants." *Mohes Chunder Mookerjee* was made a party to the suit, but no relief was prayed against him. The ground upon which the bill was framed was, that *Juggut Chunder*, who purchased the decree, stood in a fiduciary relation to the Plaintiffs, and that he had purchased the decree for an inadequate consideration. It appears that *Doorga Churn Mookerjee* was the father of *Sib Chunder*, *Sumboo Chunder*, and *Ramnarain*; that *Doorga Churn Mookerjee* was possessed of considerable property, and having died, his three sons divided the

* 2 Cowell's I. A., p. 18; 14 B. L. R., p. 276.

estate. *Sumboo Chunder* took a portion of the estate, and *Sib Chunder* covenanted with *Sumboo Chunder* to discharge all claims against the estate of *Doorga Churn*. A claim was made against *Sumboo Chunder* and others, as representatives of *Doorga Churn*, and a decree was obtained against them for about two *lacs* of rupees. *Sumboo* having died, *Juggut* as one of his executors compromised the suit for Rs. 80,000, and, as such executor, brought a suit against the representatives of *Sib Chunder* to recover that amount and other moneys from his estate; and in that suit he obtained a decree for one *lac* and Rs. 70,000. That suit was brought by *Juggut Chunder* as the executor of *Sumboo Chunder*. The question is, whether, in that position, and in that character, he did not hold a fiduciary relation to the Plaintiffs in the suit. *Sumboo Chunder* died, leaving six sons, *Juggut Chunder*, who is the Defendant in this suit, *Mohes Chunder*, who is also made a party to this suit, *Hurrish Chunder*, *Prawn Chunder*, *Cally Chunder*, and *Sreeman Chunder*; but *Sumboo Chunder* before he died made a will, by which he left his property to his five sons. *Sreeman Chunder* was not then born.

Hurrish Chunder died, leaving the Plaintiffs in the suit his heirs, and consequently *Juggut Chunder* held the decree which he recovered against the representatives of *Sib Chunder* in trust for the benefit of himself and his brothers, and as to the share of his brother *Hurrish Chunder* for the benefit of the Plaintiffs. *Hurrish Chunder* appointed *Juggut Chunder* and *Mohes Chunder* his executors; and *Mohes Chunder*, as one of the executors of *Hurrish Chunder*, sold the interest of *Hurrish Chunder's* sons to *Juggut Chunder* for the sum of Rs. 5000; in other words he sold a fifth share of a decree for Rs. 170,000 for Rs. 5000. The Courts found that that was under value, and that an inadequate consideration was given by *Juggut Chunder* to *Mohes Chunder* for the purchase. It is said that *Juggut Chunder*, as one of the representatives of *Hurrish Chunder*, renounced. Whether he did so renounce, or could renounce, appears to be immaterial, provided he held in a fiduciary character, as executor of *Sumboo Chunder*, the share which belonged to the Plaintiffs as the sons of *Hurrish Chunder*. It is clear that he held the decree which he recovered as executor of *Sumboo* in trust as to a share for the benefit of the Plaintiffs who were the sons of his brother *Hurrish*.

Now both Courts have found that no adequate consideration was given for the purchase. It therefore appears that there was a sale of the interest of the Plaintiffs for an insufficient consideration to *Juggut Chunder*, who held in a fiduciary character for them. According to the rules of equity, that sale cannot stand as an absolute sale, but *Juggut Chunder* is bound to return the share of the Plaintiffs in that estate upon receiving back the purchase-money which he gave for it.

The youngest son of *Sumboo*, *Sreeman Chunder*, was also made a Defendant in the suit. *Sreeman Chunder* is said to have been a party to the purchase by *Juggut Chunder*. He says that *Juggut Chunder* purchased the decree for the benefit of himself and *Sreeman Chunder* jointly. But if *Juggut Chunder*, holding the decree in a fiduciary position, could not purchase it for himself, could *Sreeman Chunder* employ *Juggut Chunder*, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and *Sreeman Chunder* jointly? It appears to their Lordships that the same objection would apply to *Juggut Chunder's* purchasing for himself and *Sreeman* jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this, is, that the purchaser is presumed from his position to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person, knowing that another holds a fiduciary position, and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself; therefore it

was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against *Juggut Chunder*, and to allow it to stand as to the other half for the benefit of *Sreeman Chunder*. If it became necessary to investigate the evidence, there does not seem to be sufficient to shew that *Sreeman Chunder* actually advanced any part of the purchase-money, or was really interested in the purchase.

The decree having been obtained by *Juggut Chunder*, the property of *Sib Chunder's* representatives was put up for sale by the sheriff in execution, and a portion of the property so put up was purchased under the decree, but *Juggut Chunder* did not actually pay money for the property which he so purchased. The price of that portion of the property which was sold in execution of the decree was credited to the decree, and only the balance remained due. Then *Juggut Chunder* held the balance of the decree, and also the property which he had purchased and paid for with the other portion of the decree, in trust as to one-fifth share for the benefit of the Plaintiffs. It was shewn that *Juggut Chunder* resold portions of the property which he purchased at the sale under the decree for very much larger sums of money than those for which he purchased them. Both the Lower Courts found, as a fact, that the Rs. 5000 which *Juggut Chunder* paid as the purchase-money of the share of the Plaintiffs was an inadequate consideration. Their Lordships would not disturb the finding on the question of value unless there was the clearest evidence to satisfy them that an adequate consideration was given for the property; but, so far from that appearing to be the case, their Lordships are satisfied that the Lower Courts came to a right conclusion in finding that there was an inadequate consideration.

Then it is contended that this suit cannot be maintained, inasmuch as a suit had been brought against *Mohes Chunder*, as one of the executors of *Hurrish Chunder*, for administration of the assets of his estate; and it is said that this suit is in the nature of a bill of review of the decree which was given in that suit, or that it is in the nature of a supplemental bill, or of a bill in aid of that decree. But it appears to their Lordships most clearly that that is not so, when they come to look at the nature of the two suits. The administration summons, which may be treated as a suit, was to compel *Mohes Chunder* to account for the moneys which he had received as executor of *Hurrish Chunder*. It is true that in the affidavit, and also in the petition which was filed in order to obtain that summons, it was alleged that *Mohes Chunder*, as the executor of the will of *Hurrish Chunder*, "had relinquished all claims to the decree for Rs. 170,000, by executing the said deed of assignment for the sum of Company's Rs. 5000 only, and thereby had occasioned a loss to the Plaintiffs of the balance of Company's Rs. 23,333." That was alleged in the petition; but it is clear that under a summons for an administration of the assets of an estate the executor could not be charged with negligence and wilful default. Accordingly the order which was made under that petition referring the matter to the Master did not direct the Master to inquire as to whether more could have been made by *Mohes Chunder* if he had not been guilty of wilful default, but merely to take an account of the assets which he had received; and that is all that the Master did. He found what *Mohes Chunder* had received, and stated that there was a small balance due from him to the estate; but he did not enter at all into the question of whether *Mohes Chunder* had committed waste; nor could he, under the order which was made by the Court, have entered into that question. When the matter was brought before the first Court, Mr. Justice *Morgan* says, "One point made by the Defendants is that the same points have been raised by an administration summons by the present Plaintiffs against the executor. The Master, however, properly declined to enter on an investigation of this matter;" and the Master never did, nor did Mr. Justice *Levinge*, who made the order, direct the Master to enter into such an investigation. He could not and did not make such an order, and the matter never came before the Master at all.

Well, then, assuming that *Mohes Chunder* has been decreed to account for the

Rs. 5000 which he had received from *Juggut* as the purchase-money of the estate, that circumstance would be no reason why the heirs of *Hurrish Chunder* should not have the purchase made by *Juggut Chunder* set aside upon returning the amount to him. The two causes of action are quite different. The present suit is not in the nature of a review of the decree which has been made against *Mohes Chunder*. It is a suit against *Juggut Chunder* as a purchaser in his own right, and not as executor of *Hurrish Chunder*. The other suit was against *Mohes Chunder*, to account for what he had received as executor of *Hurrish Chunder*.

It appears, therefore, to their Lordships that the Lower Court was right in declaring that the points raised by the administration summons and the order and the reference to the Master did not preclude the Plaintiffs from bringing this suit against *Juggut Chunder*. It is true that *Mohes Chunder* was made a party to the present suit, but whether it was necessary or not is immaterial. Possibly this decree might have been obtained against *Juggut Chunder* without making *Mohes* a party; but *Mohes* did not object to being made a party, and he does not appeal in this case. He is made a Respondent in this suit; he is not an Appellant.

Their Lordships do not repudiate the authority of any of the cases which were cited by Mr. *Cochrane*. Admitting them to their fullest extent they are not applicable to the present case.

Mr. Justice *Norman* says, "I see no reason why an account should not be taken against one executor on one principle and against another in respect of a separate wrong committed by him or separate relief sought against him." It appears to their Lordships that that remark is not applicable to the case. They have already pointed out that this is not a suit against *Juggut Chunder* as executor of *Hurrish Chunder*, nor for a wrong committed by him in that capacity. The relief to which the Plaintiff's are entitled is upon the ground that the purchase which *Juggut Chunder* made was invalid, not because he was executor of *Hurrish Chunder*, but because he was executor of *Sumboo Chunder*, and as such executor held, for the benefit of *Hurrish Chunder's* heirs, the share which he purchased from *Mohes Chunder* as executor of *Hurrish Chunder*.

Under these circumstances their Lordships think that the Lower Courts came to a right decision, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed. As there is no party appearing on the other side, it will be without costs.

6th November, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

HURSUHAI SINGH and Others (Plaintiffs)* ... } *Appellants,*

versus

SYUD LOOTF ALI KHAN (Defendant) ... ... } *Respondent.*

Accretion—Lands Temporarily or Permanently Settled—Reformation.

Where lands submerged by a river reform, and can be identified as having formed a part of a particular estate, they belong to the owner of that estate, whether his estate consists wholly of permanently settled lands, or whether it has been partly acquired as an alluvial accretion under temporary settlements made by Government with him as owner of permanently settled lands.

THE judgment of their Lordships was delivered without calling upon the Appellants' counsel for a reply, by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

Their Lordships, considering the turn

* 2 Cowell's I. A., p. 28; 14 B. L. R., p. 268.

that the argument has taken, do not think it necessary to go at any length into this case. The suit was brought by the Appellants, the proprietors of *mouzah Muteor*, in *Tirhoot*, against the Respondents, the proprietors of *mouzah Ramnuggur*, to recover the possession of a large quantity of land which had been submerged by the River *Ganges*. It appears that the river flowed between the estates of the Plaintiffs and the Defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed, and formed a pool or lake. The land which is the subject of the present suit was submerged, and when it first became free from water and reappeared, it adhered to and adjoined the estate of *Ramnuggur*, and *primâ facie* the accretion was to that estate; but upon an inquiry made by the Judge of *Patna*, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had reformed close to *mouzah Ramnuggur*, was, in point of fact, land which belonged to *mouzah Muteor*, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that *mouzah*. He found those facts, and applying the law as he understood it to the facts, namely, that when submerged land can be identified upon its reappearance as belonging to a particular estate, the proprietor of that estate is entitled to it because in truth he had never lost the land, the land was always his, and the difficulty of identification being removed by evidence—the land being in fact identified—there was no reason why the property should not be regained by him. He acted upon this principle of law, which had been at that time affirmed by the High Court of *Calcutta* in a case in which Sir *Barnes Peacock*, with two other Judges, had given the judgment. That, however, was the judgment of a Division Bench; and the High Court, upon appeal in the present suit, decided that they were bound by a subsequent decision of a full bench of the High Court, which had come to a contrary conclusion, and had held that land which reappeared under circumstances like the present must be held to belong to the proprietor of the estate to which it had apparently accreted; and they remanded the cause to the Judge of *Patna*, who, without altering his finding on the facts, decided according to this view of the law, and his judgment was, as might be expected, upheld by the High Court, in the judgment now under appeal, on the case again coming before it upon the appeal of the present Appellants.

The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopez* v. *Muddun Mohun Thakoor* (1), in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged re-forms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it. It is admitted by Mr. *Leith*, the counsel for the Respondents, that the authority of this case, and others which have followed it before this Committee, cannot be disputed. Their Lordships think the principles laid down in those cases are perfectly correct, and are distinctly applicable to the present; and that, if the facts are to be taken as they were found by Mr. Justice *Ainslie*, the judgment below must be reversed. Their Lordships, for the reasons they gave during the argument, think it is impossible those facts could be disputed with any effect at their bar, and therefore both law and fact are in favour of the Appellants.

Mr. *Leith* endeavoured to distinguish between the lands which were the permanently settled lands of *Muteor* and some lands which had been in themselves an accretion, and which were temporarily settled only with the proprietor of *Muteor*. Their Lordships think, however, that this distinction cannot prevail. There is evidence from which it may be presumed that those lands accreted to the estate of *Muteor*, and it may be inferred from the mode of accretion that the Government

(1) 13 Moore's I. A. C., 467; 2 P. C. J., p 591.

settled with the proprietor upon the ground that they had so accreted, and therefore that he was entitled to the settlement.

On these grounds their Lordships think that the judgment of the High Court must be reversed, and they also think that the decree originally made by the Judge of *Patna* before the remand is the correct decree. They find there is no formal petition of appeal against the decree of the High Court which remanded the suit, but this judgment ought not to be allowed to stand in the way of the proper decree to be made in the cause, and will be nullified by the course their Lordships propose to take, viz., humbly to advise Her Majesty to reverse the judgment of the High Court now under appeal, and the second judgment of the *Zillah* Judge, and to direct a decree to be made in the suit to the effect of the original decree of the *Zillah* Judge. The Respondents must pay the costs of the litigation in *India*, and of this appeal.

11th and 12th November, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the Chief Court of the Punjaub.

SIRDAR BHAGWAN SINGH (Plaintiff)* ... } *Appellant.*

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Defendant) ... } *Respondent.*

Acts of State—Jurisdiction.

Where an estate is seized by the Crown by its right of conquest, and not by virtue of any legal title, such seizure must be regarded as an act of state and is not liable to be questioned in an municipal Court.

Secretary of State for India in Council v. *Kamachee Boye Sahaba* (1) followed.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This was a suit brought against the Secretary of State for *India* to recover possession of a certain *rakh* or piece of grass land situated in the *Punjaub*. The case of the Plaintiff was, that this *rakh* had been granted by the *Maharajah Runjeet Singh*, at that time the sovereign of the territory, to his father. It was a piece of grass land held rent free for the purpose, chiefly, of supplying fodder to a contingent of cavalry which the owner was bound to supply for the service of the Government. The Plaintiff alleged that upon the death of his father this estate devolved by inheritance upon his brother, who was killed at the battle of *Ferozepore* in arms against the British troops. It appeared further by the Plaintiff's case that upon the death of his elder brother, one *Rajah Teja Singh*, who appears to have been his uncle, took possession of it, and that a grant of it was made by the British Government after the conquest of the territory to *Rajah Teja Singh* for his life. The Plaintiff alleged, but did not prove, that *Teja Singh* was his guardian. Whether *Teja Singh* was his guardian or not, it is manifest that this *rakh* was not granted by the Government of *India* to *Teja Singh* in the capacity of guardian of the Plaintiff nor did *Teja Singh* accept it as such. On the contrary, it appears that the title of *Teja Singh* was adverse to the Plaintiff, and would, if it were a good one, devolve on the heir of *Teja Singh*, who is not the Plaintiff, the Plaintiff claiming through his elder brother. On the case coming, as it did in the first instance, before the Deputy Commissioner, the Government put in a plea of which the following is an extract:—"It is also contended on be-

* 2 Cowell's I. A., p. 33.

(1) 7 Moore's Ind. Ap. Ca. 476; 1 P. C. J., p. 681.

half of the Government that if the jurisdiction of the Civil Courts be not barred on the preceding grounds, it must be considered as barred on the grouud that the *rakh* was taken possession of by the British Government as an act of state at annexation, and that as such, on the authority of the cases quoted in the *Wagentriber* and *Saliq Ram* and *Devi Singh* cases, is not cognizable by the Civil Courts."

It has been argued on the part of the Appellant that this case of the Government was not put forward by their pleader in the first instance, and it would appear that at all events it was not distinctly put forward. But that becomes immaterial, inasmuch as before the judgment it was distinctly stated in the plea, and an issue was raised upon this very plea. The Commissioner finds the plea of the Government to be proved. The material part of his finding is in these terms :—"This evidence appears to the Court sufficient on examination to prove that the Government in the person of the late Sir *Henry Lawrence*, in the exercise of the rights of conquest and as an act of state, considered the question of the *Rakh Nag* about which this suit is brought, and proceeded to dispose of it in the plenitude of its potency as best it pleased." An appeal was preferred against this judgment to the Chief Court of the *Punjaub*, and there two Judges confirmed the judgment of the Court below. They say :—"It is impossible to suppose that the British Government at the time of the annexation intended to give a legal right of redress to anyone who thought himself wronged by the seizure of property at that time. Whatever seizures were then made were acts of state and of sovereign power ; acts over which, with their consequences, the Civil Courts have no jurisdiction. It may be that the Plaintiff has some title which he could prove, but whether his interests have been injuriously affected or not are considerations into which the Civil Courts cannot enter ; if a wrong has been done the Civil Courts of Justice do not afford a remedy." The appeal was dismissed.

An appeal has now been preferred to their Lordships' Board on the ground that these two Courts of the *Punjaub* were wrong in the decision which they arrived at with reference to this plea of the Government being substantiated.

The evidence by which that plea was supported may be shortly stated. In the first place, it is a matter of history that the territory was conquered about 1849. There upon a proclamation was issued by the Government, the material parts of which are these : "Wherefore the Governor-General of *India* has declared, and hereby proclaims, that the kingdom of the *Punjaub* is at an end, and that all the territories of *Maharajah Dulip Singh* are now and henceforth a portion of the British Empire in *India*. The few chiefs who have not engaged in hostilities against the British shall retain their property and their rank. The *jaghirs* and all the property of *sirdars* for others who have been in arms against the British shall be confiscated to the State."

Subsequently to this proclamation a board of administration was constituted for the *Punjaub*, of which Sir *Henry Lawrence* was the president. That board was appointed by the Governor-General on the 31st of March, 1849, in fact, two days after the proclamation. They were invested with very large powers, Judicial and administrative, and with respect to rent-free lands and tenures, among which category it is admitted on both sides that this description of tenure falls, these special directions are given to them : "The very first object to which the board should direct their attention is the determination of all questions affecting the validity of grant to hold lands rent free. It is obvious to remark that the longer the investigation is delayed, so much the more do these tenures acquire the force of prescription, and make resumption more unpopular, and apparently unjust. In our older provinces, notwithstanding the frequent declaratory enactments respecting the right and the intention of the Government, the investigations were delayed to so late a period as to give our proceedings a character of injustice and severity. By our occupation of the country, after the whole *Sikh* nation had been in arms against us, we have acquired the absolute right of conquerors, and would be justified in declaring every acre of land liable to

Government assessment; and though our officers should not allow their minds to be exasperated against claimants on this account, yet it may instil into them a wise caution against being too liberal and profuse in their concessions, and against doing more for the grantees than their own Government would have done. There is no reason, for instance, why we should maintain in perpetuity an alienation of the Government revenues which would not have been maintained by the power we have succeeded. The Governor-General remarks, that all grants were resumed by the *Sikh* rulers at will, without reference to the terms of the grant, whenever State exigencies, or even caprice, dictated. On the death of the grantor they lapsed as a matter of course, and often were only renewed on payment of a large fine, equal in some instances to many years' collections. The Governor-General further observes, that the decision of the British Government on these claims will give a permanency, validity, and value to the tenures hitherto unknown. There is not one of the rent-free holders who would at this moment dispute this position, and who would not look upon any concession as a matter of grace. The delay, even of a single year, would encourage hopes which are not now entertained; and it is therefore particularly desired that the local officers will set the minds of the people at rest upon this most important particular at the earliest possible period. Every holder of rent-free land who is confirmed in his tenure by the Government must yield up every document in his possession which entitled him to the exemption from revenue, and a grant must be given to him under the board's seal and secretary's signature declaring that the grant is a free gift of the British Government. The Governor-General believes that this will have an important effect upon the native minds, in disabusing them of the opinion that they have any inherent rights which attach to their tenures in virtue of long possession, and make them regard their new masters in the light of personal benefactors, from whom alone the indulgence with which they are treated may be considered to emanate."

It appears to their Lordships, that by these directions to the board, it was contemplated by the Governor-General to make what may be called a *tabula rasa* of tenures of this kind, and to re-grant them upon terms entirely at the discretion of the British Government, the Government no doubt intending to act with all fairness and consideration, specially to those who appear to have been not unfaithful to them, but at the same time in a manner which appeared right and just to themselves, and which they did not intend to be inquired into or questioned by any municipal Courts.

It would appear that in persuance of these directions a Government order was made on the 8th of December, 1849, which is not set out in the case, but which is thus described: "It is said, Under the Government order contained in abstract No. 38, regarding the great *jaghirdars* of the *Punjaub* (conveyed) in No. 352, dated the 8th of December, 1849, the whole *jaghir* released to *Rajah Teja Singh* and *Sirdar Bhagwan Singh* for their lives amounts to Rs. 152,779. After their death the heirs who should be legitimate sons of *Rajah Teja Singh* shall enjoy a *jaghir* of Rs. 20,000, and those of *Sirdar Bhagwan Singh*, Rs. 7,000, for perpetuity." It would appear that the Government thought fit to act in a great measure upon the powers given by sect. 41 of this document, that they did in this particular case choose to give a validity and value to the tenures greater than they had hitherto possessed. These tenures being, according to the view of the Government, only *jaghirs*, they grant a certain amount of land in perpetuity to the heirs of *Teja Singh* and *Bhagwan Singh* the present Plaintiff; acting not by way of recognition of any right, but as conferring a favour and indulgence upon those persons.

We have further information as to the manner in which this particular *rakh* was dealt with. It would appear that two lists of *rakhs* were made out. We have a note of Sir *Henry Lawrence*, commenting on four *rakhs*, which are said to have been in the possession of *Rajah Teja Singh*. The comment is in these terms, "proposing to give *Teja Singh* enough for his own cattle

and for one-third of his own (not his nephew's) horse," his nephew being the Plaintiff, "give him his choice of two if necessary." This of itself would very clearly negative any notion that the Government intended to make any grant to *Teja Singh* in his capacity as supposed guardian of his nephew. This and another list appear to have been forwarded by the secretary of the board to Mr. *Montgomery*, Assistant-Commissioner, in a letter of the 9th of May, 1849, in which he says, "I am desired by the Board of Administration to forward two lists of grass preserves situated in the *Bari* and *Richna Doabs*. These were formerly kept up to provide fodder for the cattle of the *Lahore* state, or of certain *sirdars* to whom they belonged." Then he says, "Some of the preserves will for the present remain with the *sirdars* who hold them, according to the remarks entered in the statements. After deducting these and the preserves placed at the disposal of the military authorities, it is desirable that the remainder should be brought under cultivation and made profitable to Government." These proceedings indicate to the mind of their Lordships that the Government, or the Board of Administration representing them, were dealing with those *rakhs* as their own property, over which they had absolute control.

It would appear that some difference of opinion subsequently arose among members of the Board as to what should be done with this particular *rakh*, the subject of this suit, and this is sufficiently explained by a letter of the 5th of April, 1852, which was written by the secretary of the Board of Administrators to the Governor-General, and it is in these terms: "I am directed to request the orders of the most noble the Governor-General in Council regarding certain grass preserves (*rakhs*), which have been held hitherto by *Rajah Teja Singh*. The commissioner of *Lahore*, in his letter, No. 410, of the 17th of July, refers the question whether four *rakhs* which he names should be resumed or not, resumption being in accordance with the spirit of orders which the board issued in December, 1850, to the effect 'that as a general rule all *rakhs* (grass preserves) included in the area of a village which has been released must be considered as a part of that village, though not separately specified, while those situated in villages resumed by Government are not to be released unless specially directed to be maintained.' The *rakh* of *Nar*, which is one of the four claimed, is in the resumed village of *Nar*. The senior member considers that as that village was given up by *Rajah Teja Singh* as part of the revenue from which his contingent was paid, it should not now be released. The majority of the board are of opinion that the *Rajah* is entitled to the release of the *rakh Nar*, as he was ignorent of the board's order of December, 1850, otherwise he would assuredly not have given up a village to which is attached a valuable grass preserve, said to have young timber on it worth Rs. 25,000, and of which he has held possession for thirty years. There is no difference of opinion about the other three *rakhs*, which the board are unanimous in releasing. With reference, then, to his position in the late Government, to his long possession, and to the spirit of Sir *Henry Elliot's* promise of upholding the *jaghirs* of the councillors, the majority of the board would release all four in his favour." Then the Secretary to the Government of *India* (Foreign Department) writes this letter: "I am directed to acknowledge the receipt of your secretary's letter, No. 322, dated the 5th instant, regarding certain grass preserves which have been held hitherto by *Rajah Teja Singh*, and in reply to state that under the circumstances the Governor-General in Council releases all the four preserves in question in favour of *Teja Singh* for his life."

We have, then, the whole transaction, and the circumstances under which this grant was made to *Rajah Teja Singh* for his life, and their Lordships are of opinion that that grant was made in persuance of the right of conquest, which is referred to in the proclamation, that it was an act of state, and not questionable by any municipal Court. *Rajah Teja Singh* held under this grant until 1863, when he died, whereupon the property was resumed by the Government, and now the Plaintiff, who

in fact does not pretend even to be the heir of *Rajah Teja Singh*, brings his suit for the purpose of recovering it.

The question what acts are to be deemed acts of state was considered in the case of the *Secretary of State in Council for India* v. *Kamachee Boye Sahaba*, commonly known as the case of the *Rajah* of *Tanjore* (1). This is stated in the judgment:—"The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law?" Their Lordships are of opinion that this was a seizure on behalf of the Crown by its right of conquest, and that these acts of the Board and of the Governor-General were not acts affecting to justify themselves on grounds of municipal law, but were acts done in the exercise of sovereign authority, doubtless with the intention of effecting that which was equitable and just, but not intended to be subjected to the control or the supervision of municipal Courts. Then again, in the case cited, this question is further put as a test:—"Or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late *Rajah* of *Tanjore* in trust for those who, by law, might be entitled to it on the death of the last possessor?" In their Lordships' opinion there is no pretence for saying that this estate was taken possession of by the Government by virtue of any legal title or under colour of any legal title whatever. Further on in the judgment, there is this passage:—"With respect to the property of the *Rajah* whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters, his relations and dependants, but they intended to do this according to their own notions of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts." So, adopting the words here used, in their Lordships' opinion the act of the Government, which is the subject of their plea, was done in accordance with the notions of the Government of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts.

For these reasons their Lordships are of opinion that the judgments of both Courts in the *Punjaub* were correct, and they will humbly advise Her Majesty that this appeal should be dismissed, with costs.

18th November, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of Ajmere and Mhairwarra.

SETHS GUJMULL, JEITHMULL, and THANMULL (Defendants)* ... } *Appellants,*

versus

MUSSUMAT CHAHEE KOWAR and Another (Plaintiffs)... ... } *Respondents.*

Practice—Report under s. 181, Act VIII. of 1859—Objections.

Where a report, or supplemental report, has been made by Commissioners, to whom accounts have been referred for investigation under Act VIII. of 1859, sect. 181, the Privy Council will not entertain any objections thereto which have neither been brought to the notice of the First Court nor made in any of the grounds of appeal in the Courts in *India*.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

In this case a question involving partnership accounts came before the First

(1) 7 Moore's I. A. 476; 1 P. C. J., p. 684.

* 2 Cowell's I. A., p. 34.

Court, that of the Assistant Commissioner The Court referred the investigation of the accounts to Commissioners, under sect 181 of Act VIII of 1859 Upon that the Commissioners made a report Objections were taken to that report by the Defendant, and the Commissioners made a reply to those objections The Court sent the matter again to the Commissioners for further investigation, and the Commissioners made a supplemental report No objections were taken by the Defendants to the supplemental report It appears clear that this objection, which Mr *Cowie* has now raised on the part of the Defendants, was not raised before the first Court by the objections to the first report of the Commissioners It was certainly not taken by way of objection to the second report, inasmuch as no objections were taken to it, and it does not appear that the matter was ever called to the attention of the first Court, orally, when the case came before it

Their Lordships do not think it necessary to lay it down as an absolute rule of law that no objection can be taken to the report orally, unless the parties have taken formal exceptions in the way in which exceptions are now taken to a Judge's certificate in this country But they are of opinion that, at least, the attention of the Court ought to be called to the objections Sect 181 enacts that the proceedings of the Commissioners to whom the accounts are referred for report shall be received in evidence in the case, unless the Court shall have reason to be dissatisfied, in which case the Court shall make such further inquiry as may be requisite Now, if the attention of the first Court had been called to this particular point which is raised by the learned counsel for the Defendants, the first Court would have entered into an investigation to see whether there was really any substance in the objection, and if they had entertained any doubt upon the point, they could have referred the matter back to the Commissioners for a report as to whether the objection did apply, and then they would have received the answer of the Commissioners But nothing of the kind occurred The attention of the Court never appears to have been called to the objection, and the Court acted upon the report of the Commissioners, in the absence of any such objection being raised Upon that there was an appeal to the next Court, namely, to the Deputy Commissioner The objection not having been raised before the first Court, it appears also that no objection was taken by way of appeal to the second Court upon the point It was admitted by the learned counsel for the Defendant that the grounds of appeal from the Assistant Commissioner to the Deputy Commissioner did not include the point which is now made subsequently, however, he called their Lordships' attention to the sixth reason of appeal, first, second, and third paragraphs Their Lordships have carefully examined those grounds of appeal, and it appears to them that they do not include the objection which has been taken Their Lordships, therefore, think that the point is not now open for discussion, and, consequently, that the decision of the Commissioner upon the final appeal was correct

Under these circumstances, they will humbly recommend Her Majesty to confirm the decision of the Commissioner, and to dismiss this appeal, with costs

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19th and 20th November, 1874

PRESENT

Members of the *Judicial Committee*—The Right Hon Sir James William Colvile the Right Hon Sir Barnes Peacock, the Right Hon Sir Montague Edward Smith and the Right Hon Sir Robert Porrett Collier

Assessor,—The Right Hon Sir Lawrence Peel

On Appeal from the High Court at Bengal

JUGGERNATH SAHOO, SHEOSAHOY SAHOO & Others (Defendants)* } *Appellants*,

v. versus

SYUD SHAH MAHOMED HOSSEIN, and Others (Plaintiffs) } *Respondents*

Limitation—Act XIV of 1859, s 1, cl 15 & s 5—Laches—Estoppel

The laches of a mortgagor in taking no steps for many years to enforce his alleged rights, may afford evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by s 1, cl 15 Act XIV of 1859

A Defendant who seeks to protect himself by the provisions of s 5 Act XIV of 1859 against the claim of a mortgagor suing within sixty years to recover mortgaged lands must show clearly that he or the person from whom he derives his title was a *bonâ fide* purchaser

Radhanath Das v Elliott (1) followed

On account of the Plaintiff's laches, the Judicial Committee disallowed mesne profits prior to the date of the institution of the suit; which had been allowed by the High Court

THE judgment of their Lordships was delivered by

THE RIGHT HON SIR JAMES WILLIAM COLVILE —

This is a suit by the heirs and representatives of a Mahomedan lady named *Bibee Mujo* to recover possession of property comprised in a *zur i peshgee* lease from the Defendants, who claim to be purchasers for value of the property in dispute The title of the Plaintiffs is, in fact founded upon a right to redeem, although the suit is not exactly in the form of an ordinary redemption suit

The title of the Plaintiffs is thus derived Some time in the year 1814 one *Khadim Hossein* mortgaged the whole of the *mouzahs*, of which a share is claimed in this suit by a *zur i peshgee* lease to one *Sheikh Emam Buksh* The *zur i peshgee* was for seven years, and stipulated that out of the gross proceeds of the village five *annas* should be paid as *huk ajsree* to the mortgagors, and the remainder be retained by the mortgagees, the amount thus coming to the mortgagees to be received by them in lieu of interest *Khadim Hossein* died, and a dispute afterwards arose among his heirs, or persons claiming to be his heirs which was finally settled by a compromise in the year 1817 Under that arrangement his wife *Bibee Emamun*, became entitled to seven and a half *annas* of his interest in the mortgaged property, *Bibee Mujo* became entitled to four and a half *annas*, and *Amjed Hossein*, the nearest male relation, to four *annas* After that, though it does not appear very distinctly at what time an arrangement is admitted to have been made, by which, as between the mortgagors and the mortgagees, the original mortgage was treated as three distinct mortgages, in the proportions in which the estate of *Khadim Hossein* had been divided under the compromise above mentioned The result was that *Bibee Mujo* became solely entitled to the equity of redemption in four and a half *annas* of the mortgaged property upon the payment of a similar proportion of the original mortgage debt

It is admitted that *Amjed Hossein* unquestionably sold the equity of redemption in his four *annas* to the persons through whom the Appellants derive their title The share of *Bibee Emamun* seems to have been redeemed by her or by her representatives, as early as the year 1844, upon a suggestion that the whole of the mortgage debt for which she was liable had been satisfied by the retention of the *huk ajsree* coming to her, or in some other manner But the contention on the part of the Plaintiffs in this suit the Respon

* 2 Cowell s I A p 48; 14 B L R p 386
(1) 6 B L R, 560; S C, 14 Moore s I A 1

dents on the present appeal, is, that the equity of redemption as to her share remained in *Bibee Mujo*, and that, by reason of the retention of the *huk-ajiree* due and owing to her, the whole of her share of the mortgage debt has been satisfied, and that, therefore, her representatives are entitled to recover possession of her share of the *mouzahs* in question with six years mesne profits.

The title set up by the Defendants is as follows:—The original mortgagees sold their interest to *Sheikh Taleb Ali* and his two sons *Sheikh Fuzul Ali* and *Sheikh Ashghur Ali*. They thus became the mortgagees. *Sheikh Taleb Ali* died, and his interest descended to his two sons. It is alleged on the part of the Defendants that *Bibee Mujo*, in the year 1841, sold her interest in the four and a half *annas*, upon terms similar to those upon which *Amjed Hossein* had sold his interest in his four *annas* to *Sheikh Fuzul Ali* and *Sheikh Ashghur Ali*; and that by subsequent purchases and conveyances the absolute interest which had thus been acquired by *Sheikh Fuzul Ali* and *Sheikh Ashghur Ali* in the four and a half *anna* share of the *mouzahs*, which is the subject of this suit, had become vested in some one or more of the Appellants as purchasers for value, and without notice.

A point which has been taken as to a moiety of the property in dispute makes it necessary to state with some precision what was the devolution of title as to that moiety. The whole interest, whether absolute or merely by way of mortgage, which was vested in *Fuzul Ali* and *Ashghur Ali*, was divided between them in equal moieties. And it is alleged that on the 29th of July, 1844, *Fuzul Ali* transferred his interest to his wife by a *baimokasa*, or conveyance of property, in satisfaction of her rights of dower; that this wife, whose name was *Bibee Zenut*, exercised rights of ownership over the property, having mortgaged it on the 8th of December, 1849, and that on the 10th of January, 1859, *i. e.*, within twelve years before the institution of the suit, she transferred her absolute interest in the property to the two first Appellants on the Record. Of the other moiety of the property, being that which was vested in *Sheikh Ashghur Ali*, it is only necessary to say that by various conveyances the whole of it, with the exception of the small portion afterwards mentioned, had, before the year 1860, become vested in the principal Appellants, being the first and second on the record. That small portion having been purchased at an execution sale by a Mahomedan lady, afterwards became vested in the Appellant *Burra Toonissa*.

From this statement of the title set up by the Defendant, it is obvious that the material question to be determined in the cause was the validity of the alleged conveyance of the equity of redemption by *Bibee Mujo* to *Ashghur Ali* and *Fuzul Ali*. Against the validity of that instrument we have the decision of the two Indian Courts, both concurring in finding that, if not a fabrication, as it was found by the Judge of first instance to be, it cannot be treated as established against *Bibee Mujo* or her representatives.

The first consideration upon that point is, whether sufficient grounds have been presented before their Lordships to induce them to deviate from their general rule, not to disturb such a finding of fact by two Courts in *India*. If they are to look merely at the evidence of the execution of that conveyance, they are bound to say that, so far from thinking that there is any ground for an exception being made to the general rule, they are of opinion that upon that evidence the conclusion of the High Court would be correct. To fix *Bibee Mujo* with the deed, it is necessary to establish the *mooktearnamah*, and the evidence of the execution of that instrument by her is of the slightest and most unsatisfactory character. The evidence, again, of the execution of the deed, as it is stated to have been executed by the *mooktear* appointed by the *mooktearnamah*, and of the subsequent admission of the deed by the lady, is also of a very suspicious character. It appears, moreover, that the deed was not registered even before the *Cazee* for several months; and that it was not registered at all, as the conveyance by *Amjed Hossein* had been, in the office of the registrar of deeds. It appears further, that in 1843,

upon an application made to the collector by *Fuzul Ali* and *Ashghur Ali* for mutation of names, on the suggestion of such a conveyance having been executed by *Bibee Mujo*, a petition of objections disputing such execution was filed by that lady's agent, and that the applicants, *Fuzul Ali* and *Ashghur Ali*, thereupon allowed their proceeding to drop.

The only doubt which their Lordships have felt on this part of the case, has been founded on the laches of *Bibee Mujo* and her representatives, in taking steps to enforce their rights as mortgagors for so many years; and if there had been a substantial conflict of evidence touching the execution of the deed, their Lordships might have thought that the Courts in *India*, in weighing that conflicting evidence, had hardly given sufficient weight to the inferences which arise from such laches. But their laches cannot estop the parties from asserting their right, if it exists. The question is one of title, and the right to assert that title is to be determined by the law of limitation as it stands. The law, wisely or unwisely, has given to mortgagors the long period of sixty years within which to bring their suit; and no Court of justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights. Their Lordships, after weighing the whole of the evidence, and giving full effect to the laches of the parties, cannot say that the execution of this deed by *Bibee Mujo* has been proved. They must therefore deal with the case on the assumption that the two Courts below were right in finding that material link in the title of the Defendants to be wanting.

If that be so, it remains to be considered whether Mr. *Doyne's* argument as to the *Statute of Limitations* can prevail. He has not attempted to shew that the Courts below were wrong—in fact it could not be shewn that the Courts below were wrong—in finding that the suit as a whole was not barred by the *Statute of Limitations*. It follows that the Plaintiffs (the Respondents) can assert a title to redeem the portion of the property which fell to *Ashghur Ali*, since, if the conveyance of the equity of redemption to him is not established, he had nothing but a mortgage title to convey; and there was no conveyance even of that to the Appellants, except within the period of twelve years. The questions raised by Mr. *Doyne* are, whether a different rule ought not to be applied to that portion of the property which was vested in *Fuzul Ali*, and which passed by the *baimokasa* to his wife, and from her to the Appellants, the transfer to the wife having occurred more than twelve years before the suit; and whether the suit as to this portion is not barred by the 5th section of Act XIV. of 1859. Upon that point their Lordships, during the argument, entertained some doubt; but they are of opinion that they can make no distinction between the two classes of property, for the following reasons:—In the first place, the case which has been made here does not really appear to have been made in either of the Courts below. It was certainly not made in the Court of first instance; and though it was said that it was raised by the grounds of appeal, it appears to their Lordships that the first ground of appeal points to a general bar of the whole suit; and the observations of the learned Judges of the High Court in giving their judgment shew that the argument before them must have proceeded upon that ground. Moreover, upon the merits of the question, their Lordships are of opinion that the supposed bar to the suit is not established. In the case of *Radhanath Das* v. *Gisborne & Co.* (1), in which the judgment was given by the present Lord *Chancellor*, the principles upon which the 5th section of Act XIV. of 1859 is to be applied to such cases as the present are very clearly stated. His Lordship said, "But their Lordships cannot fail to observe that the provisions of this section are of an extremely stringent kind. They take away and cut down the title which *ex hypothesi* is a good title, of the *cestui que trust* or of a person who has deposited, pawned, or mortgaged property. They cut down that title in regard to the number of years that the person would have had a right to assert it—from a very great length of time, sixty years, they cut it

(1) 14 Moore's I. A., 1; 2 P. C. J., p. 636.

down to twelve years. It is therefore only proper that any person claiming the benefit of this section should clearly and distinctly shew that he fills the position of the person contemplated by this section as the person who ought to be protected. Their Lordships think that in order to claim the benefit of this section the Defendant must shew three things: first, that he is the purchaser according to the proper meaning of that term; second, that he is a *bonâ fide* purchaser; and third, that he is a purchaser for valuable consideration." Now if the twelve years to be computed under the 5th section are to run from the transfer by the *baimokasa* to *Bibee Zenut*, it is necessary to shew that *Bibee Zenut* was a *bonâ fide* purchaser, and of that there is no proof; on the contrary, the transaction is open to all the suspicions which attach to transactions between a Mahomedan and his wife; and the necessity of proving that the purchaser is a *bonâ fide* purchaser makes the absence of a particular plea raising the particular defence now set up extremely material, because if that point had been distinctly raised in the Courts below, it would have been open for the Plaintiffs to dispute the *bonâ fides* of that transaction, and to have it investigated.

It seems therefore to their Lordships that they cannot give any greater effect to the transfer of the share of *Fuzul Ali* than they do to that of the share of *Ashghur Ali*.

There is however one point upon which their Lordships are not satisfied with the present decree. They cannot but remark that the laches of the Plaintiffs in the case have been very great, and that the case is far from being a clear one. They have also to remark that there are no grounds for imputing to the Appellants, the actual holders of the property, a knowledge of any fraud that there may have been in the supposed transfer to their vendors. They have also to remark that, in strictness, some exception might have been taken to the form of the suit, considered as a redemption suit, although it is admitted at the Bar that there are no grounds for a further investigation of the question whether the mortgage money had been paid off at the date of the suit, and that it may be considered to have been paid off. Their Lordships however cannot see that there were sufficient grounds for allowing the Plaintiffs, who have been guilty of such laches, to recover, as against purchasers for valuable consideration, without notice of their title, mesne profits from any date earlier than that of the institution of the suit. They think that on the institution of the suit the laches of the Plaintiffs in enforcing their rights ceased, and that the mesne profits from that date should follow the result.

Their Lordships will therefore humbly advise Her Majesty to confirm the decree under appeal, with the exception that the amount of mesne profits should be reduced to the mesne profits which have been received since the institution of the suit. The Appellants having, to the extent of a reduction in the mesne profits, succeeded on the appeal, and the Respondents not having put in a case or appeared at the Bar, their Lordships will make no order as to the costs of this appeal.

25th, 26th, 27th, & 28th November, 1874, and 30th January, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor,—The Right Hon. Sir Lawrence Peel.

On Appeal from the High Court in Bengal.

AMEEROONISSA KHATOON and Others (Defendants)* ... ... } *Appellants*,

versus

AREDOONISSA KHATOON and Others (Plaintiffs) } *Respondents*.

Mahomedan Law—Gift of Mushâ—Gift of definite Shares of Zemindaries valid—Gift by a Guardian to a Minor valid without change of Possession—Secondary Evidence—Procedure—Issues.

Where there is on the part of a father or other guardian of a minor a real and *bonâ fide* intention to make a gift to the minor, the Mahomedan law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor.

Where the subjects of a gift are definite shares in certain *zemindaries*, the nature of the right in which is defined and regulated by the public Acts of the British Government, so that they form for revenue purposes distinct estates, each having a separate number in the Collector's books, and each liable to the Government only for its own assessed revenue, the proprietor collecting a definite share of the rents from the *ryots*, and having a right to this definite share and no more, the rule of the Mahomedan law as to *mushâ*, which makes the gift of undivided property invalid, does not apply.

Quære.—Whether the law relating to *mushâ* applies to those cases in which the owner gives all his own interest in undivided property.

A Plaintiff sued to set aside certain documents which he alleged to have been forged by the Defendant. At the trial of the case in the Court of first instance the only issue directed to these documents was:—"Are the three written agreements said to have been given by the Plaintiff to the Defendant genuine and valid deeds?" It was not contended by the Plaintiff in that Court that the agreements had been obtained from him while he was a minor by undue influence, nor was that objection taken in the grounds of appeal against the judgment of the Court. *Held*, that it was too late to take the objection for the first time in the Court of Appeal.

Semble.—In respect of a transaction in which a Mahomedan, the proprietor of an estate paying revenue to Government, disposes of that estate, the period of minority is that of eighteen years, as fixed by s. 2, Regulation XXVI. of 1793.

30th January, 1875.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was brought in the Civil Court of *Dacca* by *Moulvie Wahid Ali* against his father *Moulvie Abdool Ali*, in his own right and as the heir of his deceased wife *Eftekhurunissa*, and as the husband of another wife, *Ameeroonissa*, to set aside three *ikrarnamahs*, or agreements, on the allegation that they were forged. These *ikrars*, if genuine, modified the operation of three *hibbanamahs*, or deeds of gift, two purporting to be executed by his father, and one by his mother *Noorunissa*, containing ostensibly absolute gifts to *Wahid Ali* of various properties of considerable value. The plaint also prayed that *Wahid Ali* might be put into possession of these properties, and that the decree of the magistrate in a suit under Act IV. of 1840, maintaining his father in possession, might be set aside. Mr. *Barry* and others, claiming under *pottahs* from the father, were also made Defendants. Their title must stand or fall with *Abdool Ali's*; and they did not appear on the hearing of this appeal.

The questions in the suit relate to the genuineness and validity of the three *hibbanamahs* and the three *ikrars*. Each of them was on some ground impeached.

The Judge of *Dacca* dismissed the suit (except as to an 8-*annas* share of some property of the Plaintiff's mother *Noorunissa*, which it was admitted he was entitled to), holding that the first alleged *hibbanamah* of the father was not proved, and that the second and third from the father and mother respectively, were in-

* 2 Cowell's I. A., p. 87; 15 B. L R., p. 67.

valid by Mahomedan law, there being, as he found, no delivery and acceptance of the gifts, or change of possession. He also held that the *ikrars* were genuine and valid.

The High Court reversed this decree, and the grounds and nature of their own decree, which is the subject of the present appeal, are thus stated at the conclusion of their judgment. "Our decree will proceed on the basis of the validity of the three deeds of gift and the invalidity of the later documents (the *ikrars*). We shall declare that *Moulvie Wahid Ali* was in his life-time, and that those who are now by law his heirs and representatives are entitled to a decree for setting aside the documents relied upon by the Respondents, and for the recovery of the property sued for."

Wahid Ali died before the decree appealed from, and the father subsequently. The parties to this appeal are their respective representatives.

It appears that at the date of the alleged *hibbanamah* *Abdool Ali* had two wives, *Noorunissa*, the mother of *Wahid Ali*, and *Eftekhurunissa*. *Wahid* was his only son, and he had one, or at most, two daughters. *Abdool* afterwards married a third wife, *Ameeroonissa*, and the third *ikrar* purports to be made on the occasion of this marriage.

This first *hibbanamah* in order of time is dated the 14th of *Magh*, 1254, and purports to convey, by way of gift, from the father, some *lakhiraj* lands charged with religious trusts belonging to the *Kuddum Russool durgah* at *Noabaree*, and to appoint his son *mutwalee* of the *durgah* in his place. The document also contains an appointment by the father of *Moonshee Kolumoodeen Mahomed* to be the guardian of his son for the business of the *durgah* during his minority.

The original of this deed was not produced; and their Lordships, during the argument, declared their opinion that its non-production was not sufficiently accounted for to allow of secondary evidence being given of its contents. It appeared upon the Plaintiff's evidence that the original deed had been delivered to the guardian *Moonshee Kolumoodeen*, but this person was not called as a witness, nor was his absence explained. It is to be observed that, although the document tendered as evidence, viz., what purported to be a copy of the deed from the Registry, shewed that the instrument, if really executed, was signed by numerous subscribing witnesses, none of them were called to prove its existence and execution. Supposing, therefore, that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Regulation XX., 1812 (s. 2, cl. 5), was complied with. It was not shewn that the original was "lost, destroyed, or not forthcoming," that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by any of "the subscribing witnesses" that the original had been duly executed.

No doubt, although the statutory proof failed, other secondary evidence might have been given of the contents if the non-production had been duly accounted for. It was suggested that the deed may have remained with the father, but this suggestion is opposed to the evidence; and, further, the custody of the father would not be, according to the supposed terms of the deed, the proper custody. In their Lordships' opinion therefore, no sufficient foundation was laid for the admission of secondary evidence.

Objections made with the view of excluding evidence are not received with much favour at this Board, but it is sometimes necessary for the right decision of the merits of the controversy between the parties to give effect to them. In the present case the surrounding circumstances raised no presumption of the existence of the deed, and the question of the custody bore materially on the issue to be determined.

The execution of the two other *hibbanamahs* by *Abdool Ali* and *Noorunissa* respectively is not denied. The first of them is dated the 19th of *Assin*, 1256, and purports to be a gift from *Abdool Ali* to his son of certain *Jummah* lands, viz., his 10-*annas* share of the *zemindary* of *Noroollapore*, and shares of other *zemindaries*. This deed, which recites that *Abdool Ali*

had only one son, *Wahid*, and a daughter, *Sreemotee Fukhrunissa*, who was well provided for by her husband; that he had already bestowed some of his property on his wife *Noorunissa;* and that he wished to prevent quarrels at his death and to enable his son to live well; contains an absolute and present gift from the father to the son of the above-mentioned properties.

The deed from the mother *Noorunissa* is dated the 24th of *Joistee*, 1258, and purports to be a present and absolute gift to her son of certain shares of the *zemindary* of *pergunnah Boro Bajoo*, and of other *zemindaries*. Some of these properties originally belonged to *Noorunissa* in her own right, and others had been transferred to her by her husband. The deed states that the son being a minor, the father, as his guardian, had acknowledged the gift.

These two *hibbanamahs* were duly registered, but no mutation of names was made.

It has been found by the High Court that *Wahid* became of full age, viz., eighteen, in 1261; consequently, at the date of the *hibbanamah* from the father he was a child only ten or eleven years old.

The Courts below substantially agree in their conclusions of fact upon the evidence with regard to the possession and management of the properties. They both find that although all proceedings relating to the estate were subsequently to the *hibbahs* in the son's name, the father remained in actual possession and receipt of the profits of the properties, and in the uncontrolled management of them.

The Judge was of opinion, on these facts, that the transfers to the son were "purely nominal," and that the father did not intend that any property should pass by them, or at least whilst he lived; and he further held that the gifts were invalid by Mahomedan law for want of acceptance and seisin by the donee.

The High Court, however, came to the conclusion that the transfers were not colourable, but intended to operate as real gifts. They also held that "when the guardian of a minor is himself the donor, and in possession of the property, no formal delivery and seisin is required," citing in support of this exception to the general law *Macnaghten's* Principles of Mahomedan Law, chap. 5, sects. 9 and 10.

It was not denied by the learned counsel for the Appellants that the High Court had on this last point taken a correct view of the law, nor do their Lordships doubt that where there is, on the part of a father or other guardian, a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

It was, however, strongly insisted by the Appellant's counsel that the Judge was correct in considering that the transfers were colourable, and only with the view of making the son the ostensible owner; or, if not purely *benamee*, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future family settlement It is enough for their Lordships in this place to say there are circumstances in the case which favour this contention, at least as regards the transfer from the father, but they do not think it necessary to go at large into this question, for, having come to the conclusion, for reasons to be hereafter stated, that the three *ikrars* alleged to be executed by the son are genuine documents, they think the rights of the parties must be determined on the basis of the combined operation of the *hibbas* and *ikrars*. It is clear also that the father, who set up in his defence to this suit these *ikrars* as valid instruments, cannot now be allowed to aver that the *hibbas* to which they relate were intended to have no operation and effect.

A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of *mushâ*, or an undivided part in property capable of partition, was, by Mahomedan law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this bar. That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The *Hedaya* gives the two reasons on which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with res-

pect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, viz., to make a division. (See Book XXX., c. 1., vol. iii. p. 293.) Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

In the present case the subjects of the gift are definite shares in certain *zemindaries*, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court, after stating that the shares "were for revenue purposes distinct estates, each having a separate number in the collector's books, and each being liable to the Government only for its own separately assessed revenue," and further, that the proprietor collected a definite share of the rents from the *ryots*, and had a right to this definite share and no more, held that the rule of the Mahomedan law did not apply to property of this description.

In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in *zemindaries*, which are in their nature separate estates, with separate and defined rents. It was insisted by Mr. *Leith* that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained *mushá*. But although this right may exist, the shares in *zemindaries* appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *mushá*.

Mr. *Cowie*, in his argument, contended that the rule only applied to cases where the doner himself retained some share of the property, and not to those where the owner gave all his own interest in undivided shares to the donee. The authorities on Mahomedan law do not seem to be agreed on this point; and after the opinion they have just expressed, their Lordships need not enter upon the consideration of it. Indeed, but for the great practical importance of the question they would have thought it unnecessary to express their opinion on the subject-matter of the gift, since if the *hibbas* are to be construed, as they think they should be, by the light reflected upon them by the *ikrars*, absolute and pure gifts of the property were not intended; and therefore the principles of law governing such gifts are not applicable to the transaction.

Their Lordships will now proceed to consider the *ikrars*. The first two are dated on the 29th *Falgoon*, 1259. One is addressed by *Wahid* to his father, *Abdool*; the other to his mother, *Noorunissa*.

That from *Wahid Ali* to his father recites the *hibba* of the 19th *Assin*, 1256, and that his father, mother, and "half-mother" being alive, full brothers and sisters, and half brothers and sisters might be born to him. After further reciting that *Abdool*, by reason of his gift to *Wahid*, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift. It then contains an agreement by *Wahid* to maintain his sister *Fukhrunissa* and any other sisters or half brothers to be afterwards born, in joint mess during their minority, and on their becoming of age to allow them certain fixed stipends for maintenance. He also agreed, in case any full brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition; "And thus I do make my brothers and sisters co-sharers in the property received by me in gift, and the profits thereof." The *ikrar* concludes by declaring that during the father's lifetime the whole of the property named in it will remain in the father's charge, and under his management and control.

The *ikrar* to the mother contains analogous dispositions by *Wahid* in respect to the property contained in her *hibba* of the 24th *Joistee*, 1258, except that the provisions for maintenance and shares are confined to his uterine sister *Fukhurunissa*, and any uterine brothers and sisters to be afterwards born. It also contains a provision for the payment of Rs. 250 per mensem to his mother for her life. This *ikrar* concludes, like that to the father, by declaring that, as long as his father lived, he will have the entire management of the property named in it, of the collection of the rents, &c, and of all business connected therewith,—" I shall not interfere with it."

The High Court do not apparently dissent from the finding of the Judge that these *ikrars* were executed by *Wahid*. They say: " We should very reluctantly interfere with the finding of the Lower Court that these *ikrars* are genuine. They were registered when made. It is not probable they remained unknown to the Plaintiff until the year 1864, as we understand him in effect to allege in his plaint." But they declined to give effect to them on the grounds, apparently, that the son was a minor, and that they were obtained by undue influence.

It is to be observed that neither the plaint nor the issues distinctly raise these points. The plaint alleges that the *ikrars* were forged, and the only issue directed to these instruments is in the following terms:—" Are the three *ikrars* said to have been given by the Plaintiff to the Defendant genuine and valid deeds?" Granting that the objection that the *ikrars* were obtained by undue influence might, if the previous proceedings had raised it, be held to be comprehended in the word "valid" in the issue (although their Lordships think such an issue ought always to be raised in a more pointed form), the question does not seem to have been in fact raised before the Judge, nor was it taken in the grounds of appeal against his judgment. In their Lordships' opinion, therefore, it was too late to set up this defence for the first time before the High Court, especially as the evidence does not seem to have been directed to it, which would certainly have been the case if the parties had originally intended to make it an issue in the cause.

The disability of *Wahid Ali* arising from his being a minor when the first two *ikrars* were given depends on the question whether his minority is in this case to be determined by the Regulation of 1793. As regards the fact, it was admitted by the Respondent's Counsel that *Wahid*, when he made these *ikrars*, was fifteen, the age at which, by the general Mahomedan law, he would have been competent to act for himself; but they denied that he was then eighteen, and their Lordships are satisfied that the High Court were right in their conclusion of fact from the evidence that he did not reach eighteen, the age fixed for the minority of Mahomedan proprietors of estates paying revenue to Government by Regulation XXVI. of 1793, sect. 2, until 1261, which was subsequent to the date of the two *ikrars*.

If it had been necessary for their Lordships to determine whether the period of minority was governed by this Regulation, they would be strongly disposed to hold that it was. In dealing with these *ikrars*, *Wahid* must be assumed to be the proprietor of the revenue-paying estates referred to in them; and inasmuch as they contain dispositions of such estates, the period of his minority, at least for this purpose, would seem to be within the policy and terms of the Regulation and governed by it. But this point becomes immaterial, since their Lordships are of opinion upon the evidence that the Judge was right in finding that the third *ikrar*, which refers to the two earlier ones, and in substance confirms them, is a genuine instrument.

It is not denied that this *ikrar*, if genuine, was executed after *Wahid* was of the full age of eighteen, and the most disputed, and obviously the most important question of fact in the cause is whether it is genuine, or was, as *Wahid* alleges, forged by his father.

This *ikrar* bears date the 16th of *Aughran*, 1263, and was made, as before observed, upon the occasion of *Abdool's* marriage with a third wife, *Ameerunissa*. After reciting the two *hibbas* from the

father and mother, it thus refers to the two former *ikrars*:—"That I, being your only son, and on account of your having no other son, possessed of all your affections, you had, so as to prevent that any disputes could arise with any one in future, bestowed upon me, by your favour, and through the execution of a deed of gift, dated the 19th *Assin*, 1256, your ancestral *zemindaries* specified in the Schedule, and situated within the Collectorate of *zillah Dacca*, viz. a 10 *as.* 13 *gs.* 1*c.* 1*k.*, share of *pergunnah Noroollapore*, and your 7-*unnas* share of *pergunnah Idrakpore*, situated within *zillah Backergunge*. Besides this, having settled upon my late mother, *Noorunissa Khatoon Saheba*, as her marriage dower, your *zemindary* of *tuppah Awalee Jehanabad*, situated within the Collectorate of the aforesaid *Zillah Dacca*, and your *talooks*, &c., my mother aforesaid, as the owner thereof, bestowed them upon me through a deed of gift dated the 24th of *Joistee*, 1258, and I, being the owner and in possession of that property, worth, in accordance with the deed of gift, Rs. 80,000, I did formerly give and execute, as addressed to you and to my mother, the aforesaid *Khatoon Saheba*, separate *ikrars* (agreements) to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should, during your lifetime, remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that, should uterine brothers to me be born, the property received in gift from my mother should be enjoyed by all of us in equal shares, and promising, should I have sisters, or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with *Ameerunissa*, who is stated to be a lady of good family, that provision had been made for the children of the former marriages by the earlier *ikrars*, and that it was proper to make some for her and any children to be born of the intended marriage. It then states an agreement by *Wahid* to make allowance to the daughters of the marriage, his half-sisters, and that, should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." *Wahid* then grants an allowance to *Ameerunissa* of Rs. 150 per month for her table and Rs. 500 a year for her clothes. The *ikrar* contains a statement that the father was in possession of the property by virtue of the former *ikrars*, and concludes by declaring that it will remain in his control and management during his life-time, and that neither *Wahid* nor his heirs should interfere or lay any claim thereto.

This *ikrar* was registered soon after its date. It is sealed with *Wahid's* seal, but not signed. Five witnesses, two of whom were cited by both sides, deposed that the seal was affixed to the *ikrar* by *Wahid* himself in their presence, and there is no opposing evidence. *Wahid* was not called to negative the personal execution of the *ikrar* attributed to him by the witnesses; and their Lordships cannot but think, whilst making due allowance for the dislike of Mahomedans of rank to give evidence in the Courts, that it was his duty if the instrument had been forged to give the Judge the opportunity of hearing his own evidence. His not having done so naturally conduces to the belief that the witnesses who prove his execution of the *ikrar* have spoken the truth. The Judge gave credit to them, and the High Court, who overruled his finding, which affirmed the genuineness of this *ikrar*, appear to rest their decision partly on the want of *Wahid's* signature to the *ikrar*, but mainly on the improbability that, under the circumstances, he should have made the arrangement it contains.

The signature was not necessary; but no doubt its absence made it proper that the proof of the affixing of the seal should be clear and convincing. This evidence, it seems, was supplied; five witnesses, to whom the Judge gave credit, having proved that the seal was affixed to the document in their presence by *Wahid Ali* himself.

In considering the improbability that the son would make such an *ikrar*, the High Court seem to assume that there was at its date dissension between the father and the son; but it would seem from the evidence that this did not occur

until after the father's marriage with *Ameerunissa*, and no proof was given that *Wahid* was opposed to this marriage. His own mother, *Noorunissa*, was then dead. Undoubtedly domestic quarrels afterwards arose, which led to a separation of the son from the father's house, and from that time the relations of the parties were hostile.

Supposing, then, the father and the son to have been on good terms at the date of the *ikrar*, there would seem to be, according to Mahomedan family usage, and having regard to the disposition of the property under the previous *hibbas* and *ikrars*, nothing really unjust or improbable in the arrangement. *Wahid* had only one uterine sister, *Fukhurunissa*, and his own mother being dead, he could have no more brothers or sisters of the full blood. His father's second wife, *Eftekhurunissa*, appears to have had no children, and it was probably thought she would have none. In this state of the family, it would seem just and reasonable that the son, who held the bulk if not all the family property under the *hibbas*, should join in making some provision for his father's new wife and the possible children of the marriage. It is true that in this *ikrar* he agrees to make his half-brothers of this marriage equal sharers with himself, whereas in the former ones only his brothers of the full blood were so to share; but his mother was living when the former *ikrars* were given, and it was then possible he might have had uterine brothers.

Granting, however, that the arrangement in the last *ikrar* may have been too disinterested to have been altogether probable, if the property had been unquestionably the son's; it does not follow that there is the same or any want of probability in it when his title was only derived from the *hibbas*, and his father was still in actual possession and enjoyment of the property.

The High Court assumes that the father really intended to denude himself of his property and to make an absolute gift of it to his son, although he had two wives living, and probably contemplated marrying, as he afterwards did, a third; and on this assumption they regard the arrangements of the last *ikrar* to be improbable.

Their Lordships, however, in considering the probability of its execution, are disposed to adopt the opinion of the Judge that an absolute gift was not intended, and that the transaction was either purely *benamee*, or, more probably, to be followed by a family settlement. In this view of the case the improbabilities relied on by the High Court vanish, and the direct evidence of the execution of the instrument ought to prevail.

The result of establishing the third *ikrar* will be to confirm and give effect to the two former ones, which must be construed with it. The rights of the parties ought, therefore, in their Lordships' opinion, to be governed by the provisions contained in the *hibbas* of the 19th of *Assin*, 1256, and the 12th of *Joistee*, 1258, and in the three *ikrars*, read and construed as a whole; and may be declared and enforced, if necessary, in a suit properly framed for that purpose.

The form of the present suit does not allow of these rights being so declared in it. The only prayer in the plaint is to have the *ikrars* set aside as fabricated, and the Plaintiff put into possession of the properties claimed with mesne profits. Their Lordships being of opinion that the *ikrars* are genuine, the prayer to set them aside cannot, of course, be granted, nor can the father's possession be treated as wrongful, so as to justify the claim of the son to remove him from it. The *ikrars* clearly provided that the father should have the possession and control of the property during his life; and any rights, therefore, which others may have under them to any share of the profits accruing in his lifetime could only be enforced in a suit charging him in the character of manager. The present suit which treats him as a trespasser liable to mesne profits cannot be sustained.

For these reasons their Lordships will humbly advise Her Majesty that the decree of the High Court ought to be reversed, and that of the Judge, which dismissed the suit except as to 8-*annas* share of the mother *Noorunissa's* property, affirmed.

The Respondents must pay the costs of this appeal.

16th, 17th and 18th December, 1874; and 30th January, 1875.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

AUMIRTOLALL BOSE and others (Defendants)* } *Appellants,*

versus

RAJONEEKANT MITTER & another (Plaintiffs) ... } *Respondents.*

Hindu Law—Daughter's son—Daughter's Succession by Survivorship not defeated by becoming a Childless Widow—Limitation (before Act XIV. of 1859) against Reversionary Heir.

Where a Hindu widow, who takes by inheritance from her husband, is dispossessed, the period of limitation as against the reversionary heir claiming the succession after the widow's death is, in the absence of fraud, to be reckoned, not from the time of the widow's death, but from the time from which it would have run against the widow had she lived and sued to recover the inheritance—*Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) approved.

In the English Common Law Courts, and, a *fortiori*, in the Courts of Law in *India*, where the pleadings are less technical, an admission of a fact on the pleadings by implication, is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.

An admission, or even a confession of judgment by one of several Defendants in a suit, is no evidence against another Defendant.

In a suit instituted before Act XIV. of 1859 came into operation, the periods of successive minorities might be deducted in reckoning the term of limitation.

R, holding ancestral estates in Bengal, jointly with his brothers as an undivided Hindu family, died, leaving a widow, *S*, and three unmarried daughters, *B*, *S M*, and *N*. On her husband's death, *S* continued to reside with his brothers, and was supported out of the income of the joint estate. During the life-time of *S*, her daughters married, and *B* became a widow without having had a child. After *S's* death, and during the life time of *S M*, *N* also became a childless widow. *S M* died after her mother, leaving a son *R K*. *R K*, on attaining majority, sued to recover with mesne profits a 4-annas share in the ancestral estates to which he claimed to be entitled on his mother's death as heir of *R*, and from which he alleged that he had been dispossessed by the representatives of *R's* brothers, whom he made Defendants in the suit, joining *B* and *N* with them as Co-Defendants. Some time after the institution of the suit, a petition was filed, purporting to proceed from *B* and *N*, by which they admitted that the Plaintiff was the heir of *R*, and that they had no defence to offer.—*Held*, 1st.—That limitation could not be taken to have run against the Plaintiff's claim during the life-time of *S*, who, in the absence of proof that she had received only maintenance, as distinguished from participation in the profits of the estate, must be presumed to have had possession of the share in the estate which she inherited as her husband's widow, 2nd.—That *B* being a childless widow at the time of her mother's death, could take no interest in her father's estate. 3rd.—That, on their mother's death, *S M* and *N* as heirs of their father took a joint estate in his succession: and on *S M's* death, the estate which had come to her and *N* jointly, survived to *N*, since the fact of the latter being at that time a childless widow, did not destroy the right of survivorship which she had previously acquired by inheritance. 4th.—That *N* being the heir of *R*, *R K* had not, during her life time, any right to any part of the estate, and that his position was not altered by the petition, purporting to proceed from *B* and *N*, such petition not amounting to a conveyance or disclaimer of title in his favor. 5th.—That, if the petition could have been treated as a relinquishment on the part of *N* of her rights in the Plaintiff's favor, it would have been necessary to enquire whether *N* was not herself barred by limitation at the time when she transferred her rights.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The Respondents were Plaintiffs and the Appellants Defendants in the Court below. The Plaintiff, *Rajoneekant Mitter*, as the only son of a daughter of *Ram Nursing Bose*, deceased, sued to recover a 4-annas share of certain ancestral estates, and of certain other properties purchased with the income of the said estates. The

* 2 Cowell's I. A. p. 118; 15 B. L. R., p. 10.
(1) B. L. R., Sup. Vol., 1008.

Plaintiff, *Womeschunder Roy*, claimed as a purchaser of a portion of the said share from the Plaintiff, *Rajoneekant*. His title depends upon that of *Rajoneekant*.

The ancestral estates originally descended to *Ram Nursing* and his three brothers from their father, *Gokool Chunder Bose*, and were held by them as an undivided Hindu family. *Ram Nursing Bose* died in November, 1824, without a son, leaving a widow, *Soorjomoneye*, and three daughters, *Bindubasseenee*, *Sarodamoye*, and *Nittokally*. *Soorjomoneye*, the widow, died in March, 1835, and upon her death the heirs of *Ram Nursing* were *Sarodamoye* and *Nittokally*, two of the daughters, who were then married and likely to have sons. It may be taken against the Plaintiff, upon his own statement, that *Bindubasseenee* could not take any interest in her father's estate, as she was a childless widow at the time of her mother's death. In his plaint he says :—

"My elder aunt, *Bindubasseenee*, having become a childless widow, my grandmother supported her and the other two daughters, who were both under age, and effected the marriages of two unmarried daughters in due and proper time. On the 30th *Bysack*, 1242, my maternal grandmother breathed her last, leaving behind her my mother and my two maternal younger aunts" (meaning his mother and his maternal younger aunt, *Nittokally*), "who were under age, and my maternal aunt, *Bindubasseenee*, under the maintenance and control of my maternal great-uncles."

He then states his own title and eviction as follows :—

"My mother attained her majority in the month of *Choitro*, 1243, and as my youngest maternal aunt unfortunately became a childless widow in the year 1244, so the right of succession to all the aforesaid properties accrued to my mother, according to Shasters. I was born in the year 1246 ; but, owing to my evil fortune, I was at my tender age bereaved of my mother, who breathed her last on the 25th *Kartick*, 1252. Since then I, together with my maternal aunts, remained under the guidance of *Joy Doorga Dassy*, mother of *Prem Chand Bose* and *Aumirtolall Bose*, heirs of my maternal grand-uncle ; and on their attaining majority, in the same house and in the same mess, and under the superintendence of the said persons, on the 16th *Srabun*, 1262, I attained my majority. When I came to know what property I was entitled to as my grand-father's heir, I proposed separately to realize the collections of the one-forth share of all the real and personal properties left by my maternal grandfather and grandmother, and mother, and of the real and personal properties, *i. e.*, *talooks*, &c., acquired in my own name or *benamee* from the joint funds. *Prem Chand Bose*, *Aumirtolall Bose*, and *Joy Doorga Dassy*, the principal Defendants, having been instigated by the ill advice of wicked persons, and supported by the Defendant *Goorodoss Roy*, with the motive of divesting me of my rights, forcibly expelled me from the joint dwelling house on the 16th *Kartick*, 1264, and having ousted me by artifice, forcibly and fraudulently held possession of all the properties, and are enjoying the profits arising from the estate."

The principal Defendants, in answer to the Plaintiff's claim, stated that *Ram Nursing Bose*, having no male issue, and having no probability of male issue, executed, in the year 1231, a *hibbanamah*, or deed of gift, to his three brothers, and breathed his last . They then proceed :—

"The aforesaid three donees, by virtue of the said deed of gift, applied to the Courts to be made representatives in the cases that were then pending in the Court in the name of the said *Ram Nursing Bose*. An *istaharnamah* (proclamation) was duly issued from the *Adawlut* for the appearance of an heir within the period of six weeks. As the maternal grandmother of the *Mitter* Plaintiff was acquainted with the truth and validity of the said deed of gift, no objections on that head were urged by her. The *hibbanamah* was produced in the Court by our predecessors, and testified to by them ; and the Judge, considering the said deed to be genuine and proved, ordered, on the 22nd of November, 1825, the said *Ramtunoo* and *Ramdoyal* to be made representatives in the place of the aforesaid *Ram Nursing Bose*. The said representatives, agreeably to

which, conducted the suits in the *Zillah* and *Sudder* Courts, and having retained possession of all the properties specified in the *hibbanamah*, from the date of the said *hibbanamah*, managed the affairs, conducted several suits before the tribunal of different Courts, and even in appeal to the Privy Council.

Three issues were laid down for trial, viz.:—

"1. Whether the Plaintiff, *Rajoneekant*, as heir to a part of the paternal and self-acquired properties of *Ram Nursing Bose*, his grandfather (the father of his mother), was in possession or not; and whether, on the 16th *Kartick*, 1264, B.S., the Defendants dispossessed him by turning him out of doors; and *Rajoneekant* ought to recover possession with mesne profits or not?

"2. Whether, according to the bill of sale given by *Rajoneekant*, both the Plaintiffs can be entitled to possession of the property in dispute in equal proportions or not?

"3. Whether, according to the deed of gift of *Rajonee's* maternal grandfather, Defendants have been holding possession; and whether such long and continuous possession bars the suit, and it should be dismissed or not?"

The plaint was filed on the 9th of September, 1858, before the *Code of Civil Procedure* (Act VIII. of 1859) and before the passing of the present *Limitation Act* XIV. of 1859. The question of limitation must be determined according to the old law.

The Defendant's case is that limitation began to run from the time of *Ram Nursing's* death. The Judge of *Jessore* held that there was no proof of possession by the Plaintiff or by his mother or maternal grandmother.

It has been held by a full Bench of the High Court at *Calcutta*, that in the case of a succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, not to be reckoned from the time when succeeds to the estate but from the time which it would have been reckoned against the widow if she had lived and brought the suit: see *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chukerbutty* (1). That rule has been acted upon in other cases, and it appears to their Lordships that the principle of that decision is correct. If in the present case limitation began to run against *Soorjomoneye*, the widow of *Ram Nursing*, the Plaintiff's suit is barred.

The Judge of *Jessore* found that there was no proof of possession by *Soorjomoneye* or by the Plaintiff or his mother: and he held that limitation was a bar. Many of the Plaintiff's witnesses, however, deposed that *Soorjomoneye* was in possession. The Judge of *Jessore* says:—

"What he (referring to the Plaintiff) relies on, is the evidence of thirty-nine witnesses, who speak to his possession and ejectment.

"The evidence of these persons is to the effect that after the death of *Ram Nursing*, his widow and daughters, and latterly his daughter's son, were in joint possession with the Defendants; that about two years ago the Plaintiff, finding that when in joint possession he was burdened with an unfair share of the expenses, asked for a division of the shares, whereupon the Defendants told him that he had no right to anything, abused him, and turned him out of the house. Most of the witnesses are well acquainted with the *Bose* family and their history. They live near or on the same spot. Some are to all appearance very respectable; nearly all give a connected, and some a full account, of the Plaintiff' sconditional prospects and treatment."

The evidence of the witnesses above referred to is very loose and unsatisfactory; still their Lordships are induced by it to believe that *Ram Nursing's* widow, *Soorjomoneye*, continued to live with her deceased husband's brothers and was supported by them out of the income of the estate. Nothing could be more natural or consistent with the usage of Hindu families than that upon her husband's death she should continue to reside at the family dwelling-house as a member of the joint family. In-

(1) 9 Suth. W. R. 505.

deed, the principal Defendants state in their answer that "they retained their brother's wife, the said *Sooryomoneye*, and unmarried daughter, under their own support and guidance, and they effected the marriage of the unmarried daughter into a suitable family, and in a proper manner." If the widow and her daughter continued to live as members of the joint family, the presumption would be that they were maintained out of the widow's share, which she inherited from her husband, unless it could be distinctly shewn, which it has not been, that she received only maintenance as distinguished from a participation in the profits of the estate; for, even if she did not receive her full share of the profits, limitation would not run against her in the same manner as if she had been actually dispossessed of her husband's share of the estate.

As regards her daughters *Sarodamoye* and *Nittokally* the case would be different. They were married during their mother's lifetime, and would naturally go to the residences of their respective husbands and become members of their respective families.

The evidence is not such as to induce their Lordships to believe that either *Sarodamoye* or *Nittokally*, upon their mother's death, entered into joint possession of the estate with their father's brothers or their representatives, or that during the lives of their husbands they participated in the profits of the estate. *Nittokally*, after her husband's decease, may possibly have gone to live with her father's brothers, though, it is to be remarked, that in the description of her place of residence as a Defendant in the suit she is stated to be of "*Kattara pergunnah Nuldee*," which is different from that given of *Bindubasseenee*. It is unnecessary, however, to come to any conclusion in that respect as regards her. *Sarodamoye* died before her husband, and there is no sufficient evidence to induce their Lordships to believe that after her marriage she continued with her father's brothers as a member of an undivided Hindu family.

Their Lordships find that limitation began to run against the Plaintiff's mother, *Sarodamoye*, and that neither she nor the Plaintiff ever had possession of any portion of his maternal grandfather's estate or of the rents or income thereof. But the period of limitation must be calculated according to the old law, and consequently the periods during which the Plaintiff and his mother were respectively under the disability of minority must be deducted. Deducting those periods, there were only eight years seven months and twenty-four days during which the Plaintiff's mother, and three years two months and nine days during which he himself, was not under disability, even calculating the period of the Plaintiff's majority at the age of sixteen, and not eighteen. This would give only eleven years nine months and thirty-three days as the period to be taken against the Plaintiff in calculating the time which had run against him at the time when his suit was commenced.

The High Court reversed the finding of the *Zillah* Judge upon the question of limitation, and stated that it had not been insisted upon before them. Their Lordships see no reason for interfering with that decision.

The question remains whether the Plaintiff has made out his title; for he must recover (if at all) upon the strength of his own title, and not upon the weakness of that of his adversaries.

The title upon which he relied in his plaint was, that in consequence of his youngest maternal aunt's (*i. e. Nittokally's*) becoming a childless widow after the death of his grandmother and in the lifetime of his mother (*Sarodamoye*), all the property accrued to his mother according to the *Shasters*. But that was not so. The right to inherit vested in *Nittokally* jointly with *Sarodamoye*, her sister, upon the death of their mother; for at that time she and her sister *Sarodamoye* were two young married women, likely to have sons; and it is clear that, according to the Hindu law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested.

This at once disposes of the claim of the

Plaintiff to take as heir to his grandfather any portion of the estate which vested in *Nittokally*, for she was living when the suit was commenced. It was contended, however, that the Plaintiff, as the heir to his grandfather, succeeded upon the death of his mother to one moiety of the 4-*annas'* share which descended to his mother and *Nittokally*, as *Nittokally* at the time of his mother's death was a childless widow. No proof was given that *Nittokally* became a childless widow during the lifetime of *Sarodamoye*, but it was contended on behalf of the Plaintiff that the fact was alleged in the plaint and admitted by the answer. The statement in the plaint is—

"That as my youngest maternal aunt unfortunately became a childless widow in the year 1244 (that is, April 1837) so the right of succession to all the properties accrued to my mother, according to the *Shasters*."

The answer is as follows:—

"From the statement in the plaint, that subsequent to the death of the maternal grandmother of the *Mitter* Plaintiff, her three daughters lived some in a married state, some in a state of celibacy, and that all the properties left by his maternal grandfather devolved upon his mother, it is evident that this suit has been instituted merely from a malicious and vindictive motive. For agreeably to the *Dhurm Shasters*, and *Daya-bhaga*, though any woman after obtaining paternal properties becomes a widow or sterile, yet nothing can bar her right to enjoy the said property during her lifetime; therefore the statement that subsequent to his maternal aunts becoming widows the right and interest to all the properties devolved upon his mother is utterly false and fallacious."

It appears to their Lordships that there is no admission in the answer tantamount to proof of the fact that *Nittokally* became a childless widow during the lifetime of the Plaintiff's mother, *Sarodamoye*. There is a denial that *Sarodamoye* took the whole of her father's estate in consequence of *Nittokally's* becoming a childless widow; but no admission that at the time of *Sarodamoye's* death *Nittokally* was a childless widow, incapable of taking by descent from her father. There is merely an admission by implication in the denial of the legal effect imputed to the fact alleged; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact: *Edmunds* v. *Groves* (1); *Smith* v. *Martin* (2); *Robins* v. *Maidstone* (3); and it scarcely needs to be remarked that the effect given in our Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in *India*.

Their Lordships, however, would hesitate before determining the case upon the ground that there was no proof that *Nittokally* became a childless widow in the lifetime of her sister *Sarodamoye*; for it was assumed throughout the argument before their Lordships that such was the case. They will, therefore, proceed to determine the question upon the assumption that *Nittokally* was a childless widow at the time of *Sarodamoye's* death.

The question then resolves itself into this: had *Sarodamoye* an interest in the estate distinct from that of *Nittokally*, which upon her death descended to the then heirs of her father; or did she and her sister *Nittokally* take a joint estate by descent which after *Sarodamoye's* death survived to her sister *Nittokally?* If the former was the case, then *Nittokally* having during the lifetime of *Sarodamoye* become disqualified as a childless widow to take by descent from her father, the Plaintiff, as the son of *Sarodamoye*, was the next heir to her father, and upon his mother's death would have taken as reversionary heir to his grandfather the interest which had descended to his mother, and which upon her death would have descended to *Nittokally* as reversionary heir to her father if she had not at that time been disqualified; but if *Sarodamoye* and her sister *Nittokally*, upon the death of their mother, together constituted their father's

(1) 2 M. & W. 642. (2) 9 M. & W. 304.
(3) 4 Q. B. 815.

heir, then upon the death of *Sarodamoye* the property which descended to the two sisters jointly survived to *Nittokally*, and her disqualification to inherit at that time did not destroy the right of survivorship which she had previously acquired by inheritance.

There is a great analogy between the case of widows and that of daughters taking by inheritance, though the pretension of daughters is inferior to that of widows (1).

In the case of widows it has been held by the Judicial Committee (see *Bhugwandeen Doobey* v. *Myna Baee*) (2) that the estate of two widows, who take their husband's property by inheritance, is one estate. "The right of survivorship," it is there said, "is so strong, that the survivor takes the whole property, to the exclusion, even, of daughters of the deceased widow."

In the case of *Strimuttu Muttu Vezia Ragunada Rani* v. *Dorasingay Tevar* (3), it was held that daughters, to whom as a class paternal property descends, take a joint interest, with rights of survivorship.

The former case had reference to property in *Benares*, and the latter to property in *Southern India*.

In the case of *Boidyanath Sett* v. *Durga Churn Basâk*, High Court of *Bengal*, original jurisdiction, decided on the 28th of February, 1865, it was held by Mr. Justice *Morgan*, after consulting Mr. Justice *Shumbhoonath Pundit*, a learned Hindu lawyer, that in a case where two daughters succeeded, by inheritance, to their father's estate, and one of them died, leaving her sister, who had then become a childless widow, the property survived to her sister; because, like widows, the two daughters collectively were, in a legal sense, one heir to their father (*Vyavastha Darpana*, by *Shamachurn Sircar*, octavo ed. p. 170). Their Lordships are of opinion that the last-mentioned decision was correct, and that upon principle, as well as upon authority, the estates, upon the death of *Sarodamoye*, survived to *Nittokally*, though she would, at that time, have been incompetent to take by inheritance from her father.

The High Court express no opinion upon that point; they seemed, however, to assume that the Plaintiff acquired no right by inheritance during the lives of his aunts; but they decided in favour of the Plaintiff, upon the strength of a petition said to have been presented to the Court by *Bindubasseenee* and *Nittokally*, who were made Defendants in the suit.

In the Index to the Record the petition is described as "the petition of *Bindubasseenee*, filed on the 16th of April, 1859," which was more than six months after the filing of the plaint. The petition forms no part of the Record transmitted to Her Majesty in Council; for in a note to the Index it is stated that the paper cannot be traced. An abstract of the petition is set out in the decree of the *Zillah* Judge. It is as follows:—

"*Abstract of the Petition of Bindubasseenee Dassee and Others.*

"On the 16th of April of the current year, that is, 1859, the said *Dassee* and *Nittokally Dassee*, two Defendants, filed a petition, stating that they have no objection against the suit of the Plaintiff: that their father, *Ram Nursing Bose's* rights continued in the Plaintiff, *Rajoneekant*, as the real heir; that their father did not execute any *hibbanamah*; and that they agreed in the said suit of the Plaintiffs, &c."

The *Zillah* Judge, speaking of this petition, says: "I set no value on a petition said to have been filed by these women" (referring to *Bindubasseenee* and *Nittokally*), "consenting to the Plaintiff's suit.

We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything."

With reference to this part of the case, the High Court says:—

"But another objection is taken to the suit, namely, that as Plaintiff's maternal aunts, *Bindubasseenee* and *Nittokally*, childless widows, are still living, and the Plaintiff's right to succeed is contingent on his surviving them, his suit is at any rate premature.

(1) Daya Bhaga, cap. 11, s. 2, par. 30, p. 193, quarto edition.

(2) 11 Moore's Ind. Ap. Ca., 487; 2 P. C. J., p. 327.

(3) 6 Madras H. C. Reps. 310.

"These two ladies have filed in the record of this case a petition, in which they acknowledge the Plaintiff to be the rightful heir, disclaim any right of their own, and assent entirely to the suit.

"The Judge, gratuitously as it seems to us, declares that he sets no value on this petition. He says, 'We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything.'

"We can find no reason for these observations. The petition appears to have been filed in the usual way, through a pleader duly authorized; it is not suggested that the women had anywhere repudiated it, and we think it must be allowed the fullest legal effect of which it is capable.

"But, we are asked, what is its effect? Females are not at liberty to do or assent to acts which may have the effect of changing the course of succession, and these two ladies, the Respondents contend, cannot combine to give the inheritance in this case to a person who might eventually not be the legal heir.

"We consider this objection untenable; a Hindu widow, it has been ruled, is competent to alienate, with the consent of the next heirs, an estate of which she is in possession under a life interest; she has also been permitted to convey the estate to the next heir himself.

"It is admitted that, by retiring from the world, or becoming *Byragees*, they might immediately cause the succession to devolve on the Plaintiff; and we think that when the Plaintiff raises a particular question of title with the Defendants, which clearly his aunts would be first entitled to raise, and he next after them, and where they expressly give up their right in his favour, and assent to his suit, the Defendants cannot be permitted to object that Plaintiff is debarred from suing until they are, by the course of nature, out of the way.

"We see, therefore, no difficulty in the way of a decision of this suit as at present constituted."

It appears to their Lordships that the Judges of the High Court have given a greater effect to this petition than that to which it is entitled.

Admitting, for the sake of argument, that the petition having been filed in the suit might, without proof of the execution of a *vakalutnamah* by these ladies, or of any authority to file it, be used against the Defendants, *Bindubasseenee* and *Nittokally*, as an admission by them in the suit that the Plaintiff was the real heir, and that they had no defence to the suit, it appears to their Lordships that that is the greatest effect that could be given to the document. The petition did not amount to a conveyance or to a disclaimer of title, but merely to an admission made more than six months after the commencement of the suit, that the Plaintiff was the real heir, and that they had no defence to offer. It is clear that an admission, or even a confession of judgment, by one of several Defendants in a suit, is no evidence against another Defendant. Suppose *Nittokally*, the real heir, had been barred by limitation, she could not by her admission, contrary to the fact, that the Plaintiff was the real heir, have bound the other Defendants, and thus have entitled the Plaintiff, upon a question of limitation, to a deduction of the period of his minority, to which she would not have been entitled herself.

But there was, in fact, no evidence of any authority to file the petition. If a *vakeel* professing to act for *Nittokally* had filed a deed purporting to have been executed by her before the commencement of the suit conveying the estate to the Plaintiff, it would not have been evidence against the other Defendants without further proof.

The decision of their Lordships upon the first issue having disposed of the present suit, it is perhaps unnecessary for them to express an opinion upon the third issue. They think it right, however, to add that they agree with the High Court in the conclusion at which they have arrived, viz., that in the present suit the Defendants have wholly failed to establish the *hibba* on which they rely as the foundation of their title.

Their Lordships are of opinion that the Plaintiff had no right to inherit any portion of the estate during the life of *Nittokally*, and that the petition did not vest any such right in him. His suit ought

therefore to be dismissed, and dismissed against all the Defendants, including *Bindubasseenee* and *Nittokally*, notwithstanding the petition. Such a petition confessing the suit cannot be admitted as warranting a judgment against them, when upon an investigation it appears that the Plaintiff was not the real heir; nor could it justify a decree against them for possession and mesne profits, when there was no allegation in the plaint, nor any evidence in the cause, that they had dispossessed him. The only charge of dispossession was against the principal Defendants, *Prem Chund Bose*, *Aumirtolall*, and *Joy Doorga Dassee*. Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be reversed, except so far as it reverses the judgments of the *Zillah* Judge, and that the suit be dismissed.

Considering that a great part of the costs has been incurred in consequence of the issues upon which the Defendants have failed, and that it was necessary for the Plaintiff to get rid of the decisions of the *Zillah* Judge, their Lordships think it right to order that the parties respectively do bear their own costs in both the lower Courts and of this appeal.

The Judges of the High Court expressly declared by their decree that it was "to be known that from the death of *Nittokally* any dispute concerning the inheritance by other parties was not determined by their decision." Their Lordships think it right to add, that they do not decide any question between *Nittokally* or *Bindubasseenee* and the other Defendants, but merely the questions raised in the suit as to the rights of the Plaintiff at the time when the suit was instituted.

11th December, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Financial Commissioner of Oudh.

LUCHMUN SINGH, AJEET SINGH, and RAMDEEN SINGH (Plaintiffs)* ... } *Appellants*,

versus

TIRBANEE BUKSH, Successor of SHUMSHERE SINGH (Defendant) ... } *Respondent*.

Review, Application for—Act VIII. of 1859, s. 377.

Where a party applying for a review of judgment after the expiry of the period of ninety days allowed by s. 377, Act VIII. of 1859, had not, as required by that section, shown any just and reasonable cause for not preferring his application within the prescribed period, the order admitting the review was *held* to have been improperly granted, and was set aside with all subsequent proceedings thereon.

21st December, 1874.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

In this case *Luchmun Singh* brought a suit against *Shumshere Singh* in the Court of the Settlement Officer of *Seetapore*. His suit was to recover one-fourth of an estate situate in that district. *Luchmun Singh* was the representative of one of five brothers, who were the sons of *Ojeeb Singh*. He was the son, actually, of *Bhugwunt Singh*, but he had been adopted and taken out of *Bhugwunt Singh's* family by *Rae Singh*, who was one of the other five

* 2 Cowell's I. A., p. 58; 14 B. L. R., p. 373.

brothers. *Bhugwunt Singh* subsequently died without leaving any other issue, his other son, the brother of the Plaintiff, having been killed in the mutiny, and in consequence the shares, which were originally held by five brothers, belonged to four. *Luchmun Singh*, therefore, as the adopted son of *Rae Singh*, claimed one-fourth of the estate. It appears that *Shumshere Singh* was the person who had signed the *kubooleut* and had contracted for the Government revenue, but the brothers were a joint undivided Hindu family up to a certain period; and the question was whether the plaintiff had proved that they were joint, both in food and estate during the period of limitation. The period of limitation in *Oudh*, with regard to cases of this nature, depends upon Act XIII. of 1868 of the Government of *India*, which enacts that no suit relating to any tenure which, under the provisions of Act No. XVII. of 1865 shall be solely cognizable in the Courts of Revenue in the said province (and this is one of those cases) shall be barred under the rules of limitation in force in such Courts if the cause of suit shall have arisen on or after the 13th day of February, 1844.

The question was whether *Luchmun Singh's* cause of action to have a share of this estate did accrue subsequently to the commencement of the year 1844. The case was tried before the Settlement Officer, who found certain facts. He says, "The Defendants deny possession as proprietor or sharer, and claim to have held the full proprietary right for some years prior to the term of limitation. The question before the Court then is,—1. Has the Plaintiff been in possession of any rights within the term of limitation? and if so, 2. Are they the rights of a proprietor? The *onus* of proof rests on the Plaintiff. A review of the proceedings in the District Court and of the evidence produced by the Plaintiff now, seem to me to establish that—First. For many years immediately preceding annexation the Plaintiff was on perfectly amicable terms with the Defendant, and received his support in common with the Defendant himself and some other relations from the estate. Disputes arose at the close of 1263 *Fuslee*, ending in an affray, in which the Defendant's brother was killed. These disputes arose either because—(1.) Plaintiff then, for the first time, set-up a claim to a share, or (2.) Defendant, for the first time, sought to deprive the Plaintiff of a share. The Plaintiff was completely ejected till 1266 *Fuslee*, when, by order of Court, he was put into possession of what was thought to be his *seer* land, nominally 100 *beegahs* but really 150, the order being to put him in possession of what he had before. The Plaintiff is still in possession of this *seer*. Up to this point there seems no doubt about the facts. Beyond this there may be doubt. In my opinion the Plaintiff has wholly failed to prove, and there is no reasonable hope that he can establish his allegation, that he participated annually in the profits to the extent of one-fourth, and was therefore a sharer or part proprietor." But it would not be necessary for a member of an undivided family to prove that he participated in the profits to the full extent of his share. It is very common among joint families that the expenses of the family are paid out of the common fund, and that each member draws a certain sum as he requires it, but there is no account taken between the members of the family to see whether each member receives his full share.

Then the Settlement Officer goes into the question of *seer* land, and discusses the question whether the occupation of the *seer* land would take the case out of limitation, provided he had nothing else. He says, "But the question will sooner or later arise, and not alone in this, but in other similar cases,—does *seer* land, held as it is held by this Plaintiff, represent an ancestral share in the estate, or is it merely maintenance given to younger branches, at the pleasure of the head of the house? It is quite certain that if circumstances compelled the division of the estate, the Plaintiff would share by ancestral right." He then decided against the Plaintiff's claim, upon which the case was brought before the Settlement Commissioner of *Oudh*, Mr. *Currie*, and he says, —"It is shewn that the descendants of *Ojeeb Singh* lived together till about 1264 *Fuslee*, and that the Appellant held pos-

session of a village named *Akberpore*, which forms a portion of this estate, paying the proceeds into the common fund. It is also shewn that Appellant held some *seer*, but there is no actual proof of Appellant's having enjoyed a share of the general profits." Then he goes on to discuss the question whether the holding of *seer* land is a participation in profits, and he comes to this conclusion :—"In the present case, then, the Court being of opinion that the Appellant was, up to 1264 *Fuslee*, a member of an undivided Hindu family, living in common and sharing in common, holds that the cause of action in the case arose in 1264 *Fuslee*, or such other date about that year when Appellant and Respondent quarrelled and Appellant was deprived of the rights which he had up to that time enjoyed. Being of this opinion, the Court does not consider it necessary that Appellant should prove possession of a specific share, the possession of Respondent being presumed to be the possession of the entire family.

It appears to their Lordships that the Settlement Commissioner was right in this opinion. If these brothers did live in commensality, and the funds of the estate which they respectively held, independently of the *seer* land, were brought into the common fund, and they participated in this fund by reason of their living in commensality, it was not necessary that the Plaintiff should prove the possession of a specific share of the joint fund. "For these reasons," the Commissioner says, "the Court reverses the order of the Settlement Officer, and decrees the Appellant a one-fourth share in *mouzah Nawagaon*, being the share to which he is entitled by ancestral right, and to which he lays claim."

An appeal was brought from that decision to the Financial Commissioner, the Defendant upon that appeal being the Appellant. Colonel *Barrow*, as the Financial Commissioner, states the grounds of appeal, and he says :—"If the parties were an undivided family in the *Nawabee* within limitation, no doubt the Comissioner's order, reversing that of the Settlement Officer, is correct. It appears that in the *Nawabee* (1263 *Fuslee*), within limitation, a separation took place, and Respondent got only 150 *beegahs seer ;* but this does not invalidate his claim, for he was in possession as a member of an undivided Hindu family up to 1263 *Fuslee*. He is, therefore, now entitled to his share. The proof of specific possession is not requisite. I uphold, therefore, the Commissioner's finding, decreeing four *annas* share to special Respondent, subordinate to the *Zemindar*, *Shumshere Singh*."

Colonel *Barrow's* judgment was given on the 24th of September, 1867. It appears that at that time Colonel *Barrow* was only officiating as Financial Commissioner when he gave judgment affirming the decision of Mr. *Currie ;* after that Mr. *Davies* appears to have come back and resumed his duties as Financial Commissioner. An application was made to Mr. *Davies*, who was then the Official Commissioner, to review the judgment which Colonel *Barrow* had given when he was acting as Financial Commissioner. Mr. *Davies* refused to grant a review, and on the 27th of November, 1867, rejected the application. Nothing was done after this until the 24th of April, 1868, which was more than ninety days from the time of the original decision of the Colonel *Barrow*, and more than ninety days even from the time when Mr. *Davies* rejected the application for review. Colonel *Barrow* at that time was again acting as or had been appointed substantially to the office of Financial Commissioner. At all events he was performing the duties of that office, and on that day an application was made to him for a review of his own judgment ; Mr. *Davies* having rejected a review, an application was made to Colonel *Barrow* himself to grant a review. Upon that he says :—"Review is asked for in this case on the grounds of a certain statement said to have been made by the special Respondent in 1859, to the effect that they (the sharers) had been turned out of possession, sixteen or seventeen years before, by *Shumshere Singh*, meaning that the family had then separated. The statement is produced and read, shewing that *Shumshere Singh* had turned them out before February, 1844, and that they (the special Respondents) merely held their *seer*, &c.

The translation of the deposition referred to is dated January 1859, and the Plaintiffs (special Respondents) loosely stated they had been sixteen years separated, which places them a year only out of limitation. I do not think that this statement would suffice to eject *Luchmun*, &c., from a share if they could otherwise prove that they had held the *status* of shareholders." The statement referred to was, however, before the Settlement Officer when he came to the first decision, and it was also before Mr. *Currie*, as well as the evidence which had been given in the Plaintiff's favour; the statement which the Plaintiff had made, and which tended to shew that the evidence was not correct, was before both those officers, the Settlement Officer who decided the case in the first instance, and the Settlement Commissioner, Mr. *Currie*, and it was also before Colonel *Barrow* himself when he gave his judgment affirming the decision of Mr. *Currie*. But the Plaintiffs had given evidence to shew that they were shareholders, and Mr. *Currie* had acted upon that evidence and found that they were shareholders, and had given them a decree in consequence. Mr. *Currie* says that "up to 1264 *Fuslee*. Appellant (*Luchmun*) was a member of an undivided family, living in common and sharing in common, and that they only separated in 1264, when they quarrelled." The Financial Commissioner goes on: "There is no evidence on record to this effect; the trying officer, indeed, says that *Luchmun* has produced none to shew that he had any *status* as a proprietor. There are eleven or twelve villages concerned in this decision. The Government demand on the same is Rs.4150" (that is to show that the value of the estate was considerable). "Such important interest deserves full inquiry before shares can be decreed, and the quotation from Mr. *Currie's* judgment will form the subject of an issue for further trial. After the lapse of so long a time I regret to give the Courts the trouble of further inquiry, but in this instance it appears only just to special Appellant to do so, for *Luchmun*, as far as the evidence yet goes, has not proved a good title to a share."

The case, then, was sent down for the purpose of trying whether the quotation from Mr. *Currie's* judgment that the Plaintiff was a member of an undivided family up to 1264 was correct or not In reality the case was sent back to the Settlement Officer to try whether the decision of Mr. *Currie* upon appeal from the Settlement Officer upon a question of fact was correct or not. The case came before Colonel *Barrow* merely upon special appeal. He sent it back upon the ground that there was no evidence whatever given in support of that issue. There was, however, the evidence of the Plaintiff himself upon oath. It appears to their Lordships that the Financial Commissioner was wrong in granting the review and remanding the case; and further, that he had no power to do so.

The right to apply for a review of judgment depends upon Act VIII. of 1859, sect. 376, which is as follows: "any person considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been referred to a superior Court, or by the decree of a District Court," and so on, "and who, from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree."

Now, what was the ground of application to Colonel *Barrow* for a review of his own judgment? He says that there was no evidence whatever before Mr. *Currie* in support of the fact that the Plaintiff was a member of a joint family; but there was no allegation when the application for the review of judgment was made that the applicant had discovered any new matter or evidence which was not within his knowledge, or could not be adduced by him at the time the decree was passed.

Then was there any other good and sufficient reason? The only other good and sufficient reason appearing in Colonel *Barrow's* judgment was that Mr. *Currie* had found that fact without any evidence to warrant it; but that is not correct.

But the application was made more than ninety days from the date of the decree, and it was made more than ninety days even from the time when Mr. *Davies* had refused to review Colonel *Barrow's* decision. Sect. 377 of Act VIII. of 1859, enacts that the application for a review shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and sufficient cause, to the satisfaction of the Court, for not having preferred such application within the limited period.

Now if the ground for the application for review was, as stated by Colonel *Barrow* in his judgment, that Mr. *Currie* had found a fact without any evidence whatever in support of it, the Defendant ought to have applied for the review of judgment within ninety days from the date of the decree. But in this case the second application for review was not made within that period. In the case of *Maharajah Moheshur Singh* v. *The Bengal Government*, cited from 7th *Moore's* Indian Appeals (1), it was held that a review granted after ninety days without sufficient ground was invalid. That, however, was in a resumption suit, and was not a case under Act VIII. of 1859. It was under an old regulation, and was not an express decision, although probably the same principle would apply to a case under Act VIII. of 1859. There is, however, an express decision in the High Court of *Bengal* with regard to the application for a review under Act VIII. of 1859. That is reported in 8 *Sutherland's* Weekly Reporter (2), *Gungaparain Roy* v. *Gonomoonee*. The marginal note is "The order of the Lower Appellate Court, admitting a review of judgment after the expiration of ninety days from the date of the decree, without shewing whether there was sufficient cause proved to its satisfaction for the delay, was held to be illegal, and was set aside with the subsequent proceedings thereon."

Their Lordships approve of that decision, and consider it applicable to the present case. Colonel *Barrow* does not state that there was, or that it had been shewn to his satisfaction that there was, sufficient cause for not having made the application for the review within the ninety days. According to the decision, to which reference has been made, it appears that the review itself and all the subsequent proceedings under it were invalid.

The case, however, went down, and was re-tried by the Settlement Officer. It is unnecessary to go into the further proceedings. Their Lordships are of opinion that even if the review had been properly granted, the subsequent proceedings and judgment were entirely wrong. The case is decided upon the ground that Colonel *Barrow* has not shewn that it was proved to his satisfaction that there was a sufficient excuse for not having made this application for a review within ninety days from the date of the decree, and that the granting of the review, and all subsequent proceedings under it were erroneous and invalid. The original decision of Colonel *Barrow*, upholding Mr. *Currie's* decision in favour of the Plaintiff, and awarding him a one-fourth share of this estate, must stand.

Their Lordships, therefore, will humbly advise Her Majesty that the last decision of the Financial Commissioner, dated the 29th and 30th of June, 1868, be reversed, and that the first decision of the Financial Commissioner, dated the $\frac{15}{24}$ of September, 1867, be affirmed.

There were two other cases, *Ajeet Singh's Case* and *Ramdeen Singh's Case*. They appear to have been decided by Mr. *Reid* in favour of those Plaintiffs, upon the authority of the first decision of Colonel *Barrow* in *Luchmun Singh's Case*. It does not appear when the application was made, but Colonel *Barrow*, says,—"I must admit this case to review, as Captain *Thompson*, in consequence of the orders in special appeal, *Shumshere Singh* v. *Luchmun Singh*, altered his decision in the cases of *Shumshere Singh* v. *Ajeet Singh* and *Shumshere Singh* v. *Ramdeen Singh*."

Then he goes on and determines the matter in the same way as he determined it in *Luchmun Singh's Case*. He says, "And my orders of the 29 ultimo upheld Captain *Thompson's* in all three cases, which is an error, as my order was intend-

(1) P. 309; 1 P. C. J. 645. (2) P. 184.

ed to dismiss the claims of *Ajeet Singh* and *Ramdeen Singh*, as well as that of *Luchmun Singh*."

Their Lordships will humbly advise Her Majesty that the decision of the Financial Commissioner of the 14th of July, 1868, be reversed, that the decisions of the Officiating Commissioner, dated the 21st of October, 1867, in the cases of *Shumshere Singh* v. *Ajeet Singh*, and of *Shumshere Singh* v. *Ramdeen Singh*, dismissing the appeals from the decrees of the Settlement Officer, dated respectively the 8th of March, 1865, be affirmed, and that those decrees be upheld, and that the Respondent do pay the costs of those appeals, and all the costs in the lower Courts, subsequent to the order of remand of the 29th of April, 1868. One set of costs only to be allowed in the three appeals to Her Majesty in Council.

11th and 12th December, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAM SABUK BOSE, one of the (Defendants)* ... } *Appellant,*

versus

MONMOHINI DOSSEE and Others (Plaintiffs) ... } *Respondents.*

Regulation VIII. of 1819. s. 8, cl. 2—"Substantial Persons"—Service of Notice—Special Leave to appeal to Privy Council—Practice.

The provisions of cl. 2, s. 8, Regulation VIII. of 1819, with regard to the notification of the sale of a *putnee talook* for arrears of rent under that Regulation, that the serving peon shall "bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot," are merely directory, and where there is proof that the notice was in fact served, the sale will not be vitiated by non-compliance with any of these provisions, *e. g.*, as where one of the witnesses attesting the service of the notice turns out not to be "substantial."

A respectable man, of good character, living and well known in the neighbourhood, may properly be considered a "substantial person," within the meaning of cl. 2, s. 8 of the Regulation: it is too limited a construction of that clause to hold that the word "substantial" must be taken to mean a wealthy man, from whom damages could be recovered by the *putneedar* supposing the attestation to be false.

Where special leave to appeal to the Privy Council is granted upon a petition in which material mis-statements are made, objection should be taken by the Respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on. Where it was not clear that the material mis-statements in the petition had been made with an intention to deceive, and the objection to the appeal was only taken at a late stage of the hearing, the Judicial Committee declined to dismiss the appeal, but refused the Appellant the costs of the appeal.

12th December, 1874.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

In this case their Lordships, having heard the argument on the appeal, propose to give judgment upon its merits, and some observations will subsequently be made on the objection which was taken to the statements in the petition of appeal.

The suit was brought by a *putneedar* to set aside the sale of his *putnee talook*, called *Juggutbullubpore*, which had been sold for arrears of rent through the collector, under the provisions of Regulation VIII. of 1819, and the Defendants to the suit were the *Zemindar Muddun Mohun Haldar*, and the purchaser at the sale, *Ram Sabuk Bose*. The plaint charged fraud on the part of the *Zemindar* and the purchaser in the proceedings previous to the sale, and charged that the receipt of the notice which was served under the provisions of the Act had been forged. Various objections taken to the sale have

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Cowell's I. A., p. 71; 14 B. L. R., p. 394.

70 & 74-75

been disposed of in favour of the Defendants, and one only remains for consideration in the present appeal; that is, whether the witnesses who have signed the receipt are substantial persons within the meaning of the Regulation.

The Regulation provides, in the second clause of the eighth section, for the manner in which the notice of sale shall be served and published. It directs that it shall be stuck up in some conspicuous part of the *cutcherry* of the *Zemindar*, and it also provides for publicity and service in the *cutcherry* of the defaulter. It is with the latter only that it is necessary to deal in the present appeal. The Regulation says, "A similar notice shall be stuck up at the *sudder cutcherry* of the *Zemindar* himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the *cutcherry* or at the principal town or village upon the land of the defaulter. The *Zemindar* shall be exclusively answerable for the observance of the form above prescribed, and the notice required to be sent into the *mofussil* shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot."

It appears that the receipt of the defaulter could not be obtained. His *gomastah* was seen, but he refused to give one; and thereupon the peon obtained the signatures of seven persons who, it is alleged, resided in the neighbourhood. At the hearing before the Principal *Sudder Ameen* evidence was given as to the residence and the *status* of three of those seven, and the Principal *Sudder Ameen*, being satisfied that they were substantial persons within the meaning of the Regulation, thought it unnecessary to go into evidence with respect to the other four; and he found in very distinct terms these three persons resided in the neighbourhood, and were substantial persons. This is his finding upon the facts: "The Plaintiffs take exception to the above seven persons not residing in the neighbourhood of the defaulter's *mehal*. To this it would be observed that *Warris Mollah*, one of the seven persons above alluded to, was the *mandul* of *Jugguthullubpore*, and *Goluck Chowkeedar* was the *chowkeedar* of the village. These two certainly are what the law calls 'substantial' men. As regards *Kabel*, though not a man of much consequence, he was known to carry on the trade of a tailor in the village; consequently, a receipt signed by, among others, three such men as *Warris*, *Goluck Chowkeedar*, and *Kabel*, must be considered a sufficient proof for the service of notice. A more respectably signed document cannot be, from the circumstances of the country (the respectable portion of every community being at all times averse to appear in a Court of justice) expected." The objection at their Lordships' bar was directed only to one of these witnesses, *Kabel*, who carried on the trade of a tailor. It has not been contended that the other two did not satisfy the requirements of the statute, although in the judgment under appeal it appears to have been held by the High Court contrary to its former decision on the same point, that two of them did not satisfy its words.

There was an appeal from the finding of the Principal *Sudder Ameen* to the Judge of the Twenty-four *Pergunnahs*; and Mr. *Beaufort*, the Judge of the Twenty-four *Pergunnahs*, affirmed the decision. He affirmed it upon two grounds: first, upon the facts, and then that supposing the witnesses did not satisfy the statute, still notice having been really served upon the Plaintiff, the *putneedar*, as was proved in the cause, through his *gomastah*, the non-compliance with the direction of the statute would not, under the circumstances, vitiate what had been done. His finding is, "I am of opinion that the Appellants have failed to shew any sufficient ground for rejecting the receipt. When the *gomastah*, who was in the *cutcherry*, refused to give a receipt, the peon brought the *guru* of the village, and made him write a receipt under a tree close by, and then he got some of the bystanders to sign the receipt. The evidence proves these facts, and proves that the three persons who were called as witnesses at the trial of the case

in the lower Court saw the notice affixed to the door; and I find no ground for holding that they are not substantial within the meaning of the law; I think that all that is required is good evidence to the fact of the publication of the notice on a certain date, and that that has been supplied in this case;" therefore he affirmed the judgment of the Court below upon the fact that these witnesses were substantial men. Then he goes on thus: "I would go further and say that the directions of the law are intended for the guidance of the collector only." Then he gives his reasons, "Before putting up the *putnee* tenure to sale he must require proof that the notice was duly served, and the law says that such proof must be of such and such a nature. The collector is not required to take evidence; he has to examine merely the written documents produced by the *Zemindar*, and if the proof appears to be *primâ facie* good, the *putnee* is sold on the responsibility of the *Zemindar*. Then, if the *putneedar* has recourse to the Civil Court, the issue is not whether the proof adduced to the collector at the time of sale was strictly within the words of the law, but whether the evidence adduced before the Court to prove the service of the notice on or before a certain date is credible and satisfactory. The reasonable object of the law is that the defaulter should have timely notice of the intention to sell; and if it be proved that such notice was given to the satisfaction of the Court, the number of witnesses present, their actual *status* in social life, and the distance of their dwelling-houses, are points which are immaterial." It is to be observed that on this point there is a decision of the High Court when Sir *Barnes Peacock* presided in it, to the same effect. In the case of *Sona Bobee* v. *Lall Chand Chowdry and Another* (1), the Chief Justice says, "This was a suit to cancel a sale of an under-tenure under Regulation VIII. of 1819. The material part of clause 2, section 8, Regulation VIII. of 1819, so far as this case is concerned, is that the notice required to be sent into the *mofussil* shall be served. The *Zemindar* is exclusively answerable for the observation of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall bring back the receipt of the defaulter or of his manager, or in the event of his inability to procure it, that he shall obtain that which by the regulation is substituted for it is merely directory, and if not done does not vitiate the sale, provided the notice is duly served."

Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir *Barnes Peacock*, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these *putnees* could be set aside because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance.

The *putneedar* was not satisfied with these two decisions. Although the point is certainly small and narrow, whether this tailor was a substantial man or not, he appealed to the High Court. The two Courts below having found that in point of fact *Kabel* was a substantial person, his appeal could only be upon matter of law, namely, that they had misconstrued the Regulation and the meaning of the word "substantial." Upon this appeal to the High Court, he at first fared no better than he had done in the Courts below, and a Division Bench of the High Court affirmed the two former judgments, and for reasons which to their Lordships' minds are perfectly satisfactory. Having noticed some of the objections, which are not now relied upon, they say, "Next, as to these witnesses' respectability. The word used in the Regulation is 'substantial,' meaning, of course, men who have some *status* in the community, men of local influence or importance, or respectability. We think that the law has been complied with on this point also. One of the witnesses is the *mundul*, the head man of the village, another is the *chowkeedar*, an official whose attestation is always considered as the best possible in all matters connected with service of notice." It is well to call attention pointedly to this

(1) 9 Suth. W. R. 242.

finding as to the *chowkeedar*, because it is entirely inconsistent with the decision of the same Division Bench upon review, where they considered that the *chowkeedar* is not a substantial witness within the meaning of the Act. "The third appears to be a tailor, residing temporarily at the place, but who lives in the neighbourhood. This man is declared to be not a proper witness. We do not see why the man is not to be considered competent to attest the serving of notice. He appears to be a respectable man, though not a rich one; and besides, the phrase 'substantial,' on which special Appellant lays so much stress, must be taken comparatively. In a small village the measure of a 'substantial' witness will, of course, be much lower than in a place of importance."

The *Putneedar*, still dissatisfied, applied for a review of that judgment, and, upon the review, the Court, consisting of the same two Judges, without much reference to or discussion of their former judgment, reversed it upon grounds to which I will now refer. In order to see upon what grounds the Court really acted in thus reversing their former judgment, it is necessary to say that they refer in their judgment to the contention of Mr. *Paul*, the counsel for the Appellant, in this way: "It is contended by Mr. *Paul*, the learned counsel for the applicant for review, that the law requires that the attesting witnesses must be 'substantial,' that is to say, responsible, moderately wealthy men, against whom, in a case of false attestation, the party injured may have his remedy in a suit for damages." This is what they observe on the evidence: "Now, in this case, the attesting parties are sufficient in number, and they reside in the neighbourhood, but, with the exception of the *mundul*, the rest are not what can be called substantial persons. One is the *chowkeedar* of the village, and the other a *thika* tailor." The Legislature invested the *Zemindar* with the power of bringing subordinate *putnees* to sale, and made him exclusively answerable for the due observance of the prescribed processes under which such tenures could be brought to sale. To protect the *putneedar* from fraud, it was enacted that the notice of sale must be attested by three substantial persons. Now, it is clear that, unless the attesting parties answer to the common meaning to be put upon the word 'substantial,' the *putneedar* would be wholly without remedy in case of false attestation." Now the Court, this being special appeal, could only decide upon some matter of law, and the matter of law which they appear to rule upon the construction of this Act is that the word "substantial" means a wealthy man from whom damages could be recovered by the *putneedar*, supposing the attestation to be false.

Their Lordships think that this is too limited a view. It is, no doubt, desirable that men of property should sign these receipts if they can be obtained, but wealth is only one element in the position and *status* of the witness, and if he lives in the neighbourhood, and if he be a respectable man and of good character, their Lordships see no reason why, upon evidence appearing of such facts, of which the Judge in each case must satisfy himself, the Judge, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person. In the present case, the evidence appears to shew that the man objected to carried on the trade of tailor, that he had *lakheraj* lands, that he lived in the neighbourhood, was well known, and was (to use a description built up of many circumstances) a "respectable" person. Their Lordships think that upon such evidence the Judge of first instance and the Judge of the Twenty-four *Pergunnahs*, who had a right to review his decision on questions of fact, might properly come to the conclusion that the witness was a substantial man. Their Lordships, therefore, think that the first judgment of the High Court was more correct than the last.

On these grounds, their Lordships have come to the conclusion to reverse the second judgment of the High Court upon the review; but, inasmuch as the *Zemindar Muddun Mohun* has not appealed from that judgment, they see no reason to give him relief, so far as the order affected him personally only; that is to say, so far as it ordered him to pay the costs; and therefore the reversal of the judgment will be

without giving any right to him to have any costs that he may have paid under it refunded.

Their Lordships have given very serious attention to the objection raised by Mr. *Graham*, on the part of the Respondents, to the inaccurate statements in the petition for leave to appeal to Her Majesty. The appeal was made to Her Majesty upon special grounds, one being that the question was of considerable practical importance upon the construction of the Regulation. The petitioner was obviously out of time, and he could only obtain leave to appeal by excusing that lapse of time. Some of the statements in the petition are clearly inaccurate. It is stated, among other things, that the petitioner himself had applied for review of the judgment now appealed from on the 3rd of February, 1866, and that the learned Judges of the Division Bench differed in opinion as to the propriety of allowing the application, and did not allow it; and he introduced the fact of that petition to the High Court as an excuse for a part of the delay, alleging further that, according to the then understood practice of the Court, which he says was afterwards changed, the application was in time. It turns out that the statement is inaccurate in this, that he did not petition the Court for a review of the judgment at all, but that the petitioner was the *Zemindar Muddun Mohun*. Now when he came to excuse himself for the lapse of time, it is obvious that he should have been particularly careful to give their Lordships accurate information upon the points relating to that petition for review. If he had correctly stated the facts in his petition, although the point to be decided in the appeal was one of general importance, leave to appeal might not and probably would not have been granted. There is, therefore, a material misstatement in the petition.

Their Lordships have considered whether the misstatement was intentionally made with a view to deceive this tribunal; and if they had been clearly satisfied that this was the intention of the petitioner, or of those who advise him in *India*, they would, even at this late stage, dismiss the appeal; but they are not fully satisfied that such was the intention; and although the misstatement is material, and one that clearly ought not to have occurred, and shows, at least, a great deal of culpable negligence, they are not so satisfied that it was done with the intention to deceive, as to dismiss the appeal at this late period. They desire, however, to say, that they think so seriously of this objection, and it is so necessary to insist that there should be *ubarrima fides* on the part of those who come for leave to appeal, on special grounds, to Her Majesty, that they must mark their sense of what has occurred by refusing to give to the Appellants the costs of the appeal. They desire, further, to say, that if the objection had been made, as it ought to have been, by a preliminary motion, they have little doubt that motion would have been successful, and the order for hearing the appeal rescinded. Even if it had been made before the appeal had been entered upon at their Lordships' Bar—when it was called on—they must have yielded to it; but considering that the appeal has been heard upon the merits, that Mr. *Doyne's* observations upon the facts and the law had been concluded, and it was only in the course of the argument for the Respondents that this objection was taken, they think, under all the circumstances of the case, that they ought not now to dismiss the appeal, and that it will be enough to mark their sense of the impropriety of the petition by the refusal of costs.

In their Lordships' opinion, an objection of this kind ought to be taken by the Respondents as early as the matter is brought to their notice, for the plain reason that if the leave to appeal is on that ground rescinded, no further costs are incurred, and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from *India*, and when all the costs attending the hearing have been incurred. In the present case not only was there no preliminary motion made to rescind the leave to appeal, but the Respondent's case, although referring to the facts, did not point to them with distinctness, and there is no reason directed to the objection.

Under these circumstances, their Lordships think that they will best perform

their duty, the appeal having been heard, and their Lordships being clearly of opinion that the judgment appealed from is wrong, by reversing that decision, but doing so without costs; and that will be the recommendation they will humbly make to Her Majesty.

12th and 15th December, 1874.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH NILMONY SINGH DEO BAHADOOR (Plaintiff)* ... } *Appellant,*

versus

KALEE CHURN BHUTTACHARJEE and others (Defendants) } *Respondents.*

Act VIII. of 1859, s. 15—Declaratory Decree—Substantial Relief.

The words of s. 15, Act VIII. of 1859, are to be interpreted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief if relief had been prayed for.

A suit by a party in possession for a declaration of title and to set aside, not any deed nor any act of the Defendant, but a mere allegation on his part that he holds under a certain tenure, is not maintainable.

THE facts of the case are sufficiently set forth in their Lordships' judgment, which was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This was a suit instituted by the *Rajah* of *Pachete* against a great number—about fifty—of his *ryots*, "to," in his own language, "obtain possession of 10 *rekhs* or a 10-*anna* share of *mouzah Raotara*, *Pergunnah Para*, under a *mal* title, by setting aside the false *mughali brahmottara* title stated by the Defendants." The Defendants set up different defences; some of them alleged the *mughali brahmottara* tenure, which the *Rajah* complained of their having set up; others repudiated any such tenure, and declared that they had never set it up, and therefore that the suit was brought unjustly against them; others did not appear. The case came in the first instance before the Assistant Commissioner of *Manbhoom*, who in their Lordships' opinion did not sufficiently distinguish between the different classes of Defendants. He treated them substantially as all setting up this *mughali brahmottara* tenure, and framed his issue with that view. He found in the result in favor of the *Rajah*, that the *Rajah* was entitled to possession of the lands in suit, and that the Defendants' allegation of *mughali brahmottara* holding should be set aside.

An appeal was then presented to the High Court, and in their Lordships' judgment of the High Court scarcely sufficiently adverted to the distinct defences on the part of the various Defendants; the case of some being that they had a *brahmottara* tenure, that of others being that they had not and never had set it up; as against those last it was necessary for the *Rajah* to prove that they had set up a *brahmottara* tenure. The High Court reversed the decision of the lower Court, and the ground of their decision is expressed in the last paragraph of their judgment: "On the whole case we think that the *onus* being shifted "on the Plaintiff to prove that these Defendants had, since the year 1197 (1790), paid at a variable rate, and that they have not paid at the rate of Rs. 121-9 *annas*, as per settlement of 1197 (1790), he has altogether failed to do so. We therefore dismiss the Plaintiff's case, and decree the appeal with costs." In other words, the High Court appears to have found that the Defendants had proved a *primâ facie* case of a *mughali brahmottara* tenure, throwing upon the Plaintiff the *onus* of rebutting that case, and that he had failed to sustain the

* 14 B. L. R., p. 382; 2 Cowell's I. A., p. 83.

onus thrown upon him. The decree of the High Court is in these terms,—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the lower Court be reversed, and that the suit of the Plaintiff (Respondent) as against all the Defendants be, and the same is, hereby dismissed." Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to as to the proof, or the rebuttal of proof, of the *brahmottara* tenure, because in their Lordships' opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the Defendants that they had a certain tenure. In their Lordships' view such a suit is not maintainable. S. 15 of Act VIII. of 1859 is in these words,—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act.

Now, applying that test, in their Lordships' opinion this suit is not maintainable. The *Rajah* was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits; and he sought for and could obtain no other description of possession than that which he had. He could not obtain relief by an order directing an enhancement of rent, inasmuch as the cognizance of suits for the enhancement of rent is confined to the Revenue Courts, and a certain procedure is assigned to claims of that kind in those Courts. His requisition of a declaration of a *mal* title, by setting aside the false *brahmottara* title alleged by the Defendants, is really no more than this, that he should have his title, whatever it was, as a *Zemindar*, free from the allegation of the Defendants that they had some other title. If he had applied to set aside a deed set up by the Defendants, impugning his ordinary title as a *Zemindar*, then relief might be granted to him by cancelling that deed, but he cannot obtain relief in the shape of merely setting aside an assertion—an assertion, which for all that appears, may have been merely by word of mouth. On those grounds it appears to their Lordships that no relief could have been granted to him if he had prayed for it, and therefore that the suit was not maintainable. They think it right to add that even if no rule of law had barred the suit, still that, in their opinion, this was not a case in which, in the proper exercise of judicial discretion, a declaration of title should have been made.

The real object of the suit would appear to be to obtain a general declaration against a great number of persons holding by different rights that they had no *brahmottara* tenure; of which declaration the *Rajah* might avail himself in proceedings to be taken in the Revenue Court in suits for the enhancement of rent. It was, and will continue to be, open to the *Rajah* to institute any actions he may think fit in the Revenue Court for the purpose of enhancement of rent against all or any of these his tenants: but each of these cases must be tried upon its merits, and ought not to be prejudiced by a declaration such as he has sought to obtain.

Under these circumstances their Lordships, for the reasons given, are of opinion that the decree of the High Court was right, and they will humbly advise Her Majesty that that decree should be affirmed. It is scarcely necessary for their Lordships to add, that the decree being affirmed on these grounds, no adjudication has been given in favour of either party upon the question of *mughali brahmottara* tenure.

12th January, and 3rd February, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

PROSUNNO KUMARI DEBYA and another (Plaintiffs), ... } *Appellants,*

versus

GOLAB CHAND BABOO (Defendant,) ... } *Respondent.*

Hindu Law—Debuttur Property—Sebait—Power of Alienation—Res Judicata.

As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable.

It is competent, however, for the *sebait* in charge of property dedicated to the worship of an idol, in his capacity of *sebait* and as manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power to incur such debts is to be measured by the existing necessity for incurring them, the authority of the *sebait* being in this respect analogous to that of a manager for an infant heir.

It being competent for a *sebait* to borrow money for necessary purposes, it follows that judgments obtained against a former *sebait* in respect of debts so incurred, are binding upon succeeding *sebaits*, who form a continuing representaion of the *debuttur* property.

But, before applying the principle of *res judicata* to such judgments, the Court should be satisfied, that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried, and decided in the suits which led to them.

Execution of such judgments should be decreed only against the rents and profits of the *debuttur* property.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

The Appellants sued in the Court of the Judge of *Zillah Dacca* as *sebaits* of an idol called *Lukshmi Narain Thakoor* to set aside two decrees dated respectively the 27th of February, 1852, and the 25th of July, 1854, obtained by the Respondent against their immediate predecessor, the *Sebait Rajah Baboo*, and to have the *debuttur* property of the idol released from the attachment issued in execution of these decrees.

It was alleged in the plaint that the above decrees were obtained by fraud and collusion, and an issue was framed on this charge. The subordinate Judge gave a judgment on this issue, from which, although somewhat ambiguous and obscure, it may be inferred that he considered the charge of fraud had been sustained.

The High Court, however, on appeal, came to the distinct conclusion, and in their Lordships' opinion rightly, that this charge was unsupported by any evidence. The learned counsel for the Appellants having admitted at the Bar that he could not on this point successfully impeach the judgment of the High Court, it is unnecessary to consider it further.

It should be observed *in limine* that the case does not come before their Lordships by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside.

The facts which led to the suit in which the first of the two decrees was obtained are found in the judgment of the Judge of the Civil Court of *Dacca*. It appears that *Rajah Baboo*, who was a man or profligate habits, having spent the income of the *debuttur* property on his own pleasures, borrowed Rs. 4000 from the Respondent to defray the expenses of the idol, and of repairing the temple. As security for this advance he gave a bond to the Respondent, and also a *rahinama*, by which he pledged the *debuttur* property for the repayment of the borrowed money. In both securities it is stated that the money

* 2 Cowell's I. A., p. 145; 14 B. L. R., p. 450.

was borrowed for the service of the idol and the expenses of the temple.

The Respondent brought his suit against the *Sebait Rajah Baboo* on these documents, and issues were raised and evidence gone into upon the question of fact, whether the money was *bonâ fide* borrowed and expended for the service of the idol, and also upon the questions of law, whether *Rajah Baboo* could pledge the *debuttur* property for money so borrowed and expended, and whether the profits of it could be attached for payment of such a debt. It appears that the Principal *Sudder Ameen* gave the Respondent a decree for the debt and interest, but ordered the amount "to be realized from such private property of *Rajah Baboo* as is not prevented from being sold by auction," intimating that the question whether the *debuttur* property could be so sold might be determined at the time of the execution of the decree.

The present Respondent appealed from this decision to the *Zillah* Judge. In disposing of the issue of fact this Judge came to the conclusion that the money had been borrowed and expended for the service of the idol. On the other questions he held, first, in conformity with the opinion of the *pundit* of the Court, that the *rahinama* or specific pledge of the property could not be enforced; but secondly, that a decree founded on the bond for the money so borrowed might be given, to be realized from the rents of the *debuttur* lands. He accordingly so framed the decree.

The second decree now sought to be set aside was obtained in a suit instituted by the Respondent in the Court of the Principal *Sudder Ameen* of *Dacca* against *Rajah Baboo* on a bond for Rs. 2700, given by him for money which the bond states was borrowed for the service of the idol, part of it being to defray the necessary expenses of a law suit affecting the *debuttur* lands. Issues were framed as in the former suit, with respect to the purpose for which the money was borrowed, and the liability of the *debuttur* property to be attached for the debt. The issues the Principal *Sudder Ameen* found in favour of the Respondent, and decided that the debt should be paid by *Rajah Baboo*, or else realized from the profits of the *debuttur mehal*.

The above two decrees are entitled to the force due to judgments of competent Courts. The determination of the issues is *res judicata*, and their Lordships think that in the absence of proof of fraud and collusion, the High Court was right in holding that it could not re-open and review the judgment founded upon them. Nor need their Lordships now say whether the Judge in the first case was right in holding upon the evidence of title before him that *Rajah Baboo* had no power to make a specific pledge of the *debuttur* property, since they are not sitting in appeal to determine whether his conclusions of fact or of law are right or wrong. They can now properly deal only with the operation and effect of the decrees as they stand.

The question, however, how far these judgments are binding upon the Appellants, the successors of *Rajah Baboo*, remains, and has been argued at the Bar.

It was first contended that, according to the true construction of the decrees, they were *ex facie* intended to bind *Rajah Baboo* alone, and not succeeding *sebaits*; but their Lordships, during the argument, stated that in their opinion the plain meaning of the decrees was that the entire debts should be realised out of the profits of the *debuttur* lands.

The main point for decision remains, whether these decrees can now be legally carried into effect, which raises the question whether the profits of *debuttur* lands can be attached and appropriated during the incumbency of succeeding *sebaits* by virtue of judgments obtained against a former *sebait* in respect of debts properly and necessarily incurred by him for the service and benefit of the idol.

It is to be observed that the question is not raised whether the lands themselves could be sold under the decrees.

There is no doubt that, as a general rule of Hindu law, property given for the maintenance of religious worship and of charities connected with it is inalienable.

In an appeal, which not long ago came before this tribunal, a question arose as to the validity of a grant of a *mouroosee*

pottah at an invariable rent of *debuttur* lands. Lord *Chelmsford*, in delivering the judgment, said:—

"The *talook* itself, with which these *jummas* were connected by tenure, was dedicated to the religious service of the idol. The rents constituted, therefore, in legal contemplation, its property. The *sebait* had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage."

And this Committee having regard to the presumption arising from this state of things, and other facts appearing in the evidence, held that the *pottah* was not, in fact, established. (*See Maharanee Shibessouree Debya and Others* v. *Mothooranath Acharjo* (1).)

But it is to be observed that this Committee, whilst considering that the grant of such a *pottah* by a *sebait* would be *primâ facie* a breach of trust, expressed an opinion that if the grant had been affirmed by a judgment, the succeeding *sebaits* would have been bound by it; probably for the reason that after a judgment it must be assumed either that such *pottah* was warranted by the terms of the original endowment, or by usage, or was in some way beneficial to the interests of the trust. It is said:—

"If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata*, binding on the parties, and those claiming under them."

But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the *sebait* of property dedicated to the worship of an idol, in the capacity as *sebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *sebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice *Knight Bruce*:—

"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shewn to have acted *malâ fide*, will not be affected, though it be shewn that with better management the estate might have been kept free from debt." (See *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1).)

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *sebait*, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a decree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.

(1.) 13 Moore's I. A. Ca. 270; 2 P. C. J., p. 528.

(1) 6 Moore's Ind. App. Ca. 393; 1 P. C. J., p. 552.

Assuming, then, that a *sebait* may incur debts, or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained against a former *sebait* in respect of debts so incurred should be binding upon succeeding *sebaits*, who, in fact, form a continuing representation of the idol's property.

If such debts, and the judgments founded on them, were not held to be thus binding on successors, the consequence would be that no *sebait* would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors who had afforded it, by at once transferring the property to other *sebaits*, as actually done in the present case by *Rajah Baboo*, who, after the decrees were obtained against him, appointed the Appellants, his wife and nephew, *sebait* in his place.

The above view is consistent with what appears to have been the opinion of this Committee in the passage already cited from 13 *Moore's* Indian Appeals, and with two decisions in *India* (*Juggut Chunder Sein and Another* v. *Kishwanund and Others* (1), and *Kissnonund Ashroon Dundy* v. *Nursingh Doss Byragee* (2).

Before, however, applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. These conditions appear to have been fulfilled in the present case.

It is to be observed that execution of the judgments sought to be set aside is decreed, and in their Lordships' view rightly, only against the rents and profits of the *debuttur* lands. Whether the judgment have been satisfied by the profits already received, or whether some provision ought to be made out of such profits, during the pendency of the attachments, for the continuance of the worship of the idol, are questions not raised in this appeal. The object of the present suit is to have the properties released from attachment on the ground that the decrees were obtained by fraud, and were in no way binding on the succeeding *sebaits*. In deciding against this claim, their Lordships do not desire to prejudice the determination of the questions above adverted to, if they should be hereafter raised.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

(1) 2 Select Reports, 126.
(2) 1 Marshall's Rep. 465.

14th January, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MOHIMA CHUNDER ROY and another (Plaintiffs) ... ... } *Appellants,*

versus

DOORGA MONEE and anothers (Defendants) } *Respondents.*

Evidence—Genuineness of document—Pleading—Hindu Law—Husband's power of curtailing his wife's absolute interest.

In a suit by the sons of *T*, a *Hindu*, by one of his wives, against his daughter by another wife, for the recovery of certain properties, chiefly upon the basis of a *dowl* or deed of specification by *T* which purported to confirm his wives' possession of certain property, during their lives, in lieu of maintenance, restraining their power of alienation; the Defendants, by certain ancient deeds shewed the transfer to her mother by her father of an absolute interest in some *talooks*, reserving a quit-rent, and the title of her mother to certain other properties and gave parol evidence of not a very satisfactory character to prove the purchase of the rest out of her mother's *Jowtook*:

Held, that, from the pleading and under the circumstances of the case, the documents produced by the Defendant, could not be concluded to be forged;

That in the absence of evidence of the title and seisin on the part of *T*, it was made out that the Defendant was entitled to an absolute estate in the properties in question; and that *T*, could not cut down his wife's interest to a life-interest by any *dowl* he might make, and that accordingly the *dowl*, even if genuine, was inoperative.

This was a suit brought by the sons of *Tellock Chunder Roy* by one of his wives, against the daughter of his other wife, to recover possession of certain property which the daughter alleged that her mother, who died before the suit, was entitled to as an estate of inheritance in the nature of *jowtook* or *stridhana*, but which as the sons alleged belonged to her only for her life, and after her death reverted to them.

The plaint relies chiefly upon a certain *dowl*, which is described in these terms:—"Agreeably to the deed of specification of shares of our father, *Tellock Chunder Roy*, on the 18th *Bysuck* 1244 B. S., and the list dated the 27th *Joisto* 1244, signed by him, the six *Katas* (plots) written in the undermentioned first schedule, and the two *Katas* (plots) of property written in the second schedule, were, on account of maintenance, held possession of by our stepmother, *Manoka Chowdhranee*, under these conditions,—that she should in her life-time enjoy the proceeds of the said property, without the power of making over the same by sale or gift, and on her death the said property would devolve on the sons of our father." In the first schedule annexed to the plaint they described the six portions of the property which they had mentioned, and in the second the other two. *Doorga Monee*, the Defendant, in her written statement, says in answer, with respect to properties Nos. 1 to 6 inclusive, they belonged to her mother. No. 1 she says, was her mother's *jowtook* estate, and Nos. 2 to 6 property acquired by her mother from her *stridhana* estate. But with respect to Nos. 7 and 8, she says that they were assigned by her father to her *mother under a writing of the* 21st *Joisto* 1244, that is, a writing or list made by him on the 2nd of June 1837, shortly before his death. It is very material to distinguish between the titles which she sets up to these two sets of property, respectively, the first being a title of long standing in her mother, who obtained an estate of inheritance by conveyances of an early date, the second resting entirely upon this list of June 1837, a distinction which has not been adverted to by either of the Courts in *India*.

The Plaintiffs' and Defendants' cases may be thus respectively stated. The Plaintiffs gave no evidence whatever of any title or seisin on the part of their father; they put in no deeds, they gave no evidence of receipts of rent or profits, or any evidence customary in actions of this kind, but they put in this *dowl*, which bears date the 25th April 1837, some two months, or a little more it may be, before the death of their father, the purport of which is this,—that after making a partition of the great bulk of his property among his four sons, he proceeds to say:—"Besides this I have two wives, *Sree Manoka Chowdhranee*"—that is the mother of the Defendant.—"And *Sree Raj Monee Chowdhranee*. The *jageers* and other property of mine which they hold in their possession shall be confirmed to them during their lives in lieu of maintenance. They shall have no power of making sale or *hibba* of the same. On their deaths the sons will receive equal shares thereof respectively. Moreover, when the maintenance is insufficient, the deficit will be made up in a reasonable manner." They also put in a list of property stated to have been made by their father on the 8th of June 1837, about six weeks after, and very shortly before his death, which begins in this way:—"List of the property assigned over as maintenance. Creditor *Manoka Chowdhranee* and debtor *Tellock Chunder Roy*. Then follows a description of lands which are stated to have been previously given, a description which substantially agrees with the first schedule in the plaint, relating to lands Nos. 1 to 6 inclusive. These are described as previously given. Then this list gives this heading—"Given for making up the deficit," Under which heading follows a description of property substantially corresponding with Nos. 7 and 8 in the plaint.

The Plaintiffs have shown that in May 1837 a petition stating the execution of the *dowl* and its material provisions was

filed by or in the name of *Tellock Chunder Roy* in the Court of the judge of *Zillah Buhagunga, ?* (*Backergunge*) and that the *dowl* itself was filed shortly after the death of *Tellock* in a proceeding whereby his sons sought to substitute themselves for him as parties to a suit; they have also put in copies of two *Vakulatnamahs*, executed, the one by the widow, the other by the sons of *Tellock Chunder*, in February 1839, from which it appears that the widow having set up some right of adoption, a compromise had been made. In her *Vakulatnamah* she referred to a list made up and prepared by her husband; the other *Vakulatnamah* referred to the *dowl* and also to their list. This is the substance was the case of the Plaintiffs.

The Defendant put in several deeds, and gave the evidence of the attesting witnesses to them, for the purpose of showing that her mother had acquired several of the properties mentioned in the schedule of the plaint; that she had acquired the earliest of those properties as long ago as 1815, another in 1820, and others in 1831. With respect to three of these deeds she called the attesting witnesses. With respect to the fourth, she did not call any attesting witness; but it is to be observed that all of them were more than 30 years old. If these deeds were genuine, she showed that the interest in certain *talooks* was conveyed to her mother absolutely, subject to the payment of a quit-rent; and that these conveyances were confirmed by her father *Tellock Chunder*, who claimed a right as superior landlord to his wife, upon the payment to him of a certain quit-rent. She put in documentary evidence showing her mother's title to four out of the six properties mentioned in the schedule, and she gave some parol evidence, no doubt not of a very satisfactory character, that the others had been purchased out of her mother's *jowtook*.

The Principal *Sudder Ameen* decided in favour of the Plaintiffs. He held that they had proved their *dowl* and the accompanying list. He held that the Defendant had not proved her documents; on the contrary that they were forgeries; and he gave judgment for the Plaintiffs.

This judgment was reversed by the High Court. The High Court found that the *dowl* was a forgery. They do not expressly state, but perhaps it may be collected from what fell from them, that they did not agree with the view of the Principal *Sudder Ameen* that the documents put in by the Defendants were false, but their Lordships have to regret that they have not the assistance of any distinct finding on the part of the High Court on this subject. The High Court treated the genuineness of the *dowl* as the sole question in the case. They reversed the judgment of the Court below, and gave judgment for the Defendants. Their Lordships regret to have to observe that neither of these judgments appear to them satisfactory, and it will be necessary to state their view of the case. Their Lordships are by no means satisfied with the reasons given by the High Court for reversing the judgment of the Principal *Sudder Ameen*, to the effect that the *dowl* was genuine. On the whole their Lordships are inclined to think that the *dowl* and the document accompanying it—the list—were genuine documents. On the other hand, they are not prepared to dissent from what, as before observed, would appear to be the finding of the High Court that the deeds of the Defendant were genuine. It would appear by the case of the Plaintiffs themselves, that the Defendant's mother had been in possession of these properties for a considerable time; that she had in one of them at least what is called a *nim ousut talook*, which would probably be created by some document or other; and it may be assumed that some documents relating to her title were in existence. She puts in documents; she proves them by the evidence of attesting witnesses—at all events three of them. The Plaintiffs on the otherside put in no title deeds of their own, nor any *Kubooleuts* or counterparts such as might be expected to be in their possession of the title deeds under which the Defendant's mother held such of the properties as she admittedly held under her husband; and further it is to be observed that when summoned as witnesses for her by the Defendant, they declined to put themselves into the box.

On the whole their Lordships are of opinion that there is no sufficient ground for coming to the conclusion that these documents on the part of the Defendants are forged.

That being so, it is necessary to consider what aspect the case presents. It appears to their Lordships that assuming the genuineness of these documents on the part of the Defendant, it is made out she was entitled to an absolute estate in lots Nos. 1 to 6, both inclusive. They come to that conclusion, partly on the strength of her evidence, partly in the absence of any evidence whatever on the subject on the part of the Plaintiffs. Then if that were so, her husband could not cut down her interest to a life-interest by any *dowl* which he might make, and accordingly the *dowl*, assuming it to be genuine, appears to their Lordships to have been inoperative. Whether each or both of the lists are genuine, it does not appear to their Lordships absolutely necessary to decide. They are disposed to find as a fact that the list which came to the possession of the Defendant is that which she now produces. It is possible that another list also may have been made, and that may have been, as the Plaintiff *Mohima* states, entrusted to his possession. It is not necessary to go with great minuteness into an examination of these two documents, because it appears to their Lordships that, having come to the conclusion which they have already expressed, the materinility of the list produced by the Defendant would appear to be that, with respect to Nos. 7 and 8, those properties were given to her for the purpose of supplementing her maintenance. Adopting her own view, that the reference in this list to those properties which she then held recognizes her title to an estate of inheritance in them, it appears to their Lordships that the proper construction of the supplemental grant for the purpose of making her maintenance sufficient for her purpose is, that that grant should be for life and for life only. They think it highly improbable that that portion of the supplemental grant which consisted of a part of the dwelling house of the family should have been intended to be granted to her in perpetuity. Their Lordships therefore have come to the conclusion that as far as lots from Nos. 1 to 6 are concerned the Plaintiffs have failed to make out their case, and that the Defendant is entitled to judgment; but that as far as lots 7 and 8 are concerned, they have made out their case, and that the Plaintiffs are entitled to judgment.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, except so far as it reverses the decree of the Principal *Sudder Ameen*; and in lieu thereof to declare that the Plaintiffs have failed to establish, as against the Defendant, any title to the lots 1 to 6 in the plaint mentioned, and to decree that they do recover possession of the said lots 7 and 8 from the Defendant, with the mesne profits received by her since the date of the institution of the suit, but that the said suit, so far as it seeks to recover the said other lots, do stand dismissed; and to direct that the costs in the Lower Courts be borne by the parties, respectively, according to the value of the property decreed and disallowed. Each party will bear their own costs of this appeal.

6th, 9th, and 10th February, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

STRIMATHOO MOOTHOO VIJIA RAGOONADAH RANEE KOLANDAPUREE NATCHIAR, *alias* KATHAMA NATCHIAR, and Others (Defendants)* } *Appellants*,

versus

DORASINGA TEVER, *alias* GOWRY VALABA TEVER (Plaintiff) ... } *Respondent*.

Declaratory Decree—Act VIII. of 1859, s. 15—Consequential Relief.

The words of s. 15, Act VIII. of 1859, must be construed upon the principles and by the light of the decisions of the English Courts of Equity upon the 50th section of 15 and 16 Vict., c. 86, which is in similar terms.

The effect of these decisions, taken in conjunction with the decisions of the Privy Council, in construing the provisions of the Indian Act, is, that a declaratory decree is not to be made unless there is a right on the part of the Plaintiff to consequential relief, which, although not asked for, might, if asked for, have been given, or unless the declaration of right may be made the foundation of relief to be had in another Court.

The Plaintiff, purporting to be the next heir, brought a suit against the life tenant of a *zemindary*, and made another claimant to the succession to the *zemindary* a Defendant in the suit. The plaint prayed for a decree declaratory of the Plaintiff's right to succeed on the death of the *Zemindar*, and made allegations of waste, in respect of which he asked relief. *Held*, that even if the Plaintiff had proved the alleged acts of waste, which he had not done, there was not a right to consequential relief which would entitle him to a declaratory decree.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an appeal against the decree of the High Court of *Madras*, affirming a decree of the Civil Judge, of which the ordering part is in these words:—"The Court doth order and declare that as between the Plaintiff and second Defendant, Plaintiff be declared the next in succession to the *Shevagunga zemindary;* that Plaintiff's claim to maintenance and apartments be dismissed, and that he pay so much of his own costs as may be found due thereon." There was no appeal to the High Court against the latter part of the decree dismissing the Plaintiff's claim for maintenance and apartments, and, therefore, that which is the subject of the appeal must be taken to be the declaration of the two Indian Courts that the Plaintiff is the next in succession to the *Shevagunga zemindary*.

The title to this *zemindary* was the subject of a very long litigation, which was finally closed by a judgment of this tribunal in the year 1863.* The points then decided were, first, that the *zemindary* was in the nature of an impartible *raj*, to be held by one member of the family; secondly, that the *zemindary*, having been granted by the *Madras* Government, after an escheat, to the *istimirar Zemindar*, was to be treated as his self-acquired property; thirdly, that the right of succession to it was to be determined, not by any particular custom, but by the general Hindu law prevalent in that part of *India*, with only such qualifications as might follow from the impartible character of the subject. These propositions were, at least in the latter stages of the litigation, not much disputed. That which was really contested between the parties was that even if the *istimirar Zemindar* were, as he had been found to be, in the strict sense of the term, a member of an undivided Hindu family, the succession to this *zemindary*, inasmuch as it was his separate self-acquired property, was to be determined by the rules which regulate the succession to the property of one separate in estate, and consequently, that his wife, daughter, and daughter's sons were entitled to inherit it in preference to a brother, a brother's son, or any more remote collateral in the male line. This last point had been first raised by the *Zemindar's* last sur-

* 2 Cowell's I. A., p. 109; 15 B. L. R., p. 88.

* See 9 Moore's I. A., 539; 2 P. C. J., p. 25.

viving widow, *Angu Moothoo Natchiar*, in a suit commenced in 1845. It was decided against her by the Judge of first instance in 1847. She appealed against his decree to the then *Sudder* Court of *Madras*, but died in 1850, before her appeal was heard. Thereupon there ensued a very complicated and confused litigation amongst the descendants of the *istimirar Zemindar*, touching their respective titles to succeed to the right claimed by the deceased widow, and to prosecute her appeal. The claimants were, first, *Kathama Natchiar*, who is the first on the record of the present Appellants, her sister of the whole blood, and her half sister, all of whom seem to have been daughters of the *Zemindar*, then having or being capable of having issue; secondly, *Sowmia Natchiar*, a fourth daughter, who was a childless widow; and, thirdly, *Moothoo Vadooga*, a grandson of the *istimirar Zemindar* by a deceased daughter, and, as would appear by the pedigree* admitted in this cause, an elder brother of the present Respondent, who is since dead. The final judgment of this Committee determined both the question of representation raised between these parties, and also the question of succession raised in the widow's suit, against the person claiming as nearest male heir in the collateral line of the *istimirar Zemindar*. It determined these questions by a declaration in these words: "We shall, therefore, humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the *Sudder* Court"—that was a suit brought by the widow as an original suit—"ought to have been and ought to be dismissed; and in the suit of 1845, to declare that *Sowmia Natchiar* and *Moothoo Vadooga* were not, nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the appeal, and to recover the *zemindary*; this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*." The sisters, as appears by the admitted pedigree in this cause, have since died. There is indeed a statement in Mr. *Moore's* report that they were dead at the time when the judgment was pronounced; but, however, that may be, it is certain that, under the order of Her Majesty, made in pursuance of that judgment, the first Appellant became the *Zemindar* of *Shevagunga*, taking it as the heir of her father next in succession to the widow.

That having been the state of things for some years, the present Respondent brought the suit out of which this appeal has arisen. The first paragraph of his plaint claimed "to recover the *zemindary* of *Shevagunga* for the Plaintiff as the eldest surviving male heir of the *istimirar Zemindar*." But this somewhat desperate attempt to reopen the question which had been closed by the judgment of this board was shortly afterwards abandoned, and by a subsequent proceeding he withdrew the claim to any right to immediate possession and amended his plaint accordingly. The plaint then went on to pray in the alternative;—"First, to have a declaratory decree passed, establishing the Plaintiff's right to succeed to the said *zemindary* as next heir after the death of the first Defendant, and adjudging her to pay him Rs. 60,000 per annum for maintenance, and further declaring him entitled to immediate possession of a portion of the palace, No. 1, which was occupied and enjoyed by his maternal grandmother and mother during their lifetime; secondly, to declare him entitled to immediate management of the *devastanums*, *pagodas*, and *choultries* situated in the said *zemindary*, and of the lands bestowed on them, to receive the honours done by the said *devastanums* and *choultries*, and to conduct the affairs thereof; thirdly, to grant to him such further or other relief as the nature of the case will admit of." The plaint then stated the title of the Plaintiff, which is in effect that, inasmuch as upon the death of the present *zemindar* the persons entitled to inherit and to succeed to the *zemindary* would, according to the ordinary course of Hindu law, be the grandsons of the *istimirar Zemindar* if the estate were partible, he, being the eldest of such grandsons, and the estate being impartible, must be taken to be, by right of primogeniture,

* See at the end of this case.

the person next in succession to the *zemindary*. The plaint then raised a case of waste against the the first Defendant (the *zemindar*). After mentioning certain leases which are no longer the subject of dispute, it went on to say: "The first Defendant has not leased to the sixth Defendant the *punnai* (cultivated by the owner) and *kolkriam* (purchased) lands belonging to the said *zemindary* which was put in her possession by virtue of the decree of Her Majesty in Council, but she, notwithstanding her being a widow, has alienated, contrary to law, a great part of the said lands, and pledged the state jewels, and incurred debts so as to affect the permanent income of the *zemindary*." It then stated some special grounds for coming into Court. It said: "The first, second, third, fourth, and fifth Defendants and others have combined together to defraud the Plaintiff of his right to the said *zemindary*, and the third, fourth, and fifth Defendants have executed an agreement to their brother, the second Defendant, assigning to him their interest in the said *zemindary*, which they pretend to have on the death of the first Defendant. The first Defendant has also executed a document to one *Ponnoosamy Tever*, whose daughter was lately married to the second Defendant, authorizing him (the said *Ponnoosamy Tever*) to establish the right alleged by the first Defendant to be possessed by her son, the second Defendant, to succeed to the *zemindary* after her death, and to exercise other powers in prejudice to the Plaintiff's interests in the said *zemindary*." Then followed the case made for the relief prayed in respect of the management of the charitable institutions and for maintenance, which it is unnecessary to state in detail.

The Defendants to the suit appeared and set up various defences, the first and second Defendants impeaching the title of the Plaintiff upon several grounds; the third, fourth, and fifth Defendants setting up a case that the *zemindary* to which their mother had succeeded had either always been or had become her *stridhanum*; that according to the proper course of succession it would, upon their mother's death, devolve upon them, but that they had assigned and relinquished by deed their rights in favor of their brother, the second Defendant. Upon these pleadings the following issues were settled:—"1. Whether or not according to Hindu law petitioner is entitled to succeed to the *zemindary* of *Shevagunga* at the death of the present *Rance*. 2. Whether or not petitioner is entitled to succeed to the said *zemindary* at the death of the *Rance* by virtue of any peculiar custom which obtains in that *zemindary*. 3. Whether or not petitioner is estopped by this being '*res judicata*' from setting up any peculiar custom. 4. Whether or not petitioner is immediately entitled to the maintenance claimed or what maintenance, as such, or to apartments in the palace, and what apartments. 5. Whether or not petitioner's claim to maintenance and apartments is barred by the law of limitation. 6. Whether or not petitioner is entitled to the immediate management of the *devastanums* and *chuttrams* in the *zemindary*, and to the honours connected with the said management. 7. Whether this is a suit in which a declaratory decree can be given at all."

From the judgment of the Court of first instance it appears that the second, third, and sixth of these issues were abandoned. That judgment conclusively disposed of the fourth against the Plaintiff, and consequently made it unnecessary to adjudicate upon the fifth. But having decided the seventh issue, viz., whether the suit was one in which a declaratory decree could be given at all, in the Plaintiff's favour, it proceeded to decide the first issue also in his favour, and thereupon made the declaration which is the subject of this appeal. The questions raised by these issues were the only questions which were carried to the High Court, and that Court affirmed the decree of the lower Court upon both points.

Their Lordships, feeling that if the seventh issue has been improperly found in favour of the Plaintiff, and this is a case in which a declaratory decree ought not to be given at all, it would be wholly unnecessary for them to discuss the first issue, have in the first instance confined the argument to the first of these questions, and now proceed to give judgment upon it.

They at first conceived that the power of the Courts in *India* to make a merely declaratory decree was admitted to rest upon the 15th section of the *Code of Civil Procedure*, the effect of which has been so much discussed. Mr. *Doyne*, however, raised some question as to that, and suggested that the power was possessed by the Courts in the *Mofussil* before the *Code of Procedure* was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarators (if they ever possessed such a power), it would not have introduced this clause into the *Code of Procedure*, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being: "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Nor does any Court in *India* since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause.

The point, therefore, to be determined upon this appeal is, what is the true construction and effect to be given to that clause. It has been broadly urged at the Bar that the discretion given to the Courts is absolute, or at least controlled only by those reasonable considerations upon which Courts of Justice may be presumed to act in the particular case brought before them; and that in every case in which they think fit to make a declaratory decree under that clause they are competent to do so, subject of course to having the exercise of their discretion controlled by the appellate Court in cases in which the latter may think there are sufficient grounds for interfering with a discretion which the Legislature has vested in the lower Court. On the other hand, it is contended that the clause must be construed upon the principles and by the light of the decisions of the English Courts of Equity, upon the 50th section of the 15 & 16 Vict. c. 86, which is in precisely the same words, and that the true limitation of the power of the Courts is that a declaratory decree is not to be made unless there is a right to consequential relief, which, although not asked for, might, if asked for, have been given.

We have been referred to a vast number of authorities, some to show what has been the construction given to this clause in the Presidency of *Bengal*, some to shew what construction has been given to it in the Presidency of *Bombay*, and some to shew that a contrary construction has been put upon it in the Presidency of *Madras*. We have also been referred to three decisions of this tribunal, which, if clear and explicit on the point, are of course binding upon us. Their Lordships think it will be sufficient as to the Indian cases to say that although the cases in *Bengal* are not uniform, and some of the Judges there have occasionally used expressions which imply that the Courts have a wide discretion in this matter, still the balance of authority is in favour of the limited construction which the Appellants would put upon the clause. In *Bombay* that seems to be even more decidedly the case, although the *Bombay* decisions to which we have been referred are not so numerous as those of the Courts in *Bengal*. It is obvious that an enactment which is intended to apply to all the Courts in *India* and which is also a modern enactment, ought to receive the same construction in all those Courts, and that no inconsistent course of practice should be allowed to spring up in any of the Presidencies. That construction must be governed by the decisions of this Board, and their Lordships in the course of the argument intimated an opinion that the three decisions which have been cited do in fact admit the authority and binding force of the decisions in *England*, and establish that, with such slight qualifications as may be required by the different circumstances of *India* and the different constitution of the Courts in that country, the application of the clause is to be govern-

ed by the same principles as those upon which the Court of Chancery proceeds.

In the first of these cases (that of *Sreenarayan Mittro* (1), decided on the 15th of January, 1873), there is a distinct reference to the case of *Rooke* v. *Lord Kensington* (2). The learned Judge who delivered the judgment of this Committee said: "It has been held that under the 15 & 16 Vict. c. 86, s. 50, a declaratory decree cannot be made unless Plaintiff would be entitled to consequential relief if he asked for it: *Rooke* v. *Lord Kensington* (2). The 15th section, Act VIII. of 1859, is in similar terms. The Plaintiff, upon the facts so founded, is not entitled to any relief against the Defendant. It has been shewn that, treating the documents as mere agreements between the Plaintiff and the father of the child, the Plaintiff could have no right to maintain the present suit." He no doubt afterwards observed: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." It appears, however, to their Lordships that that paragraph is far from claiming an unlimited discretion. The earlier part of the judgment shews that the power is limited by the construction put upon an enactment in the similar words in *Rooke* v. *Lord Kensington* (2), and what follows is merely to the effect that even in cases in which some consequential relief might, if prayed, have been granted, it would still be a matter of discretion whether the Court should make a mere declaration in the particular case.

The next case was that which has been shortly called the case of *Fyz Ali Khan* (3), decided on the 22nd of January, 1873. Upon this point their Lordships then said: "It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the *Code of Civil Procedure* would have no operation at all. What their Lordships understand to have been decided in *India* on this article of the Code, and in the Court of Chancery upon the analogous provision of the English statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case even if it be assumed that no other consequential relief was in the mind of the party or was sought by him than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit." The case there was that the Plaintiff had sought as *Zemindar* to enhance the rent of a tenant. He was met by the objection that the *zemindary* right was not in him. He then had to go, as he could only go for a final determination of that question, to the *Zillah* Court, but the *Zillah* Court not having the power to give him the consequential relief in order to which he sought that declaration, namely, the trial of his right to enhance, could only make the declaration, leaving him to seek for his consequential relief in the Revenue Court.

The correctness or effect of this decision is not affected by the fact which Mr. *Doyne* pointed out, that the Plaintiff afterwards did go to the Revenue Court, and there, upon the merits of the question being tried, failed to establish his right to enhance.

The most recent case is that of the *Rajah of Pachete* (1), decided on the 15th of December, 1874. The judgment then delivered contains this passage: "Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to as to the proof or the rebuttal of proof of the *bromuttur* tenure, because in their Lordships' opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for

(1) 11 B. L. R., p. 171.
(2) 2 K. & J. 753.
(3) 11 B. L. R. 203.

(1) See 2 Cowell's I. A., p. 83; *Ante*, p. 447.

a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the Defendants that they had a certain tenure. In their Lordships' view, such a suit is not maintainable." After giving the words of the clause, the judgment proceeds: "A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief, if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act. Now, applying that test, in their Lordships' opinion this suit is not maintainable. The *Rajah* was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits, and he sought for and could obtain no other description of possession than that which he had." There is really no conflict between this decision and that which had been ruled in the case of *Fyz Ali*. In the case of *Fyz Ali* the Plaintiff sought to establish the *zemindary* title, which was properly triable in the *Zillah* Court, in order that on the title thereby established he might bring a fresh enhancement suit in the Revenue Court. In this case of the *Rajah of Pachete* the *zemindary* title was admitted by all the Defendants upon the proceedings; and the question which the *Rajah* sought to conclude by a declarator was that within his *zemindary* there was no such *bromuttur* tenure as that which some of the Defendants alleged to exist in limitation of the right to enhance, which as a *zemindar* he would presumably have. In short, he wished to get a declaration, the effect of which would be to prevent the fair trial in the Revenue Court of the very question to be tried there, viz., the question whether he as *Zemindar* was entitled to enhance the rents of his tenants or not.

It seems to their Lordships that these three cases do all more or less affirm that the Indian enactment is to be construed as the English Courts have construed the similar provision in the English statute, but inasmuch as this question has been so fully discussed at the Bar, and there treated as not concluded by those decisions, and as it is desirable to have an authoritative decision upon it, their Lordships think it right to say that if these three cases had not been decided, and if the question were before them as *res integra*, they would come to the above mentioned conclusion, and I will state as shortly as I can the reasons upon which they would do so.

It is clear that very shortly after the passing of the English statute, in fact in the course of the following year, the construction of its 50th section came in question in the Court of Chancery. The first decision of *Vice-Chancellor Wood*, which is reported in the appendix to the 10th volume of *Hare's* Reports, no doubt states somewhat broadly the discretionary power of the Court to make declarators under that enactment, but in the two other cases which were decided a month or two afterwards, namely, the cases of *Greenwood* v. *Sutherland*, (1) and *Garlick* v. *Lawson* (2), the learned *Vice-Chancellor* receded from that, and held that the powers of the Court were not so enlarged by the statute as to enable him to make any declaration touching future interests during the life of a tenant for life. In the case of *Garlick* v. *Lawson* (2) he said: "Now a declaration in the lifetime of the tenant for life with regard to the interests of the parties entitled in the reversion could not have been made in a cause at the time that statute passed, and therefore could not have been made on a special case. Then came the new Act, which merely said that a suit should not be open to objection on the ground that a merely declaratory decree or order was sought. It enabled the Court, in its discretion, where it should appear to be necessary for the administration of an estate, or to the relief to which a Plaintiff might be entitled, to make a decree, notwithstanding it should be merely declaratory. But this was not a case in which it was necessary to do so."

The question next came before *Vice-Chancellor Kindersley* in *Jackson* v. *Turnley* (3). At the close of his elaborate judgment on the particular case,

(1) 10 Hare, App. I, p xii.
(2) 10 Hare, App, I, p. xiv.
(3) 1 Drew. 617; S. C. 22 L. J. (Ch.) 949.

the learned judge says: "I am of opinion that this question cannot be litigated; that the representative of a deceased lessee cannot file a bill against the lessor to litigate the question whether, in the event of a breach of a covenant taking place, the lessor would have a right founded upon it, and I may observe that the last branch of the section is not unimportant. It says: 'It shall be lawful for the Court to make binding declarations of right, without granting consequential relief.' That seems to imply that it contemplates a case in which the Court is capable of giving consequential relief. Here there is not merely no consequential relief asked, but none is capable of being given."

In the case of *Rooke* v. *Lord Kensington* (1) *Vice-Chancellor Wood* also put the same construction upon the words of the clause. He said: "The form of that section of the statute implies that there is a consequential relief which might be granted in each case when the right has been so declared, but that the parties are not to be compelled to ask for that relief, and they may satisfy themselves by simply asking a declaration of right, and not pursuing the matter further."

That decision was followed shortly afterwards by the case of *Lady Langdale* v. *Briggs* (2), which is the more important, because there, as here, the question was whether the clause empowered the Court to declare future interests. Lord Justice *Turner* went at great length through the earlier cases, in order to shew that it was against the general course and practice of the Court to do this; that that had not been altered by his own Act, enabling the parties to state a case for the adjudication of the Court; and then he proceeded to deal with the argument which had been raised before him, to the effect that under the more recent statute, the 15 & 16 Vict. c. 86, that power was given. He says: "Some aid to the Appellant's argument on this part of the case was also attempted to be drawn from the 50th section of the 15 & 16 Vict. c. 86, the *Improvement of Jurisdiction Act*, but I take the same view of that enactment as the *Vice-Chancellor Wood* seems to have taken of it in *Garlick* v. *Lawson* (1)—that it does not extend the cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them." Those directions which according to the old practice would have been necessary and consequent, would have involved consequential relief in one shape or another. There is, therefore, no ground for saying that the judgment of Lord Justice *Turner* did not go to the full extent, as to the construction of the clause, of the judgments of *Vice-Chancellor Wood* in *Rooke* v. *Lord Kensington* (2), and *Vice-Chancellor Kindersley* in *Jackson* v. *Turnley* (3).

What then has been the history of this clause in *India?* It appears that before the passing of the *Code of Procedure* it had been extended to *India* by Act VI. of 1854, the 19th section of which is in precisely the same words as the English enactment. I may remark that some of those who sat in the Supreme Court of *Calcutta* were always anxious that when an English statute was extended to the Presidency Courts, it should be so extended in precisely the same words, in order that those Courts might have, on questions of construction, the advantage of the English authorities, and that it should not be open to counsel to make nice distinctions upon the varying language of the two statutes. In this instance that principle seems to have been acted upon by the Legislature, and not long after the Indian Act was passed the question of its construction appears to have come before the Supreme Court in the cause of *Sreemutty Rajcoomaree Dossee* v. *Nobocomar Mullick Aand nother* (4). That Court was bound to act upon the English authorities, and accordingly that portion of its judgment which dealt with this question is in those words: "One argu-

(1) 2 K. & J. 753.
(2) 8 De G. & M. 301.

(1) 10 Hare, App. 1, p. xiv.
(2) 2 K. & J. 753; S. C. 25 L. J. (Ch.) 795.
(3) 1 Drew. 617; S. C. 22 L. J. (Ch.) 949
(4) Boulnois, Reports.

ment which has been strongly pressed in support of this view, is founded on the 29th section of Act VI. of 1854. But that enactment only removes the objection to the suit which consists in its seeking merely a declaration of right without a consequential relief. It leaves untouched the objection that may consist in the want of sufficient interest in the Plaintiff to maintain such a suit, or in the absence of material parties interested in the question. And the cases cited by Mr. Advocate-General shew that the Courts at home, neither under the similar section in the English statute, nor under *Sir George Turner's Act*, will exercise their discretion in declaring rights where the parties principally affected are not before them." The cases cited were the cases which had then been decided on the construction of the English Act. And this decision shews that the construction which had obtained in the Court of Chancery was adopted and acted upon by the Supreme Court of *Calcutta*.

Then came Act VIII. of 1859, or the *Code of Procedure*, in framing which the Legislature thought fit to pick out of Act VI. of 1854 the 19th section, and to embody it in the very same words in the new Code. It seems to their Lordships unreasonable to suppose that the Legislature did not mean to use the words in the sense which by judicial construction they had then obtained. Again, it is to be observed that when the Supreme Court of *Calcutta* ceased to exist, and the High Court was created, the charter of the new Court required that Court to be guided in its original jurisdiction by the principles which had governed the Supreme Court. Unless, therefore, the limited construction put upon the clause by the Supreme Court is to prevail generally in all the Courts of *India*, we must come to the absurd conclusion that the same words are to be interpreted by the High Court in one sense when it is exercising its original jurisdiction or sitting on an appeal from a decree made under that jurisdiction, and in a different sense when it is sitting on an appeal from a *Mofussil* Court; and further that the Legislature has by the same form of words intended to make one law for the *Mofussil* Courts and another for those of the Presidency towns.

It appears, therefore, to their Lordships, that the construction which must be put upon the clause in question is, that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court. They admit the qualification introduced by the case of *Fya Ali*.

With respect to the course of decision in the Presidency of *Madras*, it is to be observed that some of the earlier cases decided there adopted the English construction. In others, the Judges who claimed a wider discretion as to making declaratory decrees, have assigned as a reason for its exercise that there does not exist in *India* the power of entertaining a suit to perpetuate testimony. That reason does not apply to the present case, in which there is no testimony to perpetuate, but in no case is it a satisfactory reason. The proper remedy for such a defect in the administration of justice, if it exists, is an Act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction from that which prevails in other parts of *India*, upon a statute which has no reference to the subject. It may be observed further upon the *Madras* cases that the Courts there do not appear really to have claimed, as Mr. *Doyne* has claimed for them, an uncontrolled discretion in making declaratory decrees. The judgment of Chief Justice *Scotland* in this very case certainly does not go so far. He says: "It has been decided by this Court that the rule of the Equity Courts in *England* is not applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th section of the *Code of Civil Procedure*, although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a suit is shewn to exist." What I have already said on the part of their Lordships shews that they dissent from that position; but still the very proposition admits that there must be some special ground "for seeking the

protection of such a suit." He then refers to the last decided case, and the conclusion which he draws from the decision is this, "To support such a suit there must appear to have been some act done which had worked or was likely to cause injury or serious prejudice to the Plaintiff's alleged title, and in the present case I think that ground does appear." Then he proceeds to consider the special grounds which exist in this case. Mr. Justice *Holloway* goes further, and says that the mere quieting of doubtful titles would be a sufficient reason and a better reason than the fact of alienations having been made. The principle so stated, if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title which might at any time afterwards crop up, should be determined by a declarator.

Having said thus much on the construction of the Act, their Lordships will now deal with the arguments which have been addressed to them to shew that even upon the limited and strict construction of the enactment this decree may be maintained. The first point upon which it is desirable to observe is that of the claim to maintenance. Upon that it is only necessary to say that the suit must now be treated as if the claim to maintenance had never been put forward. There has been a final adjudication between the parties as to the right to maintenance. It was held by the Lower Court that even if the Plaintiff were unquestionably the next in succession to the *Zemindary*, he would have no right to claim present maintenance from the *Zemindar*, and there was no appeal from that decision to the High Court.

It will be convenient to consider next the grounds which the High Court of *Madras* seems to have considered sufficient to justify the declaration. The Chief Justice says: "It appears that the first Defendant favouring the second Defendant's title, and concerting with him in opposition to the Plaintiff, had employed an agent, and executed a power of attorney to him, for the purpose of assisting the second Defendant to possess himself of the *Zemindary*, and withhold possession after her death. This, without reference to the other acts alleged, is sufficient to shew an extreme determination of hostility towards the Plaintiff, and there can be no doubt, I think, that serious injury to the Plaintiff's right is the probable, if not certain, result of the opposition thus begun." It appears to their Lordships that the Defendant, the *Zemindar*, was perfectly competent to grant that power of attorney, and that there is nothing in it which would give the Plaintiff a right if he had brought a suit for that purpose to have it set aside. It can, from the very nature of the instrument, operate only during the *Zemindar's* lifetime, and we are not to assume that any act will be done under it which the Plaintiff would have a right to impeach; but if any such act is done under it, as, for instance, if she were to devolve the succession upon her son, so that his interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the Plaintiff from seeking to impeach that act, and to treat it as invalid. They do not prejudge any question of that kind which may arise. Mr. Justice *Holloway*, as before remarked, rested his judgment broadly on the necessity of quieting titles, which their Lordships think is a ground far too wide for adoption, and one that cannot possibly justify the declaration in this case, because, independently of the construction of the statute, it appears to have been very reasonably ruled in *India* that the Court will not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which, like the present, may never arise: see *Pranputty Koer, Mother and Guardian of Infant Ireenundun* v. *Lall Futteh Bahadoor* (1).

A further question is raised by the pleadings, which was hardly adverted to in the argument, namely, the title set up by the sisters and the grant of their interest to the second Defendant; but that cannot give the Plaintiff a right of action in this case if it does not otherwise exist.

(1) 8 Sevestre, 277

That transaction cannot affect the interests of the Plaintiff; if these ladies would have no title against him they cannot have given a better title than they had themselves to the second Defendant. It, at most, raises another point to be determined, should the title to this *zemindary* come, on the death of the existing *Zemindar*, to be properly litigated between the Plaintiff and the second Defendant.

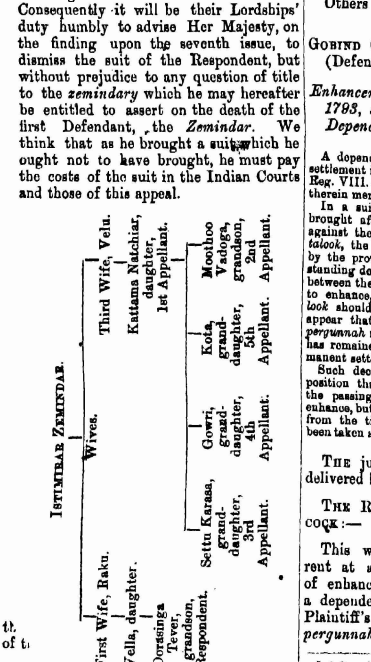
The point which, though not adverted to in the judgment of the High Court, has been mainly pressed upon their Lordships by the learned counsel for the Respondents, is, that the plaint originally made a case of waste, that it was necessary that the right of the Plaintiff as nearest reversioner should be ascertained in order to support such a suit, and that if the suit had been tried out as it was at first framed there would have been a case for consequential relief. The course the case took was that when it came before the Judge for the settlement of issues, he thought that the question of waste ought not to be tried in this suit. There was afterwards an application made to him to frame an additional issue, which he rejected; and the reasons for his coming to that conclusion are the following: "At the settlement of issues the Court was of opinion that the question of alienation of the revenues of the *zemindary* was not one which had any place in the present suit, which should be confined as much as possible to the real object in view, which is to ascertain whether or not Plaintiff is the proper person to succeed to the *zemindary* at the death of the *Ranee*. At present Plaintiff has no title either in possession or expectancy, and until he has established his right as remainder-man he is not in a position to question anything that may be done in regard to the disposal of the property by the present proprietor. Moreover, it would be impossible to frame an issue on this point, when the property said to be alienated is not distinctly specified, and when the parties who must necessarily be in possession are not parties to the suit. It is not contended that these alienations can operate beyond the lifetime of the present *Ranee*, and therefore if Plaintiff is successful in establishing his right to succession, he will have ample opportunity in future of preventing injury to the property. If, on the other hand, he is unsuccessful, the disposition of the property is a matter with which he has no concern." The Plaintiff appears to have acquiesced in this interlocutory order. If he had thought it had improperly affected his case, he might have raised before the appellate Court the question of its propriety, under the section of the Code which enables him to do so, and that question would then have been regularly before us. Considering the frame of the suit, their Lordships do not think the order was improper or unreasonable.

The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent. Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought, it must be brought by the reversioner with that object and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it. Here if the Plaintiff had brought his suit to restrain the widow from acts of waste he might, no doubt, have had to prove, not merely the acts of waste alleged, but a title sufficient to give him a *locus standi* in Court. Their Lordships are not prepared to say that by shewing that he was a grandson of the *istimirar Zemindar*, although a doubtful question might thereafter arise between him and the second Defendant as to which should succeed to the *zemindary*, he would not have established a sufficient *locus standi* against the widow, and the right to have her acts of waste restrained for the protection of the estate. This, however, would not necessarily give him a right to bring the second Defendant into Court in order to obtain a final adjudication of title against him.

It appears, therefore, to their Lordships

that, even if the Plaintiff had proved acts of waste against the widow, which he has not done, that would not have given him a right as against the second Defendant to have the question which arises between them determined by a declarator.

Upon these grounds, their Lordships think that both the Courts below have come to a wrong conclusion upon the seventh issue; and holding that, they conceive it would be improper for them to intimate any opinion as to the correctness or incorrectness of the very learned judgments given in *India* on the first issue. Consequently it will be their Lordships' duty humbly to advise Her Majesty, on the finding upon the seventh issue, to dismiss the suit of the Respondent, but without prejudice to any question of title to the *zemindary* which he may hereafter be entitled to assert on the death of the first Defendant, the *Zemindar*. We think that as he brought a suit which he ought not to have brought, he must pay the costs of the suit in the Indian Courts and those of this appeal.



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10th, 11th and 12th February 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HURRONATH ROY and Others (Plaintiffs)* ... } *Appellants,*

versus

GOBIND CHUNDER DUTT (Defendant) } *Respondent.*

Enhancement of Rent—Reg. VIII. of 1793, s. 51—Act X. of 1859, s. 15—Dependent Talook.

A dependent *talook* created before the decennial settlement is protected from enhancement by s. 51, Reg. VIII. of 1793, except under the circumstances therein mentioned.

In a suit by a *Zemindar* for enhancement, brought after Act X. of 1859 came into operation, against the holder at a fixed rent of a dependent *talook*, the latter is protected from enhancement by the provisions of s. 15 of that Act, notwithstanding decrees pronounced in previous litigation between the parties declaring the *Zemindar's* right to enhance, and directing that the rent of the *talook* should be assessed at *pergunnah* rates, if it appear that the rent never has been assessed at *pergunnah* rates, and never has been enhanced, but has remained unchanged from the time of the permanent settlement.

Such decrees place the *Zemindar* in no better position than other landlords, who, previously to the passing of Act X. of 1859, had a good right to enhance, but whose right, not having been exercised from the time of the permanent settlement, has been taken away by the 15th section of that Act.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This was a suit brought to recover rent at an enhanced rate after notice of enhancement for *turuf Oomedpore*, a dependent *talook* comprised within the Plaintiff's 3*a*. 4*g*. share of the *zemindary pergunnah Mahomedshahee* in *Zillah*

* 2 Cowell's I. A. p. 193; 15 B. L. R. p. 120.

Jessore. The suit was brought in the Revenue Court under Act X. of 1859. The collector who tried the case thought that the rent ought to be enhanced, and he decreed accordingly. He says:—"The case has been pending since 1862, when the issues were first fixed after hearing the pleadings on both sides. I come to the conclusion that the only issue on which there is any dispute between the parties is that first laid down, viz., whether the provisions of sections 15 and 16, Act X. of 1859, do not apply to the *talook* regarding the rents of which the present suit is brought, and whether the rent under these circumstances can be enhanced. Defendant's *mooktear* admits the fairness of the *pergunnah* rates assessed, but bases all his resistance to the paying of the enhanced rent on the principle above mentioned. I do not think there can be any doubt that the rent can be enhanced under the power conveyed in the two decisions above quoted" (referring to two decisions of the *Sudder* Court of the 30th April, 1821, and of the 11th December, 1860, respectively, which will be considered presently). The collector proceeds,—"It is distinctly laid down there that the rents of *taloek Oomedpore* may be enhanced by the Plaintiff after issuing the notices required by law at the *pergunnah* rates, and in the face of these decisions of the highest judicial authorities I cannot see that the plea of Defendant can for a moment be entertained, I accordingly reject it."

The case came on appeal before the High Court, who thought that the main question was whether, under the circumstances, the rent admittedly never having varied, the *talookdar* was not now protected by sect. 15, Act X. of 1859, and desired that the argument might be confined to this point, and having heard both parties upon it, were of opinion that, under the provisions of the 15th sect. of Act X. of 1859, the Defendant was protected from enhancement, and they decreed accordingly.

The present appeal is against that decision, and the question is whether the Plaintiffs are entitled to enhance the rent in the manner in which they claim to enhance it. The notice of enhancement is this:—"Be it known that in the 3*a.* 4*g.* share of *pergunnah Mahomedshahee*, our *zemindary*, the 37 *mouzahs* with *hoodas*, *julkur*, &c., of *turuf Oomedpore*, on a *jumma* of Rs. 8,346. 14*a.* 4*p.* without settlement, and liable to increase or decrease, used to be recorded in the name of the late *Baboo Nil Comul Pal Chowdhry*. On a survey of the lands of the said *jumma*, the same has been shewn to comprise 26,236 *beegahs* and 8 *cottahs* of land, and after deduction of 1041 *beegahs* and 3 *cottahs* on account of *ghur-lack* (unculturable), *khal khonduck* (ditches, &c.), a net area of 25,196 *beegahs* and 5 *cottahs* at the prevailing *pergunnah* rate was assessed at Rs. 36,008. 11*a.* 8*p.*, and a notice having been served accordingly, and a suit No. 63 of 1855 brought for assessment of the said *jumma* in the Court of the Principal *Sudder Ameen* of this *Zillah*. On an appeal preferred by us, the Judges of the *Sudder* Court, on the 11th of December, 1860 (referring to the decree in the former suit), declared that the said *mehal* was liable to assessment, in accordance with the decision of the *Zillah* Court, after service of notice, therefore, as there is in your possession an excess of land on a deficient *jumma*, and the productive powers of that land have increased, we consequently serve you with this notice, under the provisions of sect. 13 of Act X. of 1859, for the purpose of getting from you from the year 1269 the rents of 25,196 *beegahs* and 5 *cottahs* out of 26,237 *beegahs* and 8 *cottahs* of land, less 1041 *beegahs* and 3 *cottahs* of unculturable ditch, waste land, &c., comprised within the 37 *mouzahs* and *hoodas*, with *julkurs*, of the aforesaid *turuf Oomedpore*, by assessment thereof at the prevailing *pergunnah* rates."

Therefore, the ground upon which the Plaintiffs seek to enhance the rent is, that there is in the Defendants' possession an excess of land on a deficient *jumma*, and that the productive powers of that land have increased.

Those are grounds, though not accurately expressed, upon which the rents of *ryots* having rights of occupancy are liable to enhancement under sect. 17 of Act X. of 1859; but they are not applicable to a

dependent *talook* like the present, which was created before the decennial settlement. *Talooks* of that description are protected by sect. 51 of Reg. VIII. of 1793, from enhancement, except under the circumstances therein mentioned. See also Reg. XLIV. of 1793, sect. 7. The decree of the collector, therefore, could not be supported even if the rent of the *talook* were liable to enhancement under the provisions of sect. 51 of Reg. VIII. of 1793.

It may, however, be well to consider whether the High Court was right in holding that the Defendant was by sect. 15 of Act X. of 1859, protected from enhancement in any case, and upon any grounds. Sect. 15 says:—"No dependent *talookdar*, or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the *ryots*, who, in the provinces of *Bengal*, *Behar*, *Orrissa*, and *Benares*, holds his *talook* or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in sect. 51 of Reg. VIII., 1793, or in any law to the contrary notwithstanding." To bring the case within that section, he must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the permanent settlement. It should be remarked that sect. 15 does not render liable to enhancement dependent *talookdars*, who were exempted by sect. 51 of Reg. VIII. of 1793, but exempts from enhancement, amongst others, dependent *talookdars* who, under the provisions of that section, might otherwise be liable to enhancement.

Now, the first question is, did the Defendant in this case hold at a fixed rent? Proceedings which have been taken from time to time between parties who were represented by the parties in the present suit, the *Zemindar* on the one side, and the owner of the *talook* on the other, have been put in evidence. The first decision to which it is important to refer is that of the 30th of May, 1811. That was a suit brought by *Rajender Deb Roy*, the then *talookdar*, against, amongst other Defendants, *Kishen Mohun Banerjee*, who derived his title to the *zemindary* through a purchase at a sale in execution of a decree of the Supreme Court of *Calcutta*, in the month of *Srabun*, 1207, and who also claimed *turuf Oomedpore* under the same purchase. The Plaintiff claimed the *talook* under a gift from his father, the former *Zemindar*, dated the 27th *Bysack*, 1195, before the date of the sale in execution. The *Zillah* Judge, acting upon the bill of sale of the Supreme Court, dismissed the Plaintiff's suit. The Plaintiff thereupon appealed to the Provincial Court of *Calcutta*, and filed the deed of gift from his father, dated the 27th *Bysack*, 1195. The case was heard in the first instance by the second Judge, who held that, although *Kishen Mohun Banerjee* purchased the *zemindary* rights of the former *Zemindar*, yet the *talookdaree* rights of the Appellant could not be destroyed, and under those circumstances it was his opinion that the decision of the *Zillah* Judge was wrong and should be reversed, and that the Appellant should pay to the Respondent the rents of the *talook* as he did to the former *Zemindar* at the rates of the *tahoot* of the decennial settlement. The case afterwards came up in the Court of the first Judge, who agreed with the second Judge, and a decree was accordingly passed as follows:—"The first and second Judges, having agreed in their judgment that the decision of the *Zillah* Court should be reversed, and that *talook turuf Oomedpore* be declared as the right of the Appellant in the manner of a *Mofussil talook*, therefore it was ordered that the decision of Mr. *James Devienne Thourne*, acting Judge of the Civil Court of the above *Zillah*, dated the 21st of March of the year 1808, be reversed and set aside; and that the Appellant having been put and maintained in possession of the *turuf* aforesaid, do pay the rents thereof to the Respondent *Kishen Mohun Banerjee*, in accordance with the amount laid down in the *tahoot* of the decennial settlement, which the Appellant used to pay to the former *Zemindar*." Now the rent is there treated as a fixed rent which the Defendant *talookdar* used to pay to the *Zemindar*.

That decree having been passed in the year 1811, a suit was commenced on the 17th of September, 1812, by the then *Zemindars*, *Petumber Ghose*, and *Kishen Mohun Banerjee*, against *Mohesh Chunder Deb Roy*, minor son of *Rajender Deb Roy*, and against *Ramender Deb Roy*, guardian of the above minor, in the Court of *Zillah Jessore*, for the recovery of Rs. 1443. 3*a*. 12*p*., alleged to be due for arrears of rent, upon the following allegation, viz., that having purchased the 3*a*. 4*g*. share of *pergunnah Mahomedshahee* &c., the *zemindary* of *Gobind Deb Roy*, they went on paying year by year the sum of Rs. 9268. 8*a*. 1*g*. 1*c*. *sicca*, the *jumma* of the above. That on the 30th of May, 1811, A. D., by a decision of the Judges of the Provincial Court, the *talooks* aforesaid were decreed as the right of *Rajender Deb Roy*, as his *mofussil talook*. After the death of the aforesaid, the Defendants had possession, and when we called for from them the sum aforesaid, being the *jumma* as per *tahoot*, which was the proper rental, they, out of the *jumma* of the decennial settlement, acknowledged only the sum of Rs. 7825. 4*a*. 8*g*. 1*c*. *sicca*. But as out of the total of *jumma* claimed after deduction of the amount of *jumma* acknowledged by the Defendants, a sum of Rs. 1443. 3*a*. 13*g*. remains due, we therefore institute a miscellaneous suit in the *Zillah* Court, for the recovery of the rent at the rates of the decennial settlement. This appears from the decree of the *Sudder* Court of the 30th of April, 1821. It also appears from the said decree, that on the 23rd of December, 1813, the acting Judge of the *Zillah* Court, on all the grounds stated in his decision, and in accordance with the decision of the Provincial Court, dated the 30th of May, 1811, already referred to,—"Ordered that the said suit be decreed, and that the Defendants were to pay to the Plaintiffs year by year the sum of Rs. 9268. 8*a*. as the rents of the said *talook*." The Defendants preferred an appeal to the Provincial Court, and that Court, in accordance with a judgment of an appointed Judge of the Court that the former owner of the *zemindary* had before the decennial settlement made over the *talook* at a yearly *jumma* of Rs.7825. 4*a*. 8*g*. 1*c*. *sicca*, ordered :—"That the decision of the acting Judge of *Zillah Jessore*, dated the 23rd of December, 1813, be reversed and quashed, and that the costs of both Courts be borne by the Respondents."

The case came before the *Sudder* Court on special appeal from the Provincial Court. In their decree, dated the 30th of April, 1821, they state that, amongst other documents, "two papers were put in, viz., on the part of the Plaintiffs, a *dhoul* of the decennial settlement for the year 1197, shewing the *jumma* of *turuf Oomedpore* at the sum mentioned in the Plaintiff's plaint; and, on the part of the Defendants, *hustabood* paper of the year 1197 B., shewing a decrease of the *jumma* recorded in the *Heba*, and fixing it, after deduction of improper *abwabs*, at the sum of Rs. 7631." They then proceed,—"In the opinion of this Court, after examination of those two documents, they are held to be unworthy of credit or reliance, because the document filed by the Plaintiff being alleged to be a document from the collector's office, does not bear the signature or initials of any government officer; and although on the second document there appears to be the initials of the collector's name, yet his name is not even mentioned in the said *hustabood*, and therefore none of those documents appear sufficient to determine the amount of *jumma* on the *tahoots* of the settlement of that year. In short, the amount of *jumma* of the disputed *talooks*, as alleged by both parties, has not been proved by them before this Court; and the decision of the Provincial Court as to the amount it maintains for those *talooks* by rejecting the claim of the Plaintiffs should be confirmed, as the parties do not agree as to the amount of *jumma* of those *talooks* between them; under those circumstances, for the purpose of putting an end to quarrels and disputes between the parties, suits have been instituted for a very long time, that is, from the time of institution of the old suit and of the new one, about the *jumma* of the disputed *talooks* in the *Zillah* and in this Court. The order of the Court is that the *jumma* of *talook Oomedpore* be fixed according

to *pergunnah* rates, and in accordance with the rules laid down in sect. 8, Reg. V. of 1812." Not that the *jumma* shall be enhanced, but that there being a dispute between the parties as to what was the amount of the *jumma*, it shall be fixed according to the *pergunnah* rates, &c. They thought that it ought to be paid according to *pergunnah* rates, because they could not ascertain what was the actual amount of the rent; but they did not assess the rent, or fix by their decree the amount to be paid for arrears; nor did they order the rent to be enhanced. The suit was not for the purpose of enhancing the rent, but a miscellaneous suit for recovering arrears. This Committee has already pointed out in a former case of *Gopal Lall*, which was cited in argument, that there is a great distinction between a suit to enhance and a suit to recover arrears. They there say,—"Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. To a suit for enhancement it will be no bar to plead that all arrears according to the original rate have been paid."

The *Zemindar*, acting upon that decision of the *Sudder* Court, subsequently brought a suit to enhance the rent. We have not the decree of the Court, but we have a reference to it in the 22nd volume of the printed decisions of the *Sudder* Court, of the 11th of December, 1860. The Court says,—"This suit was brought to enhance the rents of *talook Oomedpore*, upon a given measurement and *pergunnah* rates, on the averment that the said *talook* constituted an under-tenure, comprised in the Plaintiff's 3*a*. 4*g*. share of *turuf Mahomedshahee*, purchased by him at an auction sale, held by order of the Master in Equity of the Supreme Court." It is to be observed that it was purchased, not under a sale for arrears of revenue, but in execution of a decree. Then they proceed to state what the different contentions were, and they finally come to this conclusion:—"As then it is evident that *Gobind Chunder Dutt*, who purchased the right of *Issarchunder*, the mortgagee proprietor, is entitled to be regarded as *talookdar* of the entire *turuf* of *Oomedpore*, and as it is nowhere pleaded that notice of enhancement has been served upon him, the decree in Plaintiff's favour giving him the authority to assess must be subject to Plaintiff's serving the notice required by the law. The present order, therefore, will, under the peculiar circumstances of the case, merely be to the recognition of Plaintiff's right to assess after proper service of notice on the proper parties." Probably they used the word "assess" instead of "enhance," and intended to declare that the Plaintiff had a right to enhance upon service of the proper notice. After that decision had been pronounced, an application was made to the Court to review their judgment. The Court say:—"Now it is urged through the present petition, and it is objected in Court, that if the decree of the year 1821 confers on the Plaintiff the power to assess, the contention now arises, What rates is the Plaintiff entitled to obtain on such reassessment of the rental? It has been urged that in the case decided in the *Sudder* Court in the year 1821, the former owner in that case had merely based his right for assessment at an increased rental on the following grounds: That the rents of the lands should be of an amount equal to the amount of *Sudder jumma* of the *zemindaries*, that is, that it should be Rs. 9400, and the *talookdar* had pleaded in preference thereto that he could remain in possession on the *mokurrareee* (fixed) rental of Rs.7400; consequently, in the above suit the only point at issue was whether the *owner* of the property could enhance the rent to Rs. 9400, or whether the *talookdar* was entitled to remain in possession on the *jumma* of Rs.7400." Then they say:—"Mr. *Peterson* now asks that an enhancement be decreed in our decision, in accordance with the increase granted in the old suit. Our judgment is, that as the Court had merely decided that the Plaintiff could enhance after service of the necessary notices on the tenants, and therefore the present contention as to the amount of enhancement which will have to be fixed in accordance

with other rates as above-mentioned, belong to another subject. And after service of the notices above-mentioned upon the tenant, it will then be time to decide that question." Therefore the Court, proceeding on the decree of 1821, declared that the Plaintiff was entitled to enhance, but refused to decide to what extent the enhancement could be made, and left that question, involving the construction of the decree of 1821, open for decision after notice of enhancement should have been served.

Now, it does not appear that either after the decree of the 30th of April, 1821, or after that of the 11th of December, 1860, the Defendant, or those under whom he claims, ever paid a higher rent than *Sicca* rupees 7825 odd, or 8846 odd, the corresponding amount in Company's rupees, or that the Plaintiffs of the *Zemindars* under whom they claim ever obtained a decree for arrears assessed at a higher rate; on the contrary, it appears that after the decree of 1821 and before that of December, 1860, viz., on the 22nd of March, 1827, a farmer of the *zemindary* sued for and obtained a decree against the *talookdar* for arrears of rent at the rate of *sicca* rupees 7825 odd, the *jumma* which he stated was acknowledged by the *talookdar*. In his plaint in that suit he says the *talook* was the *talook* of *Rajender Deb Roy*; that after his death *Mohesh Chunder Roy*, having come into possession by right of inheritance without any settlement as to the *jumma*, used to pay me the sum of Rs. 7825 *&c.* 8¼*p.* as the yearly rental acknowledged by him.

On the 19th of August, 1847, a similar decree for arrears was obtained, the *jumma* of the *talook* being stated to be 8846 odd, Company's rupees.

On the 31st of March, 1848, there was a similar decree for arrears recovered by the *Zemindar*, who, in his plaint, stated that the *talook* was recorded in the name of the Defendants, liable to increase or decrease, at the rent of 8846 odd, Company's rupees.

Numerous other decrees were obtained by the *Zemindars* against the *talookdars* for arrears of rent between 1826 and 1860, either at the rate of 7825 odd, *sicca* rupees, or at the corresponding rate of 8846 odd, Company's rupees.

It appears, therefore, to their Lordships that there was ample evidence, independently of any presumption arising under Act X. of 1859, sect. 16, to prove that the *talook* was held at a fixed rent, and that such rent had not been changed from the time of the permanent settlement. The rent was not changed by the decree of 1821, for, whether right or wrong, it at most amounted to a declaratory decree that the *jumma* should be fixed at *pergunnah* rates; or, according to the construction put upon it by the decree of 1860, that the Plaintiff was entitled to enhance. The rent never was assessed at *pergunnah* rates, and never was enhanced. Besides, there is the statement in the judgment of the High Court that the rent had admittedly never varied.

We have been referred to the case of *Nuffer Chunder Pal Chowdhry and Another* v. *Poulson* (1), decided by this Committee on the 24th of January, 1873. It appears to their Lordships that that is quite a different case from the present. That was the case of a *mokurruree* tenure, and it was proved that it was created as late as 1824. Their Lordships say:—"It should be stated that this suit was decided before Act X., to which reference has been made, came into operation. The state of the law then was that he could defend himself by shewing an ancient tenure going back twelve years before the decennial settlement; but he made no case of the kind. He made a case of *mokurruree* tenure established by *pottahs* in 1824." The fact that those *pottahs* were created in 1824, long since the time of the permanent settlement, rebutted the presumption that the tenure had been held from the time of the permanent settlement.

Our attention has been called by the learned counsel for the Appellant to the following paragraph in the judgment in that case:—"In their Lordships' opinion the Defendant did establish that the rent at which the *talook* was held had not been changed for a period of twenty years be-

(1) 12 B. L. R. 53; S. C. 19 Suth. W. R. 175.

fore the commencement of this suit, and that he thereby cast upon the Plaintiff the burden of shewing 'the contrary' (in the words of the Act) or that the rent had been fixed at some later period; and their Lordships are of opinion that the Plaintiff has succeeded in proving that which was cast upon him to prove." But that opinion merely goes to the effect that proof that the *pottahs* were created subsequently to the permanent settlement rebutted the presumption created by the 16th section of Act X. of 1859, that the tenure had been held at a uniform rent from the time of the permanent settlement.

It should be remarked that a rent may be a fixed rent though liable under certain conditions to be enhanced. That position is fully borne out by sect. 15, Act X. of 1859. The section does not merely say that the tenures therein described shall not be liable to enhancement "if held at a fixed rent," but "if held at a fixed rent which has not been changed from the time of the permanent settlement." If the mere fact of holding at a fixed rent was a bar to enhancement, the section would have been unnecessary. The term "fixed rent" in that section cannot mean a rent so permanently fixed that it cannot be enhanced under any circumstances.

It is unnecessary to determine what would have been the effect of the decrees of 1821 and 1860, so long as they were unreversed, if Act X. of 1859 had not been passed. Their Lordships concur entirely with the High Court that the effect of those decrees did not put the Plaintiffs in a better position than other landlords who, previously to the passing of Act X., had a good right to enhance, but whose right, if not exercised from the time of the permanent settlement, was taken away by the 15th section of that Act.

Upon the whole, their Lordships are of opinion that the High Court came to a correct conclusion in holding that the rent was not liable to enhancement, and they will humbly recommend Her Majesty that the decree of the High Court be affirmed, and the appeal dismissed with costs.

There is another appeal which was consolidated with this. The recommendation to Her Majesty will be the same in both cases.

The Appellants will pay the costs of both appeals.

18th February 1875.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

LOKHEE NARAIN ROY CHOWDHRY (Defendant)* ... } *Appellant.*

versus

KALYPUDDO BANDOPADHYA and SHAMAPUDDO BANDOPADHYA (Plaintiffs) ... } *Respondents.*

Suit by a Certified Purchaser—Sect. 260 of Act VIII. of 1859.

Sect. 260 of Act VIII. of 1859 must be construed strictly and literally, and is applicable only to a suit brought against a certified purchaser to assert a *benamee* title against him. Where the certified purchaser is a Plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, may shew in defence that the holder of the certificate is a mere trustee.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was brought by the widow and two sons of *Ishan Chunder Banerjee* against *Baboo Lokhee Narain Roy*, to recover possession of a 9-*annas* share of the *zemindary* called *Kishenpoora*. The case set up in the plaint was that the nine *annas* had been purchased at an auction sale held in execution of a decree obtained against a lady of the name of *Mon-*

* 2 Cowell's I. A., p. 154.

moheenee Dabya, and that the certificate of purchase was given to *Ishan Chunder*; and it is alleged that *Lokhee Narain Roy* obtained forcible possession of the nine *annas* subsequently to the certificate of sale. The defence was that *Ishan Chunder* was the manager of *Lokhee Narain*, and had purchased the nine *annas benamee* for him. It appears that *Lokhee Narain* is himself the owner of seven *annas* of the *zemindary*, and that *Monmoheenee* was the owner, for life only, of the other nine *annas*; and that it was her life interest which was sold. It would seem also that *Lokhee Narain* claims the reversionary interest after *Monmoheenee's* death in those nine *annas*.

The Judge in settling the issues refused to lay down any issue upon the question whether the purchase was *benamee* or not, in consequence of a decision of the full bench of the High Court of *Calcutta* which had determined that it could not be shewn against the holder of a certificate of sale under an execution that he purchased *benamee* for another, whether the suit was brought by any person against him, or was brought by such holder himself as Plaintiff. The section of the *Code of Civil Procedure* upon which the question turned is sect. 260, and the words applicable to the question are these:—"And any suit brought against the certified purchaser on the ground that a purchase was made on behalf of any person not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs." It was held by this Committee in appeal from the case referred to,—the case of *Mussumat Buhuns Kowur* v. *Beharee Lall* (1),—that this section should be construed strictly and literally, and was applicable only to a suit brought against the certified purchaser to assert the *benamee* title against him, that the statute did not make *benamee* purchases illegal, and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and shew that he was the apparent owner only and a mere trustee. However, these issues being settled before the case had been decided on appeal, the Judge of course felt bound by the decision of the full Court and settled the following issues only:—"First, is the Defendant in possession of the disputed share of the *zemindary* under circumstances which amount to a transfer to him of the title which the Plaintiffs derived from their purchase (made by *Ishan Chunder Banerjee*)? If not, can the Plaintiffs obtain the relief sought for, and if in possession under such circumstances can the Defendant's possession be disturbed?" The Judge adds the note, "The plea set up by the Defendant, that the Plaintiff's father had purchased the property in question *benamee* for Defendant's benefit, and with his money, was not allowed under the full bench ruling of November 12, 1868."

In *Mussumat Buhuns Kowur* v. *Beharee Lall* (1), it was stated in the judgment of the High Court that if the certified purchaser was really *benameedar*, or a trustee for another person, and after the certificate of sale did some fresh act to put the real purchaser into possession, that might operate as a transfer of the property to him. They say:—"If a person who has gained title by limitation, waives that title in favour of the real owner, and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real owner. In like manner, if a *benameedar* should acknowledge the purchase to have been made *benamee*, and waive the right conferred upon him by sections 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of the possession to the real purchaser." This passage in the judgment was the authority under which the Judge laid down the two issues. It is obvious that in the decision of those issues it becomes material to inquire under what circumstances possession was given by one party to the other, and whether by reason of the antecedent relation between the parties it was meant to

(1) 14 Moore's Ind. App. Ca. 490; *Ante* p. 69.

(1) 11 Suth. W. R., F. B. p. 20.

operate as a transfer of the property. Therefore the relation of the parties, whether they really were *benameedar* and beneficial owner, was very proper to be inquired into and tried upon the issue in fact laid down; and accordingly the Judge of the Court of *Cuttack*, having taken evidence as to the sale and the circumstances under which it was made, proceeded to give his opinion upon the question whether the purchase was made by *Ishan Chunder* on his own behalf, or as the manager, and on behalf of *Lokhee Narain*.

A good deal of evidence was given upon that question, but the learned Judge seems to have rested his decision entirely upon two witnesses, and resting his decision upon those witnesses he came to the conclusion that the purchase had been made by *Ishan Chunder* on his own account and with his own funds. He says:—"It is proved from the evidence of two of the most trustworthy of their witnesses, both of them native gentlemen, whose evidence is entitled to the fullest belief, viz., *Kanye Lall Pundit* and *Baboo Mohun Persaud Roy*, that the purchase of the *zemindary* in dispute was made by *Ishan Chunder* on his own account and with his own funds." Their Lordships will refer to that evidence presently, but it seems to them the learned Judge has drawn too broad a conclusion from the facts which they proved. On the case coming before the High Court, the Judges seemed to think that it was unnecessary to go into the facts. They thought themselves bound by the decision of the full Court, and that they could not inquire into the transaction of the sale, whether it was *benamee* or not, and so tying their hands they came to the conclusion that what was done after the sale did not amount to a transfer of the property from *Ishan Chunder* to *Lokhee Narain*. Their judgment proceeds on those short grounds.

As the law at present stands, it is open for their Lordships to consider what was the real state of the case between these parties, and whether or no this purchase was made by *Ishan Chunder* on his own account, or on behalf of *Lokhee Narain*.

It is right to see in the first place what was the relation between the parties. It is plain, and indeed is not denied, that *Ishan Chunder* had been for a period of about a year the manager of this *Zemindar*, *Lokhee Narain*, and had the possession and management of some at least of his funds. It seems that a month only before this sale, he had advanced a sum of Rs. 4400 to this lady *Monmoheenee* upon a mortgage bond. That bond was taken in his own name, but it is admitted by the Plaintiffs that the bond, although taken in his own name, was in respect of an advance out of *Lokhee Narain's* money, and that he held the bond on behalf of, and as *benameedar* for, *Lokhee Narain*. The transaction of this sale followed soon after. The lady appears to have been in difficulties. A creditor obtained a judgment against her, and there was to be a sale in execution of her life-interest in nine *annas* of an estate in which *Lokhee Narain* held the other seven in his own right, and a reversionary interest in the nine that were sold. It would be a very proper thing for his general manager to look after that sale and see whether he could make an advantageous purchase for him.

It seems to be a fair conclusion from the evidence that *Ishan Chunder* had no express instructions previous to the sale from *Lokhee Narain* to purchase these nine *annas* for him. But those facts are proved, that *Russool*, who was an agent, or acting at that time as an agent, of *Lokhee Narain*, was a bidder for these nine *annas*, and had bid Rs. 2200 for the property. At that stage, when he had given that bidding, which was the last of four, some-body suggested to him that he ought not to bid for the *Zemindar*, but that *Ishan Chunder*, the manager, was the proper person to purchase the property for *Lokhee Narain*. Accordingly the evidence is that *Ishan Chunder* was called into the room, the state of the biddings made known to him, and then he made upon the last bidding of *Russool* the small advance of Rs. 2. If the witnesses are believed, he took the bidding out of *Russool's* hands, who was professing to act for *Lokhee Narain*, saying at the time, or shortly after, that he purchased for *Lokhee Narain*. No doubt that depends upon the credit due to the witnesses, but there

are circumstances in the case which corroborate them. There is the undoubted relation in which *Ishan Chunder* stood to the *Zemindar;* the facts, also, that *Russool* bid no more, and the very small advance upon his previous bidding seem to shew that there was an understanding between the two agents, otherwise it is very unlikely that that small advance should have stopped the biddings, and that the property should have been knocked down at that point.

But not only do the circumstances attending the bidding at the sale give corroboration to the story, but the subsequent conduct of *Ishan Chunder* is inconsistent with his having purchased on his own account, and is entirely consistent with the view that he purchased on behalf of the *Zemindar*, for whom he was acting as manager. "The possession is one of the real facts in the case about which there can be little dispute. It is not pretended that *Ishan Chunder* or his sons after his death obtained anything more than formal possession by the officer of the Court. They obtained that formal possession. How did they lose it? They assert in their plaint, and for a purpose, that *Lokhee Narain* took forcible possession. There is not the slightest evidence of it, and it is conceded now that nothing like forcible possession was or could be taken. But what is proved is this,—by two *ryots* who appear to have no interest one way or the other,—that they went to *Ishan Chunder*, hearing that he was the auction purchaser, to pay their rents. One of them says he went to him in the first place and was told by him to go to *Lokhee Narain* and pay it. The other says that he went first of all to *Lokhee Narain*, who told him that *Ishan Chunder* was the auction purchaser. He went to him, and *Ishan Chunder* said: "It is true I am the auction purchaser, but the rents are payable to *Lokhee Narain*." There is beyond that the fact that *Lokhee Narain* received the rents from those two *ryots*, and therefore was in possession so far as possession can be obtained of property which is in the hands of *ryots*.

He also paid the Government revenue. The petitions he presented to the collector have been relied upon by the Plaintiffs as shewing that he did not then put forward his own title. He made no allusion to it in either of the petitions, and in the second petition he put forward *Ishan Chunder* as the owner of the property. It is perfectly well known to be a common practice in *India* where property is in the name of a man, although not the true owner, that all the proceedings as far as the Government is concerned take place in his name. All that *Lokhee Narain* then wanted to do was to pay the Government revenue, so that the estate should be in no danger of being forfeited. Their Lordships think that no very strong inference can be drawn against him from the fact that in the petition he states the title according to what it ostensibly was. It is stated by several witnesses that before *Ishan Chunder* left *Cuttack* to go to *Calcutta* he promised *Lokhee Narain* to give him a *kobala* for the property, saying: "There is no immediate haste about it; you are in possession; it shall be done when I return." He went to *Calcutta* and died there. His sons returned to *Cuttack*, and then made a claim to the property upon the ground that *Ishan Chunder* had purchased it for himself and out of his own funds. The question having arisen, the parties very sensibly called a *punchayet* to decide the matter between them, and three or four respectable persons appear to have assembled and to have heard the whole case. They came to the conclusion that *Lokhee Narain* ought to have the estate, but they also appear to have thought that *Ishan Chunder* had not funds in his hands sufficient to pay the purchase-money unless he had realized *Monmoheenee's* bond. Probably the amount was not immediately available, and they directed that the bond should be given up by the sons to *Lokhee Narain*, having no doubt that it was a *Benamee* transaction, and that the sons should convey the nine *annas* to the *Zemindar*, on his paying Rs. 2800, which is the purchase-money and interest, with a small sum for profit, the sons having contended that their father bought in order to sell again at a profit.

Now it is as well at this point to refer to

the evidence of *Kanye Lall*, the *pundit*, on which the Judge of *Cuttack* relied for the conclusion to which he came. That witness says, "Before the arrival of the Plaintiffs from *Calcutta*, *Lokhee Narain Roy Chowdhry* said that the *zemindary* of *Kishenpoora* had been purchased *benamee* in the name of *Ishan Baboo*, on which I replied that we shall know this when the son of *Ishan Baboo* arrives from *Calcutta*. Afterwards, when *Kalypuddo*, the said son of *Ishan*, came from *Calcutta*, he was one day called to the presence of *Lokhee Narain Roy Chowdhry*, and he said that the said *zemindary* was purchased by his father, and if a profit were allowed to him he would execute a *kobala*. This took place in my house at the time;" several persons, mentioning them, "were present. I do not recollect who besides these were present. The *Baboo* (*Ishan*) had requested me and *Shodanund Mahapatur* and *Mokoond Persaud Roy* to take care of his property before he left." These two persons, then, one the *pundit*, were to take possession and manage *Ishan Chunder's* property in his absence. It might be expected that they would receive rent and pay the Government revenue if the estate had really belonged to *Ishan Chunder*. He goes on, "After his death, according to a letter written by his son *Kalypuddo*, we continued to take care of his property. We were assembled there with the object of coming to a settlement in respect of this *Kishenpoora zemindary*." He says the *mooktears* of both parties were present, and goes on thus: "We arranged that *Lokhee Narain* was to pay the purchase-money, together with interest from the date of purchase at the rate of 1 per cent. per mensem. *Kalypuddo* said that he would take a profit of Rs. 1000, and the *Chowdhry* said, 'I will give Rs. 300 as profit.' On that *Kalypuddo* said that he would consider, and give his answer early next morning. This was what passed on that occasion. At the time of attempting a settlement the *Chowdhry* said that he would pay Rs. 2800. The next day the *Chowdhry* sent me a sum of money, but I did not count how much." However, there is no doubt the money was sent. Then it appears that one of the sons intimated that in consequence of some advice he had received from his mother, he would not assent to the arrangement, nor would she; and so it appears to have gone off. The other witness, *Kodanundo Mohapaller*, states the award still more explicitly. He says: "The arrangement was to the effect that when the sum of Rs. 2800, together with the stamp for the *kobala*, was deposited with *Kanye Lall Pundit*, *Kalypuddo* and *Shamapuddo* should execute a *kobala*."

The award of the *punchayet* is really consistent with the case of *Lokhee Narain*. They evidently came to the conclusion that *Ishan Chunder* had not funds in his hands sufficient to pay the purchase-money but they thought that *Lokhee Narain* ought to have the estate, and they accordingly made an award, that he was to have the estate, and the others the purchase-money, allowing, probably by way of compromise, a small profit over.

Their Lordships, therefore, upon the whole matter, think that although *Ishan Chunder* may have had no previous instructions to purchase from *Lokhee Narain*, yet that, being his manager, and finding himself at this sale, he purchased for him, after having stopped *Russool*, who was there before him bidding for the *Zemindar*, in that operation. It would be contrary to equity to allow a man who steps in and assumes the character of a principal agent, and deposes another who was really acting as agent, afterwards to turn round and say, I purchased the estate, not for the principal, but for myself, and to obtain a profit out of the estate he had so purchased. *Ishan Chunder* himself does not appear to have intended to act in this manner, because, as already observed, he gave possession of the estate to the *Zemindar*, by directing the tenants to pay their rents to him, and does not appear to have interfered in any manner inconsistent with the character he took upon himself at the sale—the character of a manager for the *Zemindar*.

Under these circumstances, their Lordships think that the judgments of the Courts below cannot be sustained, but they are anxious that the whole question between these parties should be determined

without further litigation. In their view, the parties having agreed to submit to the award of arbitrators, it is right and equitable that if the estate is maintained in the *Zemindar Lokhee Narain's* hands, he should pay to the representatives of *Ishan Chunder* the Rs. 2800 which the arbitrators thought was the proper sum to be paid to them, together with interest thereon. It is difficult to fix the precise date from which the interest should run, but their Lordships think it is equitable the Respondents should receive interest for six years at 6 per centum per annum, making the sum of Rs. 1008 for interest. Their Lordships are desirous to secure the execution of this arrangement, and they will therefore humbly recommend Her Majesty to reverse the decrees below, and to direct that in case the Appellant pays into Court within six months the sum of Rs. 3808 (being the Rs. 2800 and interest thereon as aforesaid), the Respondents be at liberty to take such sum out of Court upon executing a *kobala* of the property to the Appellant, the stamp of which is to be paid by the Appellant, and that upon such payment into Court being made, the suit be dismissed, and the Respondents do pay to the Appellant the costs of the litigation in *India* and of this appeal.

That in case the Appellant does not pay the above amount into Court, the suit at the end of the said six months be dismissed, but in that case without any order as to the costs in *India* or of this appeal, and without prejudice to the right of the Respondents to retain the certificate of sale, and to take such proceedings as they may be advised to recover any moneys due to them from the Appellant in respect of the purchase of the said property or otherwise.

10th and 19th February and 2nd March, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAM TUHUL SINGH one of the (Defendants)* ... } *Appellant,*

versus

BISESWAR LAL SAHOO and another (Plaintiffs) ... } *Respondents.*

Purchase in execution of surplus proceeds of Revenue Sale—Setting aside Revenue Sale—Suit to recover Purchase-Money—Voluntary Payment.

A person, who with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase money, merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit.

An estate of which *R* was one of the registered shareholders was sold for arrears of revenue, and the amount realized, after deducting the arrears and the expenses of the sale, remained in deposit with the Collector. *S* the holder of a decree against *R*, notwithstanding objections made by *R*, caused the interest of *R* in the surplus proceeds in the hands of the Collector to be attached and sold in execution of his decree. At the execution sale *R's* interest was bought by *B*, and from the money paid by him the judgment debt of S, and the debts of other judgment-creditors of *R*, were satisfied. In the meanwhile *R* brought a suit to set aside the revenue sale of the estate, and obtained a decree in his favour in the High Court. *B* then applied to the Collector for *R's* share of the surplus proceeds, but his application was refused. In a suit by *B* against *R* to recover the price he had paid at the execution sale:

Held, reversing the judgment of the High Court, that such a suit could not be maintained.

2nd March, 1875.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

THE point raised by this appeal is one

* 2 Cowell's I. A. p 131; 15 B. L. R. p. 268.

of novelty, and of some nicety. The facts out of which it arises are undisputed.

The Appellant is one of the registered shareholders of a certain estate which, on the 16th of February, 1867, was sold for arrears of Government revenue, under the last Sale Law, Act XI., of 1859. The sale was confirmed by the Revenue Commissioners on the 14th of the following June; and after deducting the arrears of Government revenue and sale expenses, the sum of Rs.139,692 2*a*. 5*p*. remained as surplus proceeds in deposit in the hands of the collector. The share of the Appellant in such surplus proceeds, if the sale had stood, would have been upwards of Rs. 35,500. On the 24th of February, 1868, however, the Appellant, suing *in formâ pauperis*, instituted a suit for the purpose of setting aside the revenue sale, on the ground of the non-observance of one of the formalities prescribed by the Act. The suit was dismissed by the subordinate Judge; but on appeal the High Court, by an order, dated the 3rd of May, 1870, reversed his judgment, and remanded the cause for the trial of an issue which he had left untried; and on its coming back to them with the finding on that issue, made a final decree in the Appellant's favour, on the 31st of January, 1871. Against that decree there was an appeal to Her Majesty in Council, which was dismissed, in conformity with the judgment delivered at this Board on the 18th of December, 1873 (1). The sale, therefore, has been conclusively set aside; the estate restored to the Appellant and his co-sharers; and the purchase-money returned to the purchaser.

Before this, however, and on the 25th of November, 1867, one *Sheo Persaud Sookul*, a judgment creditor of the Appellant, attached his interest in these surplus proceeds in the collector's hands, and on the 23rd of December, 1867, obtained an order for the sale of that interest in execution. The sale was originally fixed for the 3rd of February following, but, on the Appellant's application, was postponed for a fortnight, and took place on the 18th of February, 1868, when the Appellant's interest in the surplus proceeds was knocked down for Rs. 8000 to one *Juldhari Panday*, who afterwards declared that he bought as agent for and on account of the Respondents. On the 16th of March, 1868, the Appellant filed a petition for the reversal of this sale on two grounds: first, that the surplus proceeds had not been ascertained to belong to the petitioner, inasmuch as he had instituted a suit to set aside the revenue sale which was then pending; and, secondly, that the sale had been held in contravention of the 242nd section of the *Code of Procedure*, which prescribes a different mode of enforcing an execution against money in the hands of a third party, and, consequently, that the sale was irregular. The Principal *Sudder Ameen*, in whose Court these execution proceedings were pending, by two orders, dated the 18th of April, 1868, disallowed these objections, and confirmed the sale; the formal certificate was, however, not delivered to the Respondents until the 28th of August, 1868. Of the Rs. 8000 which had been paid into Court upon the sale, about Rs. 5318 were drawn out by *Sheo Persaud Sookul*, and applied in satisfaction of the decrees held by him; and the residue was drawn out by other judgment creditors of the Appellant, and similarly applied by them.

On the 14th of August, 1871, the Respondents petitioned the collector for payment to them as purchasers under the execution sale of the whole of the Appellant's assumed share in the surplus proceeds of the revenue sale, being upwards of Rs. 35,500. The High Court had then made its final decree, setting aside the sale; and the collector therefore refused to part with the fund. Upon that, and on the 4th of August, 1872, the Respondents instituted the present suit for the recovery of Rs. 11,714 10*a*. 8*p*., being the Rs. 8000 with interest, calculated from the date of the payment into Court. It was brought against the Appellant, against the heir of *Sheo Persaud Sookul*, and against the other judgment creditors of the Appellant who had shared in the Rs. 8000; and the cause of action is thus stated in the plaint: "As the rights of the judgment debtor with respect to the surplus sale proceeds of the

(1) See *Bunwaree Lall* v. *Mohabeer Persaud Singh*, Law Rep. 1 Ind. Ap. 89; *Ante* p. 338.

said *mehal* did exist up to the time of the execution sale held in the case of *Sheo Persaud Sookul*, and as by reason of the revenue sale having already been confirmed, there was no reasonable ground of apprehension with respect to such surplus proceeds; and as the collector now objects to make over the surplus proceeds on the ground of the revenue sale being set aside; for these reasons, and, moreover, in consideration of the fact that the debts due by the judgment debtor have been satisfied out of the consideration money paid by your petitioners, and that the judgment debtor cannot be permitted to derive twofold advantages since he has been benefited by the reversal of the sale of the land, and he has not deposited in Court the amount of the purchase-money paid by your petitioners, the Plaintiffs are, under such circumstances, entitled by all means to recover the said purchase-money, with interest. The cause of action has accrued from the 25th of August, 1871" (the date of the collector's refusal to pay).

It does not appear very clearly with what object the Respondents sued the execution creditors, whether or not in order to establish an alternative case for relief against them, in case the suit should fail against the Appellant. The issues settled, however, seem to imply that the claim was for recovery of the money against one or other of the Defendants.

The Court of first instance dismissed the suit with costs against all the Defendants, holding that the Plaintiffs had established no title to a refund of the purchase-money paid. But the High Court, on appeal, reversed this decision, and made a decree for the recovery of the amount claimed from the Appellant; dismissing the suit as against the other Defendants, but without costs as regarded the representative of *Sheo Persaud Sookul*.

The appeal is against the last decree, and the single question is, whether the Plaintiffs (the Respondents) have shewn that they have any cause of action for the recovery of this money against the Appellant.

The appeal has, to their Lordships' great regret, been heard *ex parte*. This circumstance has rendered them more anxious to give full weight to every reason assigned by the learned Judges of the High Court in support of their decree, and to every consideration that can be suggested in favour of the absent Respondents. But they have, nevertheless, come to the conclusion that the Respondents have established no title to recover the sum sued for from the Appellant, and that the appeal ought to be allowed.

The learned Chief Justice of *Bengal*, in the judgment delivered by him, with the concurrence of the two other Judges who sat with him, says: "I think the rule that ought to be applied in this case is that which is applied by Courts of Equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale." And he then sites and relies upon a passage in Lord *Cottenham's* judgment in *Bellamy* v. *Sabine* (1), which he treats as establishing the broad proposition, that where a transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction. This observation of Lord *Cottenham's* was, however, made with reference to a particular objection taken to the granting equitable relief in that somewhat complicated case. The bill in *Bellamy* v. *Sabine* impeached two transactions: one, by which a needy father, tenant for life, and a needy son, tenant in tail, had, at the instigation of *Sabine*, a creditor of the father, come to a certain arrangement which involved the barring of the entail; the other, a transaction by which the son had sold and conveyed his remainder in fee, thus acquired, to *Sabine*. The son died in his fathers's lifetime, and the suit was brought by another son, who was next in remainder under the entail. Lord *Cottenham* held that the Plaintiff was entitled to sue either in that character, or as heir-at-law of his brother; that the transaction between the father and the elder brother could not be successfully impeached; but that the purchase from the latter by *Sabine* was fraudulent, and ought to be set aside. And then proceed-

(1) 2 Ph. 425.

ing to deal with the objection which had been taken, that the personal representative of the older brother had an interest in supporting that purchase, part of the purchase-money being still unpaid, and that it was contrary to the course of the Court to deal with the conflicting rights of the real and personal representatives, he made the observation relied upon. In fact, he ruled only that an interest derived under the conveyance impeached could not affect the equitable right of the heir-at-law to have that conveyance set aside for fraud. If this principle has any application to the present case, it seems to be against rather than in favour of the Respondents. The conveyance was set aside on the terms ordinarily imposed, viz., the repayment by the Plaintiff to *Sabine* of the sums actually paid by him. In their Lordships' opinion, however, the case of *Bellamy* v. *Sabine* and the other cases in equity which are cited in the judgment under appeal are inapplicable to the present, upon the broad ground that they all proceed upon the doctrine of Courts of Equity—that a Plaintiff who comes to be relieved from his own act, or the act of one whom he represents, on equitable grounds, must do equity, and submit to those equitable conditions which the Court may see fit to impose on its grant of relief. Here the Appellant is not seeking the aid of the Court, but is sued as a Defendant, and the money sought to be recovered has not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum*.

Again, their Lordships must observe that a fallacy, occasioned by some confusion in the use of the words "transaction" and "sale," seems to run through the judgment. What is the transaction or sale which has been set aside? It is not the execution sale under which the Rs.8000 were paid, but the statutory revenue sale. A good deal, no doubt, has been said in the judgment of the Court of first instance, and something has been said here at the bar, of the irregularity of the execution sale, and of the miscarriage of the Principal *Sudder Ameen* in putting up the Appellant's possible interest in the surplus proceeds for sale, instead of proceeding under the 242nd section of the *Code of Procedure*. And their Lordships think it is much to be regretted that that officer did not proceed under the wholesome provision which was designed in such cases to remedy a mischief of frequent occurrence in *India*—the ruinous sacrifice of property which an execution sale is apt to involve. But they must observe that since the objections of the Appellant were overruled, no attempt has been made to question the regularity or legal effect of that sale; that the Respondents held to it as long as there was a hope of their getting anything by it; that their present suit is not framed with the object of setting it aside, or of being relieved from it; and consequently, that any judgment declaring its invalidity, or treating it as a nullity, would be extra-judicial.

The learned Chief Justice no doubt seeks to meet the objection just taken by saying that the Appellant ought to have made the Respondents parties to the suit for setting aside the revenue sale, and holds that the Court ought to give them in this suit the relief which he assumes they would, if they had been made parties to it, have obtained in the other suit, by way of condition on the relief then granted. Their Lordships, however, fail to see that there was any obligation on the Appellant to make the Respondent parties to that suit, and have some doubt whether this question could have been litigated in a suit the only object of which was to determine whether a statutory sale was to stand good, or was to be set aside upon the terms prescribed by the statute. And in any case it would seem that the Respondents, if they conceived that they had an interest entitling them to defend that suit, of which they had full notice, might have applied to be made parties to it under the 73rd section of the *Code of Procedure*.

Upon the whole, then, their Lordships are of opinion that the course and practice of the Court of Chancery in setting aside transactions on account of fraud, or other recognised ground for equitable relief, afford no support to the decree under appeal.

Upon what ground, then, can the Respondents be said to have a substantive

cause of action for the recovery of this money from the Appellant?

What was the real nature of their purchase at the execution sale? What did they buy? They bought the Appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become *nil*. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that his suit had been commenced. There was no warranty or contract on his part. The sale was had under proceedings *in invitum*, and indeed against his express protest. The parties were at arm's length. The Appellant was free to prosecute his suit; the Respondents free to enforce their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting Rs.35, 500 for Rs.8000, dependent on the happening or non-happening of a certain event. And a substantial chance it must be taken to have been, since the construction of the clause in the Sale Law, on which the right to annul the sale depended, was doubtful, and the Court of first instance determined the question against the Appellant. If that judgment had stood, he would have lost his land; and the Respondents would have taken from him all its proceeds, except the Rs. 8000 applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the Appellant ought to be compelled to restore the Respondents to their original position, because the event on which they speculated has ultimately gone against them.

Then it is said that if the Respondents fail in the present suit, the Appellant will not only keep the estate which he has recovered, but will get debts to the amount of Rs.8000, for which his property was liable to be attached and sold, paid with the Plaintiffs' money.

But even if this were true, it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A.* of *B.'s* debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid: *Stokes* v. *Lewis* (1). Nor can the case of *A.* be better because he made the payment not *ex mero motu*, but in the course of a transaction which in one event would have turned out highly profitable to himself, and extremely detrimental to the person whose debts the money went to pay.

Their Lordships can find no ground on which the legal liability of the Appellant can satisfactorily be rested. The case seems to them to fall within the principle of that reported in the 4 *Bengal Law Reports*, Full Bench Ruling, page 11. The fact that in this case the worthlessness of the subject purchased was a consequence of the success of the judgment debtor in his own suit, and not of a recovery by a third party under a superior title, does not appear to them in the circumstances of this case to afford a distinction which ought to prevent the application of that principle.

Their Lordships, for obvious reasons, express no opinion whether the Respondents could have had any remedy against the execution creditors by a suit for setting aside the execution sale or otherwise; whether in such a case the right of the judgment creditors would not have been revived against the Appellant; or whether, if such a remedy ever existed, the Plaintiffs have lost it by the dismissal of this suit against those creditors. These and other questions were suggested in the course of the argument, but in determining this appeal it is unnecessary, and, indeed, would be improper to decide them.

Their Lordships will humbly advise Her Majesty to allow this appeal, and to direct that the decree of the High Court be varied by omitting so much thereof as orders and decrees "that the Plaintiffs do recover from the first Defendant the sum of Rs. 11,714 10*a.* 8*p.*, the principal and interest of money which they had paid upon

(1) 1 T. R. 20.

a sale to them of the right and interests of *Ram Tuhul Singh* in the surplus sale proceeds of a *talook Muleck Alypore Buzoorg*, which had been sold for arrears of Government revenue, and purchased by the Plaintiffs on the 18th of February, 1868;" and as orders and decrees "that *Ram Tuhul Singh*, Defendant, Respondent, do pay to the Plaintiffs, Appellants, this sum of Rs. 470 10*a.* 2*p.*;" and as orders and decrees "that the said first Defendant do pay to the Plaintiffs the costs incurred by them in the Lower Court;" and by ordering and decreeing in lieu thereof that the suit of the Plaintiffs do stand dismissed as against the Defendant *Ram Tuhul Singh*, and that the Plaintiffs do pay the costs incurred by the said Defendant both in the Lower and in the High Court.

Their Lordships are disposed to recommend an order in the above form, because they do not wish to interfere with the discretion exercised by the High Court in refusing to give his costs of the suit to the Defendant *Byjnath Sookul*. The Appellant must also have the costs of this appeal.

26th February, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RADHAMOHUN MUNDUL & others (Defendants) ... } *Appellants,*

versus

JADOO MONEE DOSSEE (Plaintiff) ... } *Respondent.*

Plaint—Variance between the case in the plaint and evidence—Evidence—Document proved to have been executed and long acted upon, weight of.

A Hindu widow sued to recover the share she was entitled to as heiress of her husband in the family property, claiming a portion in her absolute right, and a portion as one of the joint-*shebaets* of certain idols, that latter property being *Debuttur* property. As to a portion of the *Debuttur* property, the Lower Court found in her favour; but regarding the portion claimed in her absolute right, her suit was dismissed. The Subordinate Judge found the portion of the property to be the property of a certain idol and held, upon the suggestion on Plaintiff's behalf, that failing to prove her absolute right, she was entitled to a share as a joint-*shebaet*, that she could not recover in that capacity, as she had not sued as *shebaet* and failed to maintain her allegation in the plaint:

Held, upholding the decision of the High Court, that the objection which had been made to the reception of her claim by the Subordinate Judge was an objection rather of form than of substance and the Plaintiff was entitled to the relief she prayed for.

Regarding certain Government papers, which formed a portion of the Plaintiff's claim, the Defendants contended that the papers with the accumulations, had been by an agreement of the whole family then in existence devoted to the service of an idol, the contention on Plaintiff's behalf being that the supposed agreement of dedication, even if actually executed, was colourable and collusive, was not intended to have effect and was merely entered into for the purpose of defeating the possible rights of the widow and keeping the property in the hands of the male members of the family:—

Held, affirming the decision of the first Court and reversing that of the High Court, that an agreement proved, by very strong evidence, to have been not merely executed, but acted upon for a number of years, could not be possibly set aside as invalid, merely upon the suggestion that the amount set aside was an exorbitant amount and that there possibly might have been some intention to defraud widows and other persons.

THIS was a suit brought by the widow of one of six sons of one *Nurronarain*, to recover the share which she was entitled to as heiress of her husband in certain family property, and she claimed a portion of that property in her absolute right, and a portion as one of the joint *shebaets* of certain idols, that latter property being *debuttur* property. Her share became a fifth instead of a sixth by a family arrangement, whereby the share of one of the brothers had been extinguished. Her case came in the first instance before the Judge of the Twenty-four *Pergunnahs*; that judgment, together with the judgment of the High Court, and the course which the case has taken, make it unnecessary to refer to a great number of issues and of statements and a great deal of evidence in the case. That Judge decided in her favor with respect to a certain portion of the real pro-

perty and a certain portion of the personal property, and so far there is no question with respect to his decision. With respect to her claim to the *debuttur* property, he decided in her favor as to a portion of it, namely, a fifth share of Government papers for the sum of Rs. 14,000. He decided that she was entitled to a fifth share of those securities, and to retain them in her hands; but that inasmuch as they were *debuttur* property, she was not competent to waste the same by gift, sale, or in any other way. Upon the question — which was one of the main questions in the cause, raised between the parties—whether she had any right or title at all to property which was *debuttur*, he observed:— "It is admitted by both the parties that there exist ornaments, plates, and furniture as well as *debuttur* lands and rents for the use" of certain idols. The "question which then presents itself for my consideration is, whether the Plaintiff can have possession of the said properties. The Defendants do not allege that the widows of the family shall not be competent to hold possession of the said endowed properties; in other words, that they have not the power of exercising that control over the same which the male members of the family can exercise. They merely say that as the said properties are of a *debuttur* character, they are not susceptible of division among the shareholders; and that since the Plaintiff is a childless widow, she is not competent to carry on the service of the gods. That the properties in question do not admit of any partition among the co-sharers is a fact which must be admitted by me; but I do not see any reason why a widow of the family should be incapacitated from superintending the service of the gods. It is not urged by the Defendants that any such rule has been laid down in the family, and that under it the widows have been excluded from the above superintendence. On the other hand, among the *Hindus*, persons belonging to no other caste except that of *Brahmins* can perform the service of a god with his own hands, that is, worship the idol by touching its person. Men of other castes simply superintend the service of the gods and godesses established by themselves, while they cause their actual worship to be performed by *Brahmins*. Thus, when persons of the above description can conduct the service of idols in the above-mentioned manner, why should not the widows of their family be able to carry on worship in a similar way?" And after citing a decision of the High Court, he came to the following conclusion:—"Consequently, there is nothing to prevent the Court from finding that the Plaintiff has a right to hold possession of the *debuttur* properties enumerated by the Defendants in the 12th paragraph of their written statement, and to superintend the service of the gods conjointly with the other co-sharers."

Two other questions arose which it is necessary to notice, and two only. The Plaintiff claimed, among other properties, a right to a one-fifth share in a *talook* called *Talook Chunder Hatt*, which is No. 86 in the particulars of her plaint; and she claimed that, not as *debuttur* property, but in right of her husband, as her absolute property. The Subordinate Judge found that this property was in fact the property of a certain idol which may be called *Sreedhur*; and, therefore, he held that she had not maintained the allegation in her plaint. It was, indeed, suggested by her advocate before him that, although she had failed to prove an absolute right in the property, still she was entitled in her right of joint *shebaet* to a share of the property of the idol; but the Subordinate Judge held that as she had not framed her plaint in that way, and had not sued as *shebaet*, she could not recover in that capacity, and, therefore, he decided against her upon that point.

The other question, which is the most important question in the cause, was this:—The Defendants contended that other Government papers for a sum of two *lacs* and Rs. 15,000, which with the accumulations of interest had become a sum of two *lacs* and Rs. 57,000, had been, by an agreement of the whole family then in existence in 1859, devoted to the service of this idol *Sreedhur*, and, therefore, that the Plaintiff could not recover a share of that property, which she sued for, not in her capacity of *shebaet*, but as part of

her husband's estate. It was contended on the part of her advocate that the supposed agreement of dedication, even if actually executed, was colorable and collusive, that it was not intended to have effect, and was merely entered into for the purpose of defeating the possible rights of the widows, and keeping the property in the hands of the male members of the family. The Subordinate Judge found in favour of the Defendants upon this contention: That the agreement was executed, and was a *bonâ fide* agreement; and upon the same argument being used which had been used before with respect to the *talook*, namely, that if the Plaintiff was not entitled to any share of this as heiress of her husband, still she was entitled to some share of it as *shebaet*, he made the same reply that she had not sued as *shebaet*, and therefore dismissed her claim to it.

The decree is in these terms:—After giving her certain relief, it says "that she be further competent, by furnishing security against waste, to keep in her own possession a fifth share of the company's papers for Rs. 14,000, belonging to the estate of *Manick Chunder Mundul*, and owned by the idol *Gopinath Thakoor*, which are now in the hands of the principal Defendants: that with the exception of the idol *Sreedhur Thakoor*, in regard to whose *shebaet-ship* the compentency or otherwise of the Plaintiff has not been determined in this suit, she shall have the power of holding joint possession with the principal Defendants of the realties and personalities belonging to the other joint gods of the litigant parties."

Upon this, both parties appealed to the High Court. It is not necessary to notice the appeal of the Defendants. That was dismissed with cost, and no question is now raised about it; but it is necessary to notice the main points which were raised by the appeal of the Plaintiff. She contended that, in addition to the relief which she had obtained in the Court below, she was entitled to a share of this *talook*, which had been mentioned, and also to a share of the Government papers for two *lacs* and Rs. 57,000, either beneficially or as *shebaet*. The High Court Upon the first issue, namely, as to her share of the *talook*, decided in her favour that she was entitled to claim one-fifth as *shebaet*, and they observed that, although perhaps by a strict construction of the declaration, she might be held not to have expressed her claim to it properly, nevertheless, this was an objection rather of form than of substance, and that looking to the whole case, and considering that the evidence of both parties was gone into, they thought the justice of the case required that they should give her this relief.

Their Lordships are of opinion that the High Court was right in treating the objection which had been made to the reception of this claim by the Subordinate Judge as an objection rather of form than of substance, and in giving her the relief which she prayed for.

Then comes the question, and the more important question, as to her right to a share of the large sum of rupees, being Government paper, which the Defendants allege had been appropriated irrevocably by the family to the service of the idol *Sreedhur* by a memorandum of agreement of the 9th of February 1859. Upon that question the High Court, after intimating that there was no estoppel on the part of the Plaintiff, as there would have been none on the part of her husband from setting up that the agreement of appropriation on the part of the family was fraudulent and collusive, a point on which it is not necessary now to enter, came to the conclusion that the agreement was collusive. They do not appear to have doubted that such an agreement was executed upon the day it bears date, but they treat it as invalid and their reasons are to this effect:—They observe that in the memorandum of agreement, "no person is named whose duty it would be to see that the income from the notes was applied for the purposes mentioned, nor any provision for its being applied, and further, that upon the Defendants' own showing it was not applied, but was allowed to accumulate, and was invested in the purchase of other notes." Then "that the notes have not been produced." Then that *Hurry Mohun*, the late husband of the Plaintiff, had pledged some of these notes at the Bank of *Bengal*;

then, further, that there were no attesting witnesses to the memorandum, although they do not lay much stress upon that; and then they proceed to observe:—"The real aspect of the transaction appears to us to be that the parties, not wishing at that time to divide the whole of the Government notes amongst them, or, possibly, in order to prevent a widow from taking any part of it, and to preserve it for the male members of the family, restored to this contrivance to keep a portion as a joint fund to accumulate, and be afterwards used or divided as they might have occasion."

There Lordships are unable to concur in this finding of the High Court. The document is conclusively established, at all events, as far as its execution is concerned, about which there never appears to have been any serious dispute. Two of the Defendants, *Radha Mohun Mundul and Issur Chunder Mundul*, give evidence, and very distinct evidence, upon this point, and that evidence is confirmed by other witnesses. The occasion which is said to have given rise to it appears a legitimate one, and one not unlikely to suggest the execution of such a document. It is said that one of the brothers, *Chundernarain* being in an ailing condition, and probably not expecting to live long, desired that a division should be made of the family property, as far as it consisted of Company's paper, and was divisible; where upon a memorandum of agreement was entered into, which is to this effect:—That the heads of the family then existing, being the five brothers, and *Bhoggobutty Dassee*, the widow of *Uddoitto*, a deceased brother, agree to set apart certain promissory notes of the value of two *lacs* and Rs. 15,000 for the daily service of a certain idol called *Sreedhur*, and other religious objects connected with such service, and to divide the residue among them, in shares amounting to Rs. 45,000 for each. They take each the share of Rs. 45,000, and they all sign the agreement. There is abundant evidence of this document being subsequently acted upon. It appears that about three years after the document was executed, *Nistarinee Dassee*, the widow of *Romanath*, the son of *Uddoitto*, one of the brothers, brought an action against the brothers who were then alive to recover her share as a widow, whereupon the Defendants, including *Hurry Mohun* himself, the husband of the present Plaintiff, set up this agreement. It does not appear that the Plaintiff in that suit disputed it; and finally she accepted a compromise upon the terms of that agreement, she retaining what she would be entitled to receive on the supposition that it was valid, namely, altogether Rs. 45,000 of which 20,000 had been previously paid to her mother-in-law *Bhoggobutty Dassee*, who, as has been observed, was a party to the agreement. But, further, in addition to the evidence of the Defendants themselves, there is that of *Gomastahs* and others that this agreement was acted upon, that a temple was erected to the idol at a considerable cost, though the precise cost can scarcely be determined without going through a number of accounts, and that that temple took several years in erection. A number of accounts are put in, which, no doubt, may be open to an observation made by the High Court that specific entries in them were not sufficiently called attention to in the Court below, but which nevetheless, cannot be disregarded; and unless these accounts are wholly fabricated, which their Lordships see no reason whatever to suppose, they do show beyond all doubt that the agreement was acted upon to a great extent for many years, and that a great deal of money was spent upon the purposes contemplated by it. With regard to the observation of the High Court that the interest was not applied to the purposes indicated by the agreement, but was allowed to accumulate, and was invested in the purchase of other notes, it must be borne in mind that the amount accumulated, some Rs. 42,000, would by no means be the whole interest of those notes, and that such an accumulation would not be at all inconsistent with the agreement having been acted upon, and a considerable portion of the income having been applied to the purposes stated in it.

On the whole, it appears to their Lordships that this agreement is substantiated by very strong evidence. It is shown to

have been acted upon by all the parties; and their Lordships do not think themselves justified in putting it aside and declaring it to be a colorable transaction having no validity, merely upon the suggestion—for it amounts to no more—that the amount set aside was an exorbitant amount, and that there might possibly have been some intention to defraud widows or some other persons. It is not upon mere speculations of this sort that an agreement proved by evidence so strong to have been not merely executed, but acted upon for a number of years, can in their Lordships' judgment be properly set aside.

This agreement being, in their Lordships' opinion, established, the question still remains whether the Plaintiff is not entitled to her share of this property as joint *shebaet* of *debuttur* property appropriated to the service of this idol; and this question appears to their Lordships to depend very much on the same considerations as those which have induced them to uphold the judgment of the High Court with respect to her share of a *talook* which was purchased for the same idol, and, as far as it appears, by the same fund. It may be here observed that, although there is evidence of some parol agreement (one of the witnesses putting it as an agreement before the execution of this memorandum of February 1859) that the head of the family, the eldest brother, should be the sole *shebaet*, nevertheless that evidence appears to their Lordships to be inconsistent with the documents. The document itself, of February 1859, contains no mention or suggestion of there being any one *shebaet* to the exclusion of the rest. On the contrary, it would appear from it that all parties were equally entitled to be *shebaets* of the idol. But, further, the accounts which have been put in by the Defendants show by their heading that such was the intention; for, so far from stating that any one member of the family is entitled to retain all the property and to see to its application himself, the heading of the accounts treats all the members of the family, including widows of deceased brothers, as joint *shebaets*.

Under these circumstances, it appears to their Lordships that the Plaintiff, although she has failed to establish the title which she relied upon to the two *lacs* and Rs. 57,000, is nevertheless entitled to a share of it as joint *shebaet*; and therefore, their Lordships will humbly recommend Her Majesty to reverse so much of the decree of the High Court as declares the Plaintiff's right to a fifth share of the two *lacs* and Rs. 57,000, and the interest thereon, and as directs that one-fifth share and interest be delivered over and paid to her, and as condemns the Defendants in the payment of the costs of that appeal; and, in lieu thereof, to declare that the Plaintiff is entitled as joint *shebaet* to a fifth share of the Government notes for two *lacs* and Rs. 57,000 and is competent by furnishing security against waste to keep in her own possession the said fifth share and to hold the same, subject to the trusts for the worship of the idol *Sreedhur*, and by ordering that each party should bear his own costs of that appeal, that is, the appeal to the High Court; and their Lordships think that there should be no costs of this appeal.

27th February, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BABOO GUNGA PERSHAD (Defendant) ... } *Appellant*,

versus

BABOO INDERJEET SINGH (Plaintiff) ... } *Respondent*.

Evidence—Books of account, mere corroborative Evidence—Proof of Execution of Documents—Retrial.

The *onus* of proof of certain payments being on the Defendants (bankers) and the fact of those payments being distinctly out in issue, the mercantile

books of the firm were produced in evidence and a general statement was made by one of the Defendants to the effect that the books were correctly kept: *Held* that, the books being at most corroborative evidence, the mere general statement of the kind was not sufficient to satisfy the burden of proof lying on the Defendants; particularly as with respect to many of the disputed items, they had the means of producing much better evidence.

Where the Defendants' case principally rests on documents purported to have been signed by the Plaintiff, they should be put in the hands of the latter who should be called upon to admit or deny his alleged signature, and those documents should be specifically proved and witnesses called upon to state if they saw the Plaintiff sign them, or, if not, whether they could speak to the handwriting and generally what took place on the occasion when they were executed.

So ruled in a suit for sums claimed as unaccounted for, where the Defendants' case principally rested on two *amanutnamahs* and the endorsements of payments thereon purported to have been made by the Plaintiffs.

Though no retrial ought to be directed solely to enable a party to amend his case and though doing so in *India* would be especially objectionable, yet considering how much the conduct of a trial in *India* depended upon the Judge and the possibility of the Defendants having been misled by the Judge's giving undue weight to a piece of evidence on their behalf, with other circumstances of the case, retrial allowed upon certain terms as to costs.

THE Appellants in this case are bankers in the district of *Monghyr*, and the Respondents, who were the Plaintiffs in the action, are *Zemindars* resident in that district. They appear to have been in embarrassed circumstances, many decrees having been recovered against them. In this state of things they borrowed, as is admitted, from the Respondents, Rs. 29,000 upon a *Zurpeshgi* lease, the effect of which may shortly be stated to be that it was a lease for 15 years at a rent calculated to cover the interest on the Rs. 29,000 at nine per cent., and also the Government revenue payable on the property leased, the lessees and mortgagees undertaking to keep down the Government revenue, and to pay themselves such interest, and being at liberty to make what further profits they could out of the *Zurpeshgi*, or farming lease. At the end of the 15 years the principal sum was to be paid down in a lump sum and the property redeemed. That was the mortgage transaction. It is, however, admitted that it was further arranged between the parties that this sum of Rs. 29,000 should not be paid by the mortgagees, the bankers, into the hands of the mortgagors, but should be transferred to their account in the books of the former, to be applied, as occasion should require, in satisfaction of their judgment and other debts. The result of that arrangement was to make the bankers accounting parties to the Plaintiffs for Rs. 29,000.

It was, however, alleged by the Plaintiffs, though the transaction is denied by the Defendants, that the Rs. 29,000 proving insufficient to pay all the debts that were to be paid, one of the Plaintiffs, *Bidyanund Singh*, borrowed from his father-in-law a further sum of Rs. 3,157-8, and paid it into the bank, the bankers giving a deposit note in the name of the father-in-law, but treating the money as the money of the Plaintiffs, or, at all events, of *Bidyanund Singh*. The effect of this transaction, if it did take place, was of course to increase the sum for which the bankers were accountable by the amount of the further deposit.

That being the position of the parties, the Plaintiffs brought their suit, in which they claimed upwards of Rs. 10,000 as unaccounted for. They gave credit for admitted payments on their account to the amount of upwards of Rs. 22,000, and claimed the difference between that sum and the original Rs. 29,000, plus the Rs. 3,157-8, with interest. Therefore, as Mr. Justice *Phear* has observed, it lay upon the Plaintiffs to prove the payment of the additional sum of Rs. 3,157-8; and it lay upon the Defendants to disprove that payment, if the other side succeeded in establishing a *primâ facie* case against them; and in any case to account for so much of the Rs. 29,000 as the Plaintiffs did not admit to have been paid.

In the Court below the Subordinate Judge seems to have considered that the Plaintiffs' case was wholly false, and the Defendants' case wholly true, and to have dismissed the suit. It went on appeal to the High Court; and the learned Judges there considered it to have been very unsatisfactorily tried in the Lower Court.

They doubted whether it would not be proper, in the circumstances of the case, to remand it for retrial; but ultimately came to the opinion that after making one small allowance in favour of the Defendants, they ought to give the Plaintiffs a decree

for the amount claimed. It is against that decree that the present appeal has been brought, which has imposed upon this Board functions which it is not often called upon to exercise, namely, those of settling the items of a disputed account.

Their Lordships are disposed to concur generally with the High Court in the conclusion to which they came, that the case was unsatisfactorily tried by the Subordinate Judge, and that his decree cannot stand.

The evidence which he seems to have considered sufficient to prove the payments which the Defendants were bound to prove, consisted of the mercantile books of the banking firm and of a general statement by the Defendant *Gunga Pershad* that the items in those books were correct. Their Lordships are of opinion that the books being, as is admitted, at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence.

Again, the documentary evidence on which the Defendants' case principally rested consisted of the two *amanutnamahs* at pp. 40 and 45 of the Record, and the endorsements of payments thereon, which purported to have been signed by the Plaintiffs; because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the Plaintiffs; and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the Defendants would have been far more specific than a mere statement that they were identified and varified, as the Judge says, by the witnesses; the witnesses would have been called upon to state whether they saw *Bidyanund Singh* sign the first, or *Bidyanund Singh* and *Inderjeet* sign the second, or, if not, whether they could speak to the handwriting and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted. Those *amanutnamahs*, it may be remarked, were important, not merely by way of admissions of the actual sums that were therein stated by the endorsements to have been paid, but also as admissions of the liability for the rent and of the transfers of a balance of account into the joint names of *Addyanund* and *Hungseraj* and of another and subsequent balance into the separate names of *Addyanund* and *Hungseraj*, transactions which do not on the face of them appear to be in the ordinary course of business, and therefore required explanation. No such explanation has, however, been given by the witnesses or has been supplied by any document showing that those transfers were made by the authority or at the desire of the Plaintiffs. The importance of proving that the last of those transfers was so made is very great, because such evidence would have been gone for to show that the admitted *amanutnamah*, that for the Rs. 3,157, which was given by the firm to *Hungseraj*, was really given in consequence of a direction that the existing balance of the Rs. 29,000 should be so transferred, and, not as the Plaintiffs contend, as a deposit receipt for the additional sum which had been paid in.

Their Lordships, therefore, are clearly of opinion that even if they dissent from the judgment of the High Court, they are not in a condition to affirm the judgment of the Subordinate Judge which dismissed the Plaintiffs' suit.

On the other hand, their Lordships feel that in some respects the judgment of the High Court has gone too far, and contains here and there a passage which evinces some misconception of what took place in the Court below. For instance, at page 74, the learned Judge, who delivered that judgment, says, that neither *Gunga Pershad* nor the *Gomastahs* "say a single word about the receipt of Rs. 3,157-8, which *Bidyanund Singh* swears that he paid into the *Kothi*. *Gunga Pershad* does

not say that that was not received." The record, however, shows that *Gunga Pershad* in his evidence did state that neither *Hungsraj* nor *Bidyanund* had paid him money in cash, evidently meaning thereby to deny the transaction in question. Then, again, the learned judges, in dealing with a circumstance that can hardly have failed to strike them as it has struck their Lordships, namely, the probability that the bankers would in the ordinary course of business have given an *amanatnamah* for the original deposit of Rs. 29,000, say that the necessity for such a document was obviated by the *Zurpeshgi* itself, "which contains express mention of all the particulars relative to the deposit of the Rs. 29,000, and the duty of the Defendants in regard to its application." Their Lordships, however, on examining that instrument, cannot find that it contains any thing of this kind. It says:—"We have taken the same into our possession for the purpose of paying off debts due to *Mahajans*." But if the document be examined, it will be found that the pronoun "We" imports the Plaintiffs, not the Defendants; and consequently that the whole passage expresses the receipt of the mortgage money by the mortgagors, and not the real transaction between the parties, namely, that the money should be carried to the account of the Plaintiffs in the *Mahajan's* books.

It is further to be observed that the learned Judges appear to have been struck with the fact that, if the Subordinate Judge had acted more in accordance with the rules of evidence, and had not given an undue credit to the books, and the general statement of their correctness, he would have gone much more carefully into the trial of the issues before him, and to have thought at one time that his miscarriage in the conduct of the inquiry might be a sufficient reason for sending the case down to be re-tried. They came, however, ultimately to the conclusion that it would not be right to send the case back to a re-trial, because the Defendants had failed to make out so good a case as they might have done.

Their Lordships fully recognize the force of the consideration, which ultimately prevailed with the Judges of the High Court. They admit that a re-trial ought not to be directed solely to enable a party to mend his case, and that to do so in *India* would be especially objectionable. Nevertheless, considering in this particular case the doubt that exists as to what really took place in the Subordinate Judge's Court, and as to what is implied in his statement that the documents of which he speaks were identified and verified by the witnesses; considering also how much the conduct of a trial in *India* depends on the Judge, and that the Defendants may have been misled by his giving undue weight to the books, and to what was said concerning the entries in the books, and so prevented from going more fully into their case; and further, considering that in this case the question is not merely one of money but one of character, and that the evidence on this record fails to establish satisfactorily on which side the truth lies, their Lordships are disposed, if the Defendants should be so advised, to send back the case for re-trial; but they think that it would be unjust to do so, except upon putting the Defendants, who ought to have seen that their case was conducted better, upon the terms of paying the costs of the litigation so far. If they are willing to accept those terms, then their Lordships would be prepared to recommend Her Majesty that the case should be remanded. Their Lordships, desire to observe that if it should go back, the case should be tried much more strictly both with reference to the genuineness of the signatures of the endorsements on the two *amanatnamahs*, and with reference to particular payments. It is only necessary to instance one of the latter, namely, that which is said to have been made in satisfaction of the judgment-debt of *Ram Churn Singh* as to which the case of either side, if true, might have been far better proved. It will be for the Appellants to consider whether they accept these terms, or whether they are content to leave matters as they are. If they do not accept them, their Lordships will have no others alternative but that of recommending Her Majesty to dismiss the appeal, with costs.

The Appellants, having considered the

terms proposed to them by their Lordships, intimated by their Counsel that they accepted the same; and their Lordships, therefore, agreed humbly to report to Her Majesty that the case ought to be remanded to the High Court, with directions, upon payment by the Appellants, within six months after the date of Her Majesty's order on this report, of the costs incurred by the Respondents in the two Indian Courts except the stamp on the plaint (so far as the same remain unpaid), and also of the costs (if any), of the Respondents incurred on this appeal (the amount thereof to be certified by the Register), to remit the said case back to the *Zillah* Court for re-trial; and with a declaration that in default of such payment within the said six months, the decree of the High Court do stand affirmed; and that the costs of this appeal be paid by the Appellants.

10th and 11th March, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THAKOOR JEEBNATH SINGH (Plaintiff)* } *Appellant,*

versus

THE COURT OF WARDS and Others (Defendants) ... } *Respondents.*

Hindu Law—Mitakshara—Inheritance—Appointment of a Daughter.

By the Hindu law of inheritance as contained in the *Mitakshara*, the great-grandson of the great great great-grandfather of the deceased is a nearer heir to the deceased than his father's sister's son.

The case of *Bhyah Ram Singh* v *Agarh Singh*(1) followed.

The custom of Hindu law, under which a father, in default of male issue, might appoint a daughter to be as a son, or appoint her to raise a son for him, if not obsolete, as appears to be the opinion of the text writers, is one which in modern times does not seem to have been brought under the consideration of the Courts of Justice in *India*.

Assuming the custom to exist, inasmuch as it breaks in upon the general rules of succession, whoever claims by virtue of it to succeed as heir, must bring himself clearly within it. There seems to be no sufficient authority for holding that a father may delegate the power to appoint.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This was a suit brought by *Thakoor Jeebnath Singh* against *Baboo Brumnarain Singh*, represented by the Court of Wards, and the *Maharanee Heeranath Koowuree*, to recover the possession of the *raj* of *Ramgurh*, which is an impartible *raj*. The principal question raised in the suit turned upon the Hindu law of inheritance, and was whether the Plaintiff *Jeebnath Singh* or *Baboo Brumnarain Singh* was entitled to succeed the *Rajah Trilokenath*, who was the last proprietor of the *raj*. *Rajah Trilokenath* died childless, and, indeed, a minor. The Appellant *Jeebnath Singh* claims as father's sister's son, and no doubt he is a nearer relative, in one sense, to the deceased *Rajah* than the Respondent *Brumnarain Singh*; going back to the common ancestor, *Brumnarain* is the great-grandson of that common ancestor.

It was admitted by Mr. *Leith* in argument, that the case which was lately decided by this Tribunal, of *Bhyah Ram Singh* v. *Bhyah Agarh Singh*(1), was an authority decisively against the Appellant's claim. It is immaterial to consider whether *Brumnarain* was a *Sapinda* or *Samanodaka*, because he was clearly in one of those two classes, and whether in one or the other, he was in the line of male descendants from the common ancestor, and the decision referred to is that this line must be exhausted before *bundhoos* are resorted to, in order to discover the heir of the last proprietor. *Jeebnath Singh* is a *bundhoo* or cognate

* 2 Cowell's I. A., p. 163; 15 B. L. R., p. 190.

(1) 5 B. L. R., p. 293, S. C., 13 Moore's I. A., p. 373; 2 P. C. J., p. 566.

(1) 13 Moore's In. Ap. Ca. 373; 2 P. C. J., 566.

only, and therefore he cannot take as long as there is either a *Sapindu* or a *Samanodaka* in existence. The case, therefore, to which Mr. *Leith* referred, in the 13th Moore, has really decided the appeal, so far as that question is concerned, against the Appellant, and that case in principle followed two previous cases, one in the 2nd Moore, p. 132, and the other in the 4th Moore, p. 292.

The other point which Mr. *Leith* raised was this: that assuming the Appellant *Jeebnath* was not the nearest heir according to the ordinary rules of succession, he was made an heir by the act of *Maharajah Sidnath Singh*, who, he says, appointed a daughter, *Jeebnath's* mother, to raise a son to him; and he contends that by a rule of Hindu law, a son of a daughter so appointed is entitled to succeed in preference to more distant male relatives. That a rule of law of this nature is to be found amongst old collections of Hindu law appears to be established by the text to which Mr. *Leith* referred, but there seems to be an opinion amongst the text-writers that that rule has become obsolete. In Sir *Thomas Strange's* book, under the head of "Inheritance," he thus speaks of it: "Daughters.—The right of daughters to succeed in default of sons and widow is not to be confounded with that of the appointed daughter under the old law. That appointment was one of the many substitutions for the son, and by a fiction no longer subsisting regarded as one." Then he says, referring to another custom: "This is analogous to the law as applicable to the appointed daughter, but that substitution, with others of a more questionable kind, became obsolete." In Sir *William Macnaghten's* Treatise on Hindu Law, in the chapter on "Adoption," he says: "In former times it was the practice to affiliate daughters in default of male issue, but the practice is now forbidden. The other forms of adoption enumerated by *Menu* appear to be wholly obsolete in the present age." This appointment of a daughter may not be strictly an adoption, but the text-writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. But supposing it to exist, inasmuch as it breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it.

It is difficult to discover the precise ground on which the Plaintiff originally based this claim. The plaint certainly does not state enough to bring him within the rules as laid down in *Menu* and in the *Mitakshara*. The plaint says this: "Your petitioner's maternal uncle, *Maharajah Luchmeenath Singh Bahadoor*, agreeably to the council of his father, *Maharajah Sidnath Singh Bahadoor*, having given in marriage your Petitioner's mother, kept her under his roof, declaring and giving her hopes that if a son be born to her such son will stand in the relation of son's son to his mother's father, and that if at any time occasion arise, he will observe the religious rites of *sradh* (obsequies), and keep the estate intact; and accordingly your Petitioner, from the day of his birth to the present moment lived with the deceased *Maharajahs* in common for all the purposes of board, lodging, and worship." Now, in this statement it is not said that the *Maharajah Sidnath* by any act of his appointed the daughter, nor that the son, her brother, *Luchmeenath Singh*, did any formal act appointing her to raise a son to his father; the plaint says no more than that the latter gave her hopes that if a son was born to her such son would stand in that relation.

Looking at the text, it seems not only that the act of appointment must proceed from the father himself, but apparently should be made by himself, because all the forms of expression which are given are those which it is supposed the father himself would utter. In *Menu*, the leading passage referred to by Mr. *Leith* in chap. ix. sect. 127, is, "He who has no son may appoint his daughter in this manner to raise up a son for him, saying, 'the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies.'" The passages in the *Mitakshara* are to the same effect. In chap. i. sect. xi. cl. 3: "The

son of an appointed daughter is equal to him,—that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly, he is equal to the legitimate son, as described by *Vasisht'ha*,—'This damsel, who has no brother, I will give unto thee decked with ornaments: the son who may be born of her shall be my son.' Or that term may signify a daughter becoming by special appointment a son." The last is not the present case. As their Lordships understand, what is set up is, not that the daughter became a son by appointment, but that she was appointed as a special daughter from whom might proceed a son who should stand in the place of a son's son. "Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly, she is mentioned by *Vasisht'ha* as a son, but as third in rank." Then the note to that is,—"The *putrica-putra* is of four descriptions; the first is the daughter appointed to be a son; she is so by a stipulation to that effect. The next is her son. He obtains, of course, the name of son of an appointed daughter, without any special compact. This distinction, however, occurs: he is not in place of a son but in place of a son's son, and is a daughter's son,"—that is, the son of a daughter who is herself appointed to be in the place of a son. Then there is this: "The third description of son of an appointed daughter is the child born of a daughter who was given in marriage with an express stipulation in this form: the child which shall be born of her shall be mine for the purpose of performing my obsequies." The attempt is made to bring the Appellant within this third description of son of an appointed daughter. A special form of stipulation is given. It is stated that it must be expressed, and *Menu* also speaks of an express appointment proceeding in the same way from the father himself upon the marriage of the daughter. In this case no appointment was made by the father, and it certainly requires positive law or evidence of a custom from which the law may be presumed, that, supposing the rule still to exist that a father may appoint a daughter for this purpose, it is a part of it that he may delegate the appointment to his sons. There is nothing said of that power to delegate being a part of the law, but, on the contrary, the rules as to the manner of appointment given in the old authorities point to the act proceeding personally from the father. The law as to adoption of sons bears an analogy to this, but the usages of that law cannot, without authority, be imported into this mode of appointment. These adoptions must stand upon the authority relating to each. In this case there was no formal appointment by the father himself in his lifetime, and no sufficient authority has been cited to establish that what was done afterwards can have the effect of making the son of the daughter, who appears to have been married with the consent of her brother upon the condition that the husband should live in the house, equal for the purposes of succession to the son of a son. But, however, the law may be, the evidence of the authority supposed to have been given by *Maharajah Sidnath* to his sons, and of the exercise of it by them, is most vague and unsatisfactory. No more appears respecting the supposed exercise of it by the sons, than that when their sister married a condition was imposed upon the husband that they should live in the *Maharajah's* (her brother's) house, and the son be brought up as one of his. No ceremonies are proved to have been performed, nor any express form of appointment used. This evidence seems to be wholly insufficient to establish a formal appointment which is to have the serious consequences of altering the line of succession.

On the whole, therefore, their Lordships think that the judgments of the Courts below are correct, and they will humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

11th March, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MAHARAJAH JOYMANGAL SINGH BAHADOOR (Defendant) ... } *Appellant,*

versus

MOHAN RAM MARAWAREE (Plaintiff) } *Respondent.*

Arbitration—Award, Judgment in conformity with, final under sec. 325 of Act VIII. of 1859—No appeal to High Court and a fortiori none to Privy Council—Arbitrator's resignation, mere tender of, not vitiating award.

Upon a case being remanded to the District Judge with certain directions, the Judge referred the case to arbitration with the consent of the parties. The award was accordingly made, but was signed by the arbitrators separately. It was then filed in the *Zillah* Court and a decree was passed in conformity with it, which was subsequently set aside on appeal apparently on two grounds,—(1) that the award was informal, being separately signed by the arbitrators and (2) that the Judge proceeded irregularly in passing the decree without allowing ten day's time for bringing in objections to the award; and the case again remanded to the Judge to have the award put into a formal shape and regularly filed. The Judge acted accordingly, inducing, however, one of the arbitrators to withdraw his resignation and sign the award in the presence of the other.

Upon appeal against the judgment in conformity with the award:—

Held, that the judgment being in accordance with the award, was under sec. 325, Procedure Code, final, and that being so, no appeal lay against it to the High Court; and that *a fortiori*, the appeal from the judgment of the High Court to the Privy Council, could not be maintained.

Held, further, that the award was formal, the mere tender of the arbitrator's resignation afterwards withdrawn not affecting it; that there had been adjudication as to its validity and that that adjudication was final.

THIS is an appeal against a judgment of the High Court, dated the 18th January 1871, which dismissed an appeal that had been brought against a judgment of the *Zillah* Judge of *Bhaugulpore*, dated the 1st February 1870.

The circumstances out of which this appeal arises are shortly these:—The Respondent, who is a *Mohajan*, sued the Appellant, who is a person of high rank in the district, for the balance of an account arising out of transactions between them. That suit was first dismissed. There was an appeal by the Respondent from that decision to the High Court, and the High Court remanded the case for retrial to the *Zillah* Judge with certain directions. Upon its coming back to the Judge, it was suggested by him that all matters in dispute should be referred to arbitration; and that was done by the consent of the parties,—the arbitrators being a European gentleman, formerly the Judge of *Bhaugulpore*, and a member of the Bengal Civil Service, and a mahomedan who exercised Judicial functions in the district as the Judge of the small Cause Court. Those gentlemen entered upon the inquiry, and in the course of it certain books of account which had been produced by the Plaintiff were, on his application, given back to him. He took them out of the hands of the arbitrators, meaning, as he says, to bring them back; but they were, according to his account of what happened afterwards, taken from him by violence; and in any case they disappeared, and have not since been forth-coming. The arbitrators, however, made their award. It is not necessary to state in detail the form in which it was made. It suffices to say that they did not sign that award, as first made, together. The Mahomedan Judge first expressed his opinion, and after going through the facts stated that in his opinion the balance found by him to be due should be paid by the Appellant to the Respondent. It then went to Mr. *Sandys*, the other arbitrator, who seems to have made further inquiry, and to have had some communication on the subject with his co-arbitrator. But the award was on that occasion signed by them separately. It was then filed in the *Zillah* Court, and the Judge passed a decree in conformity with it. From that decree there was an appeal to the High Court, and the

decree was set aside, and properly set aside by the High Court, apparently on two grounds. The first was that the Judge had proceeded irregularly inasmuch as he had passed his decree without allowing the parties the ten days for bringing in objections to an award which the Code of Procedure allows them. The other ground on which the learned Judges of the High Court, or at least Mr. Justice *Norman*, proceeded, was that the award was altogether informal, inasmuch as it had been signed by the arbitrators separately. The result of that proceeding in the High Court was that the judgment appealed against was reversed with costs, and the case sent back to the *Zillah* Judge,—Mr. Justice *Norman* observing:—"The Judge will consider whether it would not be proper to send back the papers signed in pursuance of his former suggestion that an award may be duly and regularly signed by the arbitrators in the presence of each other." And in another passage he said:—"We leave it to the Judge, on hearing any objections made by the Defendant, or on the application of the Plaintiff for that purpose, to remit the award to the arbitrators under the provisions of the 324rd section, if he thinks that the ends of Justice will be served thereby." The other Judge, Mr. Justice *Elphinstone Jackson* after expressing a doubt whether there was any informality in the separate signature by the arbitrators, says:—"As, however, my learned Colleague is of an opposite opinion, I am ready to concur with him in remanding this case to the Judge, in order that he may take steps to have the award formally signed by the arbitrators at the same time, and not on different dates. I think also that there must be a remand, in order that the Appellant may obtain ten days time after the award is signed within which to prefer any objection he can legally urge against the award."

Now Mr. *Doyne* has pressed strongly upon their Lordships that the intention of the Court in making this remand was that the case should go back again to the arbitrators for re-consideration and re-adjudication before it came at all before the Judge in the shape of an award and that it was an essential part of that proceeding that the missing books should be produced and considered by the arbitrators, or that, if they could not be produced, their loss should be in some manner enquired into and accounted for. But their Lordships do not take that view of the order of remand. It seems to them clear, upon the face of the judgments of the learned Judges, that their intention was that the case should go back to the Judge; that he should in the first instance have the award put into a formal shape by getting it signed by both the arbitrators together; that when so signed it should be regularly filed; that the parties should have ten days within which to take their objections, whether founded on the abstraction of the books, or any other legal ground, to the validity of the award; and that the Judge should then proceed to adjudicate upon those objections. He himself seems to have taken that view of his duty, and he accordingly proposed to have the award signed by both the arbitrators in his presence. Then arose a new difficulty. Mr. *Sandys*, taking exception to some things that had been done, wrote a letter to the Judge, in which, after stating these objections, he says:—"Under the circumstances above detailed, I feel that I cannot with any seemly propriety continue to act any longer in this arbitration; and in the perplexity this gives rise to, I can discover no other alternative to be left me than herewith to submit my resignation." The Judge was very unwilling to accept that resignation, and induced Mr. *Sandys* to withdraw it. The result was that Mr. *Sandys* and the Mahomedan gentleman came before the Judge; they signed the award; the award was then regularly placed upon the file of the Court, and formal objections were brought in by the Appellant. One of these objections, the 5th, was that the act of the *Moulvie* (the Mahomedan arbitrator) in allowing the Plaintiff to take away his books was an irregular and illegal proceeding, and amounted to such misconduct as would vitiate the award. The Judge adjudicated upon those objections under the 324th and 325th sections of the Code of Procedure and overruled them.

He then made a decree in conformity

with the award, going neither beyond it, nor altering it in any way. Upon that there was a final appeal to the High Court, which resulted in the judgment now under appeal.

There Lordships entirely concur with the first point taken by the learned Judges of the High Court, namely, that the appeal was an appeal against the judgment passed in pursuance of an award made by the arbitrators; and that the judgment, being in accordance with the award, was, under the 325th section of the Code of Procedure, final. If this were so, it follows that no appeal lay against that decision of the Judge to the Court; and, *a fortiori*, that this appeal from the judgment of the High Court cannot be maintained. Their Lordships have already dealt with objections raised by Mr. *Doyne*, to the effect that the award was not in fact an award within the meaning of the Code of Procedure, inasmuch as it had not been made pursuant to the instructions with which the case was remanded; and that the arbitrators ought again to have considered the questions referred to them with the books, if they could get them or to have pursued the inquiry concerning the books. Therefore, it is not necessary to say more upon that point.

It was, however, further objected that the award was informal, and not properly the subject of a final adjudication by the Judge, because Mr. *Sandys*, at the time when he signed it, was *functus officio*. But their Lordships, looking to the mode in which he merely tendered his resignation to the Judge in a letter addressed to him, and afterwards withdrew it at the request of the Judge, are of opinion that he never formally divested himself of his character of arbitrator; and concur with the High Court in thinking that the award was a formal award; that there has been adjudication as to its validity, and that that adjudication is final.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

18th March, 1875.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner at Oudh.

GAJADHUR PERSHAD (Plaintiff),* ... } *Appellant,*

versus

THE TWO WIDOWS OF EMAM ALI BEG and Others (Defendants)... } *Respondents.*

Practice—Appeal to Privy Council—Leave to Appeal granted without Authority—Preliminary Objection—Special Leave to Appeal.

An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest moment, but may be entertained at any stage of the appeal, and is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.

An appeal being called on, and before the case was gone into on the merits, the objection was taken by the Respondent and appeared to be well founded. The Appellant thereupon applied to the Judicial Committee to grant him special leave to appeal, *nunc pro tunc*. *Held*, that it was competent to the Judicial Committee to grant such special leave, but leave was refused under the particular circumstances of the case.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

THIS case comes before their Lordships under circumstances of great irregularity in the proceedings. The leave to appeal granted by the judicial commissioner, Mr. *Currie*, is clearly *ultra vires*, and therefore the appeal is now before them without any proper authority. Mr. *Doyne* has taken the objection that the Appellant is in that position. He was met by a count-

* 2 Cowell's I, A., p. 205; 15 B. L. R., p. 221.

er objection on the part of Mr. *Leith* that the Respondents could not now be heard to object, inasmuch as they had not done so at an earlier period when they first became aware that the irregular petition of appeal had been lodged. Their Lordships think that the right practice is to take objections of this kind at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, their Lordships feel obliged to yield to it. But although their Lordships think that the objection should be taken at an early period, it is clearly competent to them to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced. Mr. *Doyne* has taken it at that time, and their Lordships think his objection ought to prevail. Mr. *Leith* then suggested that he desired to apply to this board for special leave to appeal; and no doubt there have been cases where, upon the appeal being called on and the objection discussed, their Lordships have given special leave to appeal, *nunc pro tunc*, directing that the petition to appeal should go to Her Majesty with the report upon the appeal itself. An Appellant, however, cannot be in a better position with regard to the application than that in which he would have stood if he had made it at an earlier period; and their Lordships have had to consider whether or no this is a case in which they ought to grant special leave to appeal; and they have come very clearly to the conclusion that it is not.

It seems that the Plaintiff is mortgagee, and the original Defendant, *Emam Ali Beg*, was mortgagor. *Emam Ali Beg* is dead; his two widows are on the record, and there is a third party now on the record as an intervenor, the *Rajah* of *Bhinga*, the Respondent, who became a purchaser of the estate from *Emam Ali Beg*, or of some interest in it. The original suit was for foreclosure of the mortgage, in which various questions as to the right to tack and other matters arose; and it seems that before a decree of foreclosure was finally obtained, a compromise was entered into between the Plaintiff and *Emam Ali Beg*. The compromise contained the following terms:—"That the Plaintiff is to get Rs. 10,000, the balance remaining after remission of a certain sum on account of interest recently accruing out of the aggregate amount of the principal, costs, and interest accruing up to the month of November, 1868. That from the 1st of December, 1868, the Defendant is to be liable for interest at the rate of Rs. 1. 8*a*. per cent. per mensem. That the Defendant's rights and interests in the village are to remain as before hypothecated to Plaintiff, mortgagee. That Defendant is to put the Plaintiff in possession of the estate, and to have the mutation of names effected in the Collector's Register of Proprietors, before *Bysakh* 1276 F. Plaintiff is to appropriate the proceeds towards payment of the interest due. Defendant is to pay to Plaintiff the whole amount in cash due to him within the two years from this day, in the case of the mutation of names having been effected in favour of and possession given to Plaintiff."

It seems that the Defendant did pay into Court a sum of about Rs. 10,700, the Rs. 700 being for interest, in pursuance of this compromise, and that the Plaintiff refused to accept it or to take it out of Court, upon the ground that by the terms of this compromise he was entitled to have the possession of the estate for two years, and a mutation of names, and afterwards to get this money. He petitioned the Court to give effect to this contention; but the deputy commissioner rejected the application, and stated that the Petitioner refused the money at his own risk, and would receive no interest from the time it had been paid into Court. This rejection was confirmed on appeal. The money having been thus refused, it appears that an order (dated 26th April, 1869) was made by the deputy commissioner for the repayment of the deposit of *Emam Ali Beg*. That was an irregular proceeding. The money ought not to have been paid out without notice. However, that was done. Thereupon began a set of proceedings on the part of the Plaintiff, the mortgagee, to

have the compromise carried into effect, which has led to the present appeal. It seems that the Plaintiff contended that he was entitled to have a decree of foreclosure in consequence of the withdrawal of the money. It is sufficient to say that the deputy commissioner held that he was entitled to the money, but not to a decree of foreclosure. The officiating commissioner reversed that decision and held that he was entitled to foreclose. The case then came before Mr. *Capper*, the Judicial Commissioner, and, on the 28th of June, 1870, he made a decree reversing the decree of the officiating commissioner, setting up that of the deputy commissioner, and holding that the Plaintiff could not have that relief. In the course of his judgment Mr. *Capper* says:—"It is not denied that this was a full payment of the sum due under the compromise, and, consequently, on that date all the conditions and stipulations of the mortgage contract, and all rights accruing under it to the mortgagees, actually ceased and were at an end." He also says the *Rajah*, the intervenor, "has agreed in Court to repay the Rs. 10,725 withdrawn, and it is asserted that this amount is actually in deposit in the treasury of the deputy commissioner." It appears Mr. *Capper* was not rightly informed, and that this money had not been so deposited, although it had been agreed that it should be. It is against this order that their Lordships are now for the first time, in March, 1875, asked to grant special leave to appeal.

Several subsequent proceedings have taken place. There was a petition for review, heard by Mr. *Capper* himself, who rejected it; and then the Plaintiff filed proceedings which it is difficult to characterize. There is a claim or petition to revive the decree of foreclosure, which had been reversed on appeal, another petition to review Mr. *Capper's* decision, and to revive the decree of the 5th of January, 1869, upon the ground that this money having been taken out after it was deposited the Plaintiff ought to be restored to the former state of things. But matters had greatly changed. The *Rajah* of *Bhinga* had come in as purchaser, and his rights as purchaser have never been tried. There are, it appears, conflicting contentions on the part of the *Rajah* and the representatives of *Emam Ali Beg* which have not been determined. These petitions came on before Mr. *Ouseley*, the then officiating commissioner, and he, it appears, felt some difficulty in dealing with them. He says in his judgment:—"It seems to me that at this stage of the proceedings the only thing that can be done is to call on the *Rajah* of *Bhinga* to shew cause why he should not pay the money which he agreed in Court to pay." The counsel for the *Rajah* apparently objected to that on the ground that the case was not heard in review of judgment, and that the Court could not call on his client to shew cause why he should not pay the money. It does not appear what was done before Mr. *Ouseley* upon that objection.

Then the case comes before Mr. *Currie*, who, apparently feeling the same difficulty, declined to admit a review of the order. He says this: "As Mr. *Capper* has already declined to admit a review of this order, and as the entire facts of the case as above detailed were before him at the time he passed his order, I do not feel justified in admitting his order to review; but taking the entire circumstances into consideration, and being of opinion that the Plaintiff was justified in urging his claim to possession under the deed of compromise, and that the Defendant fraudulently withdrew the money out of deposit before that point was determined, I am of opinion that the case is one which may properly be appealed to Her Majesty's Privy Council."

The judicial commissioner, therefore, feeling unable to give any relief himself, without any application apparently on the part of the Plaintiff, grants leave to him to appeal to Her Majesty in Council, which, as already observed, it was beyond his power to do.

Under these circumstances, their Lordships think it would be a wrong exercise of their judicial discretion to grant the special leave now applied for. There are only two grounds on which it is suggested that the appeal ought to be heard. The first is, that *Emam Ali Beg* did not pay

the proper amount into the Court under the compromise. It seems to have been suggested in the course of the proceedings that a small sum of Rs. 7 had not been paid in. Whatever may be the case in a proceeding where the party is entitled to avail himself of the strict law, it is obvious their Lordships would not give special leave to appeal upon any question of that kind. The other and substantial ground upon which alone leave could be granted, if at all, is that there is a large sum of money, to which the Plaintiff is clearly entitled, withdrawn under the circumstances already alluded to. How that sum is to be recovered, and what are the rights of the Plaintiff, arising from its withdrawal, and against whom, it is not for their Lordships, in dealing simply with the preliminary question of leave to appeal, to determine. It is enough to say that they think those rights may be ascertained more satisfactorily in some other proceedings than by this tribunal under the irregular appeal which has been sent up.

Their decision dismissing the appeal being upon the ground that the appeal is not properly before them will not, of course, prejudice any rights the Plaintiff may have either against the representatives of *Emam Ali Beg* or the *Rajah* of *Bhinga*.

Under these circumstances, their Lordships will humbly advise Her Majesty to dismiss the appeal. But this being upon a preliminary objection, only taken when the appeal was called on to be heard upon the merits, their Lordships think that there should be no order as to costs.

25th March, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

MAHARAJAH RAM KISHEN SINGH (Plaintiff) } *Appellant,*

versus

RAJAH SHEONUNDUN SINGH and another (Defendants) ... } *Respondents.*

Hindu Law—Joint Property—Separation of shares without actual partition by mêtes and bounds, effect of—Joint lease, not inconsistent with separate ownership—Practice—Defence raised for the first time before the Judicial Committee not allowed except in cases of manifest injustice.

Touching the question of separation of the joint property of a Hindu family, the principle is established that there may be a division of right and interest which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his separate share in severalty, severs the joint interest and extinguishes the rights springing from united family ownership. The question of intention must arise in all such cases and be determined in each upon its own circumstances [*Appooser* v. *Rama Subba Aiyan*. 11. Moore's I. A. 75 and 3 cases in 13. Moore's I. A. pp. 113, 181, 407 and another in L. R. 1. I. A. pp. 55, approved and followed.]

Joining in granting a lease is in no way inconsistent with the lessors being owners of separate shares. Until an actual partition of lands, they would be in the position of tenants in common in *England* and would for convenience join in granting leases.

Where the defence suggested for the first time before the Privy Council is raised neither by the Defendants' answer, the issues, nor the ground of appeal, it will be improper to give effect to it unless the evidence to support it is so clear and uncontradicted that it cannot, without manifest injustice, be disregarded.

* From the judgment of L. S. Jackson and MACPHERSON, J. J., dated 11th July, 1871.

Maharajah Ram Kissen Singh (the Appellant) brought this suit in the Civil Court of *Zillah Sarun*, so long ago as the year 1852, to recover shares of numerous villages in *Pergunnahs Mahashee* and *Bibrah*, which he claimed as maternal grandson and heir of *Rajcoomar Radha Mohun Singh*, who died on the 24th December, 1858.

The principal Defendants, the now Respondents, *Rajah Sheonundun Singh* and *Rajcoomar Deonundun Singh*, are the grandsons of *Rajah Dost Doon Singh*, an elder brother of *Radha Mohun*. *Sheonundun* is sued as guardian of his minor brother, *Deonundun*. *Rajah Dost Doon* died before *Radha Mohun*, leaving two sons *Rajah Rughoonundun*, who survived his uncle, *Radha Mohun*, and died childless on the 16th September 1852, and *Judoonundun*, who was the father of the two Defendants, and died in *Radha Mohun's* life time.

It appears that *Radha Mohun* had a son, *Hurnundun*, who died in his life-time, leaving a widow, *Munroop*, and a daughter, *Jankee*. These ladies were made Defendants in the suit, but do not appear in this appeal.

The family was one of distinction, and had formerly possessed considerable estates. It appears that the bulk of their property had been sold under Government and execution sales, but much of it had been again acquired by them through the powerful aid of the *Rajahs* of *Benares*, who were related to the family by marriage, and seem to have taken great interest in its welfare.

The family is governed by the law of the *Mitakshara*.

The Plaintiff bases his claim on the ground that the property was the separate estate of *Radha Mohun*, to which as the son of a daughter, in default of descendants in the male line, he was, by this law, entitled to succeed as heir.

The Defendants oppose to this claim two defences: (1) that the family was joint, and the property undivided, and that, consequently, on *Radha Mohun's* death, it devolved on *Rajah Rughoonundun* and themselves, as the male descendants of his brother, *Rajah Dost Doon*; and (2) that if this were not so, *Radha Mohun* made a deed of gift or will by which he declared his grand nephew, *Deonundun*, to be his heir, and gave all his property to him.

It may be observed in the outset, that the disposition in this alleged will (which in the commencement of the litigation was the ground of defence, principally relied on) constituting *Deonundun* sole inheritor, to the exclusion of his uncle and brother, is not very consistent with the theory that the property with which it deals was joint and undivided family estate. It is true that the uncle and brother seem to have been consenting parties to the will, and in that way validity might have been given to it; but if the property had been really joint, it is highly improbable that such an arrangement would have been thought of.

The origin of the separation of the estate appears to have been an award of *Maha-Rajah Odeet narain*, a former *Rajah* of *Benares*, made in April, 1819, by which a large part of the possessions of this family was divided into two unequal shares of 10 *annas* and 6 *annas*, the larger share being alloted to the sons of *Rajah Dost Doon*, the elder brother, and the smaller to *Radha Mohun*.

This award is recited at length in some later proceedings before a succeeding *Rajah* of *Benares*, the *Maharajah Iswree Pershad*. This recital states that disputes having arisen between *Rughoonundun* and *Judoonundun*, sons of *Rajah Dost Doon* (deceased), on the one side, and *Radha Mohun* on the other, respecting a share of the *zemindary* of certain villages, the parties had executed *Ikrarnamah* to the effect "that the *Maharajah* has the full power to fix our title and divide our shares, and whatever he should think proper to assign for any party none of the other parties shall object thereto." It states that the *Maharajah*, "in order to remove doubts former," accepted the *Ikrarnamah* and drew up and passed a decision, the effect of which is set forth as follows:—

"The villages detailed below in *Pergunnahs*, *Mahashee* and *Bibrah*, which had been purchased at auction in the names of *Rajah Dost Doon Singh*, *Babu Radha Mohun Singh*, *Babu Rughoonundun Singh*

and others, and were, till then, in the joint possession of both the brothers, without a specification of shares.

"Now, as *Rajah Dost Doon Singh*, is dead, and there appear indications of disagreements between *Babu Radha Mohun Singh* and the sons of the said *Rajah*, therefore it is settled to divide the shares, whereas these auction-purchased villages were not their ancestral property, but were acquired with the aid and assistance of the *Maharajah*—both the above persons knowing me as the real owner, and leaving the determination of the shares of my judgment and decisions—have appeared and executed an *Ikrarnamah* to the above effect, under their own seals, therefore, in order to the preservation, agreement, and management of both houses, in consideration of the title of both parties with respect to this *sircar* and old usage, and the consideration always shewn to them, judgment and decision were made to this effect—that, after defraying collection expenses, and paying the Government revenue, and debts due to creditors, and costs of the Courts in the joint suits instituted previously and recently, which were joint from the life-time of the said *Rajah*, whatever profits of the said villages might remain, *Babu Radha Mohun Singh* and *Hur nundun Singh*, his son, shall take 6 *annas* per rupee; and Rajah *Rughoonundun Singh*, and *Babu Judoonundun Singh*, sons of the said *Rajah*, 10 *annas* per rupee; and none of them shall deviate from, or refuse this partition, and both the brothers shall remain in union with each other as they are up to the present moment. Any person who shall be appointed by the judgment of both parties shall make collections from the villages detailed below and, after defraying the above mentioned expenses pay in the profits according to the division of both parties. The said villages shall remain in the name of the party in whose name they were purchased, and whose name is entered in the settlement book. With respect to the name, no one party will be able to alter or viate from this decision, and decrease or rease the share, because the decision and sion of shares is made with respect to the villages specified below."

There is abundant evidence that this award was acted on.

The division was notified to the collector of *Sarun*, as appears from the copy of a *kyfeut* or "memorandum of the shares of villages of *Rajah Rughoonundun* and *Judoonundun*, deceased proprietors of *Pergunnahs*, *Mahashee* and *Bibrah*," found in the Collectorate, in which the division into shares of 10 *annas* and 6 *annas* is stated, and the 6 *annas* are referred to as *Radha Mohun's* share.

From the account books in evidence it appears that, whilst the collections for the villages were joint, the net proceeds were divided into shares in accordance with the mode of collection and partition prescribed by the award.

In several transactions *Radha Mohun* acted as owner of the 6 *annas* share. In 1842 he mortgaged, by way of conditional sale, his 6 *annas* share in some of the villages. This mortgage was foreclosed in 1845, and a mutation of names effected, without the intervention of the other sharers.

Again, on the 6th February, 1846, *Radha Mohun* made another conditional sale by way of mortgage to *Sheonundun* himself. The deed disclosed the fact that the other 10 *annas* belonged to *Rughoonundun* and *Sheonundun*. There was afterwards a suit to forclose followed by a decree. It is evident that in this transaction the parties were treating the shares as separate estate.

Besides the above, other mortgages were made by *Radha Mohun* of his 6 *annas* share.

Some leases to indigo planters and others were put in evidence by the Defendants which the proprietors of the 10 *annas* share, and *Radha Mohun* joined in granting. But their so joining is in no way inconsistent with their being owners of separate shares. Until an actual partition of the land, they were in the position of tenants in common in *England*, and would for convenience join in granting leases. Besides it is to be remembered that the collections were by the terms of the award to be joint.

The cases which have been recently decided by this tribunal on questions touch

ing the separation of the joint property of a Hindu family established the principle that there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by mêtes and bounds; and, therefore, that the agreement of a family to divide the proceeds of the joint property among its members indefinite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.

The question of intention, as was pointed out in the latest of these decisions, must arise in all such cases, and be determined in each upon its own circumstances. (See *Appovier* v. *Rama Subba Aiyan*, 11 Moore's I. A., 75, see also 3 cases in 13 Moore's I. A. pp. 113, 181, and 497, and another in L. R., 1 Indian Appeals, 55.) (2 P. C. J., 218.)

Applying these principles to the evidence, it appears to their Lordships to be clear, both from the terms of the submission to the *Rajah* of *Benares*, and of his award of 1819, and also from the subsequent conduct of the parties, that their intention was that the shares specified by the *Rajah* should be the subject of separate ownership.

The recital of the agreement to refer states it to have been to the effect that "the *Maharajah* has full power to fix our title and divide our shares." Then the award, which the recital says was made "to remove disputes for ever," states that the villages which it was proposed to divide had been purchased at auction, and were not the ancestral property of the parties; but acquired with the aid of the *Maharajah*. It further states that the parties knowing the *Maharajah* to be the real owner, had left the determination of the shares to his decision; and then the award, after determining the shares of the profits which each should take, directs that none shall "deviate from or refuse the partition.

This award carefully excludes ancestral estates, which would therefore remain joint as before, and deals only with newly acquired property which, being purchased with his aid, the *Maharajah* deemed himself to be, in some sense, entitled to dispose of. It discloses throughout a general intention to give a separate ownership in the specified shares. The passage that "both the brothers should remain in union with each other as they are up to the present moment," which was relied on by the Respondents, as having a contrary tendency, is not sufficient to rebut this general intention. It is not at all clear that the words mean more than that the brothers should remain in concord. They would be satisfied also by supposing that the brothers were to remain joint as to the ancestral family property. But, be this as it may the whole tenor of the rest of the award shows that, as regards the purchased estates, a final division into separate shares was intended to be made.

The evidence already referred to of the dealing with the property, and the conduct of the parties subsequent to the award, furnish very strong proof that from the first they understood the arrangement to mean a separation of ownership.

The Principal *Sudder Ameen* came to the opinion that this separation had been effected, in which opinion, for the reasons above given, their Lordships concur, disagreeing on this part of the case with the judgment of the High Court which overruled it.

Coming to the second defence that *Radha Mohun* had executed a deed of gift or will constituting his great nephew *Deonundun* his heir, their Lordships find that both the Courts in *India*, upon a full review of the evidence, have arrived at the conclusion that the execution of the instrument propounded by the Defendants has not been established. Their learned counsel, adverting to the general practice of this committee, admitted that no special grounds existed on which they could hope to disturb on appeal these concurrent judgments upon a question of fact; but they attempted to show that, independently of the particular instrument, the evidence was sufficient to warrant the conclusion either that the previous disposition of the property had been made by *Radha Mohun* to the effect of that contained in the will,

or that he had so acted as to estop him and his representatives from denying that such a disposition existed.

It is to be observed that this is a new case, set up for the first time at their Lordships' bar, the Defendants having throughout the suit, in all its previous stages, propounded a particular will executed by *Radha Mohun*, as they alleged, on the 7th September, 1849.

The defence now suggested is raised neither by the Defendants' answer, the issues, nor the grounds of appeal. It would, therefore, be improper to give effect to it, unless the evidence to support it was so clear and uncontradicted that it could not, without manifest injustice, be disregarded.

But this is far from being so. It appears no doubt, that a strong effort was made in the family to induce *Radha Mohun*, after the death of his son *Hurnundun*, to come to such an arrangement. He had, it seems, incurred debts, and mortgaged some of his property, and there was a desire on the part of *Rughoonundun*, representing the other branch of the family, to prevent the descent of his estate in the female line.

With this view it was agreed to submit to the advice of the then *Rajah* of *Benares*. The parties accordingly attended him, and there is evidence that it was then arranged that *Radha Mohun* should execute a *wassyatnamah* or will to the effect of that propounded, and a draft of it was prepared. This took place in June, 1848. It is said that *Radha Mohun* took away this draft, but it is not at all clear he had then determined to execute it for, although the matter was urgent it is not alleged that he in fact, executed the will until fifteen months afterwards (the 7th September, 1849.)

A good deal of evidence was given by the Defendants of acts alleged to be done by *Radha Mohun* in his life-time, to corroborate the proof of the *factum* of the will. The facts disclosed in this evidence are undoubtedly deserving of consideration; but they were investigated, and the inferences sought to be drawn from them answered by the Judges of the Indian Courts in determining the questions of the validity of the will. On the other hand, Mr. *Cowie*, for the Appellant, referred to the mortgage from *Radha Mohun* of the 29th October, 1848, and also to the fact that on the 18th January, 1849, *Sheonundun* took proceedings to foreclose *Radha Mohun's* mortgage to him of the 6th February 1846, already adverted to, as being acts altogether inconsistent with the supposition that, at the time they took place, the arrangement contemplated in the month of June, 1848 had been finally agreed upon.

In this state of the evidence, and of the findings of the Indian Courts upon it, their Lordships think it is not possible for them, in this final stages of the suit, to give effect to the new ground of defence raised by the Respondent's Counsel.

For these reasons their Lordships must hold that the Plaintiff, as heir of his maternal grandfather, *Radha Mohun*, is entitled to recover such of the villages enumerated in the plaint as were his grandfather's separate property.

Their decision is founded mainly on the arrangement evidenced by the award of 1819, to divide certain villages into shares of 10 and 6 *annas*. This award is confined to the villages "detailed below," described as having been purchased at auction by the aid of the *Maharajah* in the name of *Rajah Dost Doon*, *Radha Mohun*, *Rughoonundun*, and others, and which, it states, "were not their ancestral property." This is a clear indication that ancestral villages were to remain joint as before, and there is no evidence of any subsequent partition of such villages. The Principal *Sudder Ameen* seems to have been of opinion that the sons of *Rajah Dost Doon* were separate in food and had ceased to form a joint family; but their Lordships think the evidence is insufficient to support this conclusion. The limited partition of 1819 is inconsistent with an intention wholly to destroy the joint family, and no subsequent agreement to that effect is shown.

Unfortunately, the detail of the villages which formed part of the award is not in the record. The Respondents' Counsel have contended that, at the most, only the villages contained in this detail were separated, and that there is no proof that

any of the villages mentioned in the plaint were included in it. On the other hand, the Appellant's Counsel have urged that the villages enumerated in the plaint being the same as those in the Schedule of the alleged will, which was put forward by the Respondents, it must be assumed that the plaint contains only such separate property as *Radha Mohun* could have disposed of by will.

In their Lordships' view neither of these contentions is well founded. It appears to them, with reference to the contention of the Respondents that, although the detailed list contained in the award is not forth coming, there are means in the record of distinguishing the newly purchased from the ancestral villages; and, with regard to the argument of the Appellants, derived from the schedule in the alleged will, they think it cannot be assumed that it contains only separated property. Looking at the object the parties had in view in putting forward this document, it is probable that they would so prepare it as to include all the villages in which *Radha Mohun* had any interest, whether joint or several. Indeed, it was contended by the Respondents that this will would be valid, even with regard to joint estate, by reason of its being made with the consent of the other members of the family.

This tribunal is no doubt placed in some difficulty in this matter, as they are without the assistance of the opinion of either of the Courts in *India* upon it. The High Court having dismissed the suit it was unnecessary for them to consider it, and the Principal *Sudder Ameen* made no distinction in his final decree between ancestral and purchased property, thinking apparently, there had been an entire separation between the brothers. Their Lordships, however, are reluctant to prolong a suit, which had been already pending upwards of twenty-two years, by directing further inquiries, especially as they think the result of the proceedings on remand, in an early stage of the cause, will enable them to dispose of the question.

These early proceedings show that the original positions taken up by the parties have been considerably shifted in the course of the litigation. In his first judgment the Principal *Sudder Ameen* found that this family were separate in food and estate, and then decided two things according to a *vyvastha*:—(1) that the Plaintiff, as a maternal grandson, was *Radha Mohun's* heir; and (2), assuming, apparently, that the villages were ancestral, that *Radha Mohun* could not disinherit him by will. Upon this view of the case, he did not think it necessary to decide on the *factum* of the will, although he expressed great doubt of its authenticity.

The Defendants appealed to the *Sudder* Court, one of their main grounds being that the villages were not ancestral, but purchased by *Rajah Dost Doon* and his brothers, and thus were the self-acquired property of *Radha Mohun*, which he was competent to alienate by will.

The *Sudder* Court thought the Judge below had overlooked this distinction, and remanded it to him for re-trial, and especially "to determine whether any and what portion of the property sued for was acquired personally by *Radha Mohun*, and specifically to distinguish that from the portion which is ancestral."

A new issue was accordingly framed as follows:—"Out of the property in suit, the estate of the maternal grandfather of the Plaintiff, what was the ancestral property of *Radha Mohun Singh*, deceased, and what was acquired by the deceased himself?"

The judgment of the Principal *Sudder Ameen* on this issue will be found at p. 624 of the record. It appears from his finding, which, although made for a somewhat different object, seems to be in substance sufficient for the present purpose, that, as their Lordships understand the judgment, twenty-six of the lots mentioned in the plaint, that is to say, Nos. 1, 11, 12, 18, 19, 24, 25, 33, 49, 53, 56, 74, 80, 81, 87, 96, and 105, which the Judge groups together; Nos. 13, 31, 34, 40, 50, and 51, which he places in another group; and Nos. 60, 62 (being *Chuk Fotima*, in *Pergunnah Mahashee*), and 108, which last three lots he deals with separately, were ancestral property; and that all the remaining lots were acquired by means of

various purchases in the ostensible names of *Rajah Dost Doon Singh*, *Radha Mohun*, *Rughoonundun*, *Sheonundun*, and others.

The ancestral property was, as already shown, clearly excluded from the partition in 1819, and their Lordships therefore think, for the reasons already given, that the Plaintiff is not entitled to recover in respect of the above twenty-six ancestral villages or lots, and that his suit as regards them ought to be dismissed.

But, with regard to the remaining lots found to be newly purchased, they think the Plaintiff is entitled to maintain this suit. The bulk of these villages would seem to have been acquired before the award of 1819, which referred to large purchases then recently made; and it is reasonable to presume that the lots which were subsequently acquired were purchased and held by the brothers and their descendants in the shares specified in the award, since neither the parties themselves nor the Principal *Sudder Ameen* appear to have made, any distinction between the villages purchased before and after the award. They are all placed in his judgment in the category of newly acquired estates, as distinguished from ancestral.

In the result their Lordships will humbly advise Her Majesty that the decrees of the Indian Courts be reversed, and that in lieu thereof it be decreed that, so far as regards the twenty-six lots found as above to be ancestral property, the Plaintiff's suit be dismissed, and that, as to the remaining lots, that the Plaintiff is entitled to a six *annas* share in such lots, and to possession thereof, and that the costs of the litigation in *India* be apportioned between the parties in the usual way, according to the value of the property to which they have been held to be respectively entitled, and in case either of the parties shall have received from the other a larger amount of costs than he would have received if the costs had been apportioned as above, the difference is to be ascertained and refunded.

There will be no order as to the costs of this appeal.

16th April, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

KOER PORESH NARAIN ROY (Plaintiff) ... } *Appellant,*

versus

ROBERT WATSON, & CO., & others (Defendants), } *Respondents.*

Concurrent judgments on questions of fact—Disclaimer of title by Defendants cannot entitle the Plaintiff to recover lands in resumed Khasmehal under resettlement—Chur-land—Finding not accepted and regarding property not claimed in plaint, not to entitle Plaintiff to a decree in appeal before Judicial Committee.

The concurrent judgments of the Courts below upon questions of fact *held* impossible to be reversed merely on the ground, that the *Ameen* had reported in a different way, when their Lordships had not the materials before them upon which the *Ameen* had formed his opinion.

In a suit to recover some *chur* lands alleged to have accreted to certain estates or parcels of estates, the lower appellate Court found the proprietary right of the Plaintiff to be admitted by the Defendants; but held that as the parcel was a Government *Khas Mehal* then under resettlement, the proprietary right to the land in front of it belonged to Government and the right to it would appertain to any party with whom the Government might settle. *Held* that, although the admission of the Defendants amounted to disclaimer of any title in themselves, yet it was not sufficient to entitle the Plaintiffs to a decree, unless he could show the other part of the finding wrong, that the finding should be taken together and that, if the judge was right, as he apparently was, in his conclusion of the property being *Khas mehal* in the hands of the Government yet to be resettled, neither party could be entitled to a decree with regard to the *chur* land in front of that resumed property.

Where the Appellant was not disposed to accept a certain finding and there was no claim in respect of the property, the subject matter of the finding,

* From the judgment of Sir Barnes Peacock, C. J., and Hobhouse, J., dated the 12th February, 1868.

in the plaint and the finding seemed to their Lordships, therefore, not noticed by the High Court in appeal:—*Held* that the Appellant was not in a position to ask for a decree based upon the finding in that appeal before their lordships of the judicial committee. Under the circumstances of the case, however, the appeal was ordered to be dismissed without prejudice to any claim that the Appellant might have in respect of the subject-matter of the finding.

In the first appeal of *Koer Poresh Narain Roy* v. *Robert Watson & Co.*, their Lordships think that there is no other course to take than to dismiss the appeal.

The suit was brought to recover some *chur* land which was alleged to have accreted to five different estates or parcels of estates. As to the three first, *Ramkrishtopore, Jotashahye*, and *Chuck Futtehpore*, it was admitted by Mr. *Bell*, the learned Council for the Appellant, that the questions arising with regard to those estates were purely questions of fact, and that the decisions of both Courts below were against him. Therefore he felt that, consistently with the general rules of this Committe, he could not hope to succeed in the appeal as regards those estates.

With respect to the fourth and fifth parcels, namely, the original *Nowshurra* and the resumed *Nowshurra Sooltanpore Futtehpore*, he argued that the appeal should be heard, and, if heard, decided in his favor, although there were the judgments of both the Courts against him, upon the ground that the *Ameen*, who had been directed to make a local enquiry by the first Judge, had reported in favor of the Appellant as regarded those estates. But upon investigation it appeared that the materials upon which the *Ameen* had reported were not in the record, and their Lordships feel that it would be quite impossible to reverse the concurrent judgments of the Courts below upon questions of fact merely on the ground that the *Ameen* had reported in a different way, when they have not the materials before them upon which the *Ameen* formed his opinion.

Mr. *Bell* then contended that as regarded the resumed *Nowshurra* he was entitled to succeed as to the parcel in front of that resumed *Nowshurra*, by reason of a special finding of the Judge, Mr. *Belli*, which finding was as follows:—"There only remains *Nowshurra Sooltanpore Futtehpore*, which is a Government *khas mehal*, now under re-settlement. The *Watsons* admit that the proprietary right of *Poresh Narain* in this has been allowed by the Government officers to be coincident with his proprietary title in *Pergunnah Luskurpore, viz., annas* 4-13-1-1, and that the remainder was farmed by the Government to them. If, however, it is a *khas mehal*, the proprietary right in it belongs to no one but the Government, who may settle it with the *Watsons* or with *Poresh Narain* or with any one else whom it likes; and the fact of the last settlement having been made between the *Watsons* and *Poresh Narain* must be regarded as merely a happy accident for these parties. I say therefore with regard to the land opposite to *Nowshurra Sooltanpore Futtehpore* the right to it will appertain to any party with whom the Government may settle that *mehal*." Now it is true that the *Watsons* admit that the proprietary right of *Poresh Narain* has been allowed by the Government officers to be coincident with his proprietary title to *Pergunnah Luskurpore*, which shows that they disclaim any title in themselves; but that is not sufficient to entitle the Plaintiff to a decree unless he can show, which he fails to do, that the Judge was wrong in saying that *Nowshurra* was a Government *khas mehal* then under re-settlement; the finding must be taken altogether; and apparently the Judge is right in coming to the conclusion that it was a *khas mehal* in the hands of the Government which had not been re-settled; and if he was right in that, then of course neither the Appellant nor any other person until the settlement can entitle to a decree with regard to the *chur* land in front of that resumed *Nowshurra*.

The result is that the Appellant has entirely failed in the present appeal, and their Lordships will therefore humbly advise Her Majesty to affirm the judgments of the Courts below and to dismiss the appeal with costs.

The other appeal of *Ranee Surrut Soondry* against *Watson* and *Co.*, it is conceded, must follow the same fate, and be dismissed as regards the main part of

the claim; but in the course of the argument it was stated by *Mr. Bell*, that the judgment of the High Court had taken no notice of a finding of the Judge upon the remand. It appears that upon the remand there was no second judgment of *Mr. Belli*, but merely a report by him to the High Court which was to make the decree in the cause; and no doubt *Mr. Belli* says:—"I find this, that at the date of the *thakbust* proceedings, that the recorded proprietors of *Rajapore*, as ascertained from the *thakbust* map, were *Mohesh Narain Roy*, who was represented as holding 3 *annas* 10 *gundahs*, *Bhoyrub Narain Roy*, 5 *annas* 10 *gundahs* and *Jogendra Narain Roy's* predecessors, *Ranee Surjyamonee*, 7 *annas*. The representative of these 7 *annas* is now the widow of *Jogendra Narain*, the *Surrut Soondry*, and the remaining shares are held by the *Watsons* in firm. Therefore the lands opposite to *Rajapore* will fall to the *Watsons* and *Ranee Surrut Soondry* as joint holders, in the proportion of 9 and 7 *annas*." It appears that upon the appeal from this judgment objections were made on the part of the present Respondents to that finding, which will be found on page 355 of the record in the other appeal. The objection is:—"The share of petitioners in *Rajapore* is 12 *annas*, and the Judge has made a mistake in supposing that any other person could have a share in excess of 4 *annas*." Therefore *Watson* and *Co.* claimed to be entitled to 12 *annas* in respect of *Rajapore*. It appears that the present Appellant was also dissatisfied with the finding, and her objection takes this form. It appears on page 94 of the record in her appeal:—"That the investigation of the *Ameen* with regard to the question as to whether the lands marked being original land, or only original, and the other alluvial, is based upon mere conjecture, also the finding of the *Ameen* that all these lands belong to *Rajapore* in *Jotashahye* and not to *Ramkrishtopore*, is not borne out by the evidence on record." Therefore the Appellant is not disposed to accept that finding. Her original plaint put forward a claim to a large portion of land as being accretions to the estate of *Ramkrishtopore*, and she was not willing to accept the finding in her favor in respect of *Rajapore*. That circumstance may account for the High Court not having noticed that finding or given any decree based upon it, and they may also have felt, inasmuch as there was no claim in respect of *Rajapore* in the plaint, that it was not competent for them to deal with it in this suit. Their Lordships, therefore, think that although there is a finding, which, if it be a correct one, the Appellant ought to have the benefit of in some future proceeding, yet that the Appellant is not in a position to ask for a decree based upon it in the present appeal.

Their Lordships will therefore humbly advise Her Majesty that this appeal also ought to be dismissed, and with costs; but they desire that this should be without prejudice to any claim that the Appellant may have in respect of land accreted to *Rajapore*, and therefore they prove to advise Her Majesty to declare, in the terms which were read by one of their Lordships in the course of the argument, that the dismissal of this appeal shall be without prejudice to the Appellant's right to any portion of the *chur* land in dispute, as a shareholder in *Rajapore*, and without prejudice to the question whether she is entitled to a 7 *annas* share or to any, and what, other share in *Rajapore*.

17th April, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

ROBERT WATSON AND Co. (Plaintiff) ... } *Appellant,*

versus

MOHESH NARAIN ROY (Defendant) ... } *Respondent.*

Construction, rule of—Estate pur autre vie, very unusual and almost scarcely known in India—Pattah, construed to convey an estate of inheritance under the circumstances of the case.

The real intention of the parties to a document is to be collected chiefly, no doubt, from the terms of the instrument itself but to a certain extent also from the circumstances existing at the time of its execution, and by the conduct of the parties since its execution.

An estate *pur autre vie* is very unusual and might be almost said scarcely known in *India*.

Jotes of considerable extent being held for generations, in an enhancement suit by the *Zemindar*, his right was established to enhance rent to such an extent that the then *jotedars* were obliged to relinquish their *jotes*. Whereupon a re-settlement was made with *R*, one of the former *jotedars*, contracting in the name of *S*, his sister-in law, of a portion of the relinquished property at a much lower rent than the enhanced rent, the *pattah* reciting the lease to be "at a settled rent" not enhancible by the lessor or his heirs on any account, the liability of the tenant being provided to continue unaltered for any loss arising from inundation and so forth. Subsequently the *Zemindar* being under the wrong impression of *S*. being dead at the time, admitted in a suit under section 4 Act IV. of 1840, the possession of *R. B.* on behalf of her minor son and heir to her husband *R* (deceased) as legal and brought rent suits against the minor and *R. B.* after *S.* had really died: *Held*, that the intention of the parties was to create a permanent tenure.

This was a suit to recover possession of lands as upon the determination of a sub-tenure. The Plaintiffs were the *Zemindars*, and the real question between them and the Defendant was, whether a *pattah* granted in 1854, nominally to one *Subhodra Burmonya*, but really, as it manifestly appears, to one *Ramdhone Roy*, conveyed an estate for life only or an estate of inheritance. In order to determine this question, their Lordships must arrive as well as they can at the real intention of the parties, to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by the conduct of the parties since its execution.

It is contended on behalf of the Plaintiffs that this document conveyed an estate *pur autre vie*, that is, for the life of *Subhodra*. Their Lordships may observe upon that that an estate *pur autri vie* is very unusual, and they might almost say, scarcely known in *India*, and there appears to be some antecedent in probability that such an estate was meant to be created.

The circumstances existing at the time of the document being entered into, so far as they are material to the present enquiry were these:—*Ramdhone Roy*, who was a brother-in-law of *Subhodra*, in whose name the lease was granted, had been together with other members of his family the holder of a *jote* within the *zemindary* of considerable extent, and including the lands in question. It was a patrimonial property held before him by his ancestors for some generations. The *Zemindar* brought an action against *Ramdhone Roy* and the other *jotedars* for enhancement of rent, and succeeded in establishing the right to enhance the rent to such an extent that the *jotedar* declined to hold the property on those terms, and accordingly relinquished it. This is stated in the *pattah*. Their Lordships have not, however, the deed of relinquishment before them, nor a precise statement of the terms under which the relinquishment was made. It would seem by the recitals in the *pattah* that upon this relinquishment a re-settlement was made with *Ramdhone Roy*, contracting in the name of *Subhodra*, of a portion of the property which had been relin-

* From the judgment of Sir Richard Couch, Kt. C. J., and Jackson and Glover, J. J. decided on 16th January, 1872.

quished, and at a much lower rent than the enhanced rent; and then the *pattah* proceeds in these terms:—"When I caused notice to be given for the settlement of the above land and *jummah* you appeared through your *mokhtar*, and applied for a *pattah* of the land and *jummah*. Your application is approved; and after deducting certain quantities," a portion of land amounting to 1,785 *beegahs* is granted "at a settled rent"—that is the expression—of Rs. 618. There is a further provision that if any loss arises from inundation and so forth the tenant shall continue to pay the rent; and then follows a provision not immaterial to consider:—"Over and above the said rate at which I have fixed the rent and granted this *pattah* neither I nor my heirs shall upon any account enhance the rent of the said land and *junmah*, or allow it to be enhanced."

Undoubtedly it may be said that it is not very probable this land should have been granted at a comparatively low rent never to be enhanced; but it may be that the rent had been enhanced to such an amount that no tenant could be found to pay it, and it may have suited the landlord's convenience to accept this tenant at a permanent tenure upon a moderate fixed rent, which the tenant himself should never be able to diminish, whatever loss by inundation or otherwise he might sustain. But some light is thrown upon this matter by subsequent occurrences. We have not the precise date of *Ramdhone Roy's* death, but it appears beyond all question that upon his death he was succeeded in the possession of the property by his widow *Rebutty Burmonya* as guardian of his minor son, and that the son upon attaining his majority took possession himself. It is also abundantly clear that the *Watsons* recognized this possession, for on the 14th January, 1862, they filed a petition to this effect:—"petition of objection by Mr. *Robert Watson*. The representation is this:—My *zemindary* within *Turruf Boira* in *Toke Chandpore* in *pergunnah Rukunpore* is the *Jote* land of the late *Subhodra Burmonya*." Therefore it would appear that they were under the impression at this time that *Subhodra* was dead. It would appear also that they were under a wrong impression; but when we come to enquire into the state of their mind, it is immaterial whether their impression was right or wrong provided they entertained it. They supposed *Subhodra* was dead. They then say:—"A suit under sec. 4 Act IV. of 1840 having been instituted in respect of the lands of that *jote jummah* comprised within the boundaries specified below, between *Rebutty Burmonya*, guardian of the minor *Mohesh Narain*, successor of the late *Ramdhone Roy* and others, and *Ramdhone Tewary* Defendant, the 25th January has been fixed as the day for hearing the case. Consequently, it being necessary to put in an objection in this case, it is prayed that as the said disputed lands comprised within my *zemindary* are in the possession of the aforesaid *Burmonya*;" that is, of *Rebutty Burmonya* in her capacity as guardian of *Mohesh Narain*. They assert and confirm the legality of the possession of the widow on behalf of the minor as succeeding to *Ramdhone Roy*, and they further, on several other occasions more especially referred to, in 1865, when it would appear that *Subhodra* really was dead, bring suits for rent against *Rebutty Burmonya* and the son of *Ramdhone Roy*, treating the son as succeeding to the father, a contention wholly inconsistant with the view which has been put forward that they considered the *pattah* conferred an estate *pur autri vie* merely during the life of *Subhodra Burmonya*.

That being so, upon the best judgment their Lordships are able to come to, it seems to them that the intention of the parties was to create a permanent tenure, and that the Plaintiffs have failed to establish their right to eject the Defendant. It follows that the judgments of the two Courts, both of whom have found in favor of the Defendants, are right; and it becomes unnecessary for their Lordships to refer to another question on their determination of which undoubtedly those Courts do to a great degree, though not altogether, base their judgments, namely, whether or not it was satisfactorily proved, as was attempted on the part of the Defendant, that the *kuboolout* which was not

produced by the Plaintiffs contained words of inheritance of a more clear and definite character than those contained in the *pattah*: or what would have been the legal effect of that evidence if it had been believed. Undoubtedly some difficulties have been raised with regard to this latter question which it now becomes unnecessary to discuss.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

21st April, and 13th May, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature, North-West Provinces of Bengal.

SAH MUKHUN LALL PANDAY, (Defendant) ... } *Appellant,*

versus

SAH KOONDUN LALL AND ANOTHER, (Plaintiffs) } *Respondents.*

Registration—Act XX. of 1866, ss. 22, 24, 36, 49, & 88—Limitation—Act VIII. of 1859, ss. 246 & 247—"District Court"—Jurisdiction of High Court, N. W. P.

Ss. 22 and 24 of Act XX. of 1866 make it imperative that the instruments therein referred to shall be presented for registration within four, or at most eight, months from the date of their execution; but the Act fixes no time within which the registration must be completed.

Where the registration of an instrument has been declared by a competent Court to be invalid, the instrument, if originally presented in due time, may again be submitted for registration, although the four months provided by s. 22, Act XX, of 1866, and the further period of four months allowed by s. 24, have both expired.

A registering officer who registers a deed of sale without the vendor who executed the deed having appeared before him, acts in contravention of s. 36, Act XX. of 1866; but there are no words in that section which declare that the registration of a deed under such circumstances shall be null and void.

Quære.—Whether the words of that section are not merely directory to the registering officer for the benefit of the parties to the deed; and whether his acting without the appearance of the parties as provided by the Act is more than a defect of procedure within the meaning of s. 88.

In considering the effect to be given to s. 49, Act XX. of 1866, that section must be read in conjunction with s. 88, and with the words of the heading of Part x, "Of the effects of Registration and Non-registration." It is not clear that the words of s. 49, "unless it shall have been registered in accordance with the provisions of this Act," are not confined to the procedure on admitting to registration, without reference to any matters prior to registration, or to the provisions of ss. 19, 21, or 30, or other provisions of a similar nature.

For the purposes of Act XX.* of 1866, "District Court" means, 'the Principal Court of original jurisdiction in a District, and includes the High Court in its ordinary original civil jurisdiction.'' The High Court of the North-West Provinces, which has no ordinary original civil jurisdiction, is consequently not a "District Court" to which a petition may be presented under s. 84 of the Act, and an order passed by that Court, on such a petition, directing the registration of a deed is made without jurisdiction.

Certain lands having been attached in execution of a decree obtained by *A* against *B*, *C* intervened under s. 246, Act VIII. of 1859, claiming their release, on the ground that before the attachment they had been conveyed to him by *B* under a deed of sale, and he prayed that the execution-sale, might be stayed to enable him to put in the deed after having it registered. The Court however refused to stay the sale, and the lands were sold in execution. More than a year from the date of the Court's refusal to stay the sale, *C* sued to establish his right to the lands. *Held* that the suit was not barred by limitation under s. 246, Act VIII. of 1859, since the refusal of the Court to postpone the sale was not an order under that section, but was a mere refusal to order a postponement under s. 247.

13th May, 1875.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

THE Respondents in this appeal were Plaintiffs in the suit. They sued to set aside the auction sale of one-half of *mouzah Naila*, which the Defendant, the now Appellant, on the 20th of March, 1871, caused to be sold in execution of a decree which he had obtained on the 24th of August, 1868, against *Gungha Singh* and others, and which half of the *mouzah* he

* 2 Cowell's I. A., p. 210; 15 B. L. R., p. 229.

himself purchased at that sale for Rs. 11,025.

The claim was founded upon a deed of sale executed by the said *Gungha Singh* and others, by which they conveyed the property in dispute to the Plaintiffs. It was at one time contended that the property was under attachment at the time of the execution of the deed of sale; that the deed was not proved to have been executed on the 10th of July, 1868, the day of its date, and that it was collusive. But those objections have been abandoned, and it must now be taken that the deed was executed *bonâ fide* and for a valuable consideration on the said 10th of July, 1868, before the property was under attachment.

The principal question to be determined is whether the Plaintiffs are entitled to avail themselves of the deed. It was contended on the part of the present Defendant that the deed was not admissible in evidence, and that it could not be acted upon or held to have conveyed to the Plaintiffs the property comprised therein; and the ground upon which he relied was that the deed had not been registered in accordance with the provisions of Act XX. of 1866. It is not disputed that the deed was presented for registration to the proper officer in due time, viz., on the 22nd of October, 1868, within the period of four months from the date of its execution; but the vendors did not appear before him. They were consequently summoned under the provisions of sect. 37, but did not appear on the day fixed for their attendance, whereupon the registering officer having satisfied himself by the deposition of witnesses and otherwise, that the deed had been executed by the vendors, registered it.

After the execution of the deed, viz., on the 12th of November, 1868, the property was attached in execution by the present Defendant, under his decree against the vendors, whereupon the present Plaintiffs intervened and objected, under sect. 246 of the *Code of Civil Procedure* (Act VIII. of 1859), that the property had, before attachment, been conveyed to them by the deed of the 10th of July. It was at that time admitted by all parties, including the present Defendant, that the Plaintiffs were in possession of the property, and that the deed of sale had been registered; and under those circumstances the property was, on the 15th of December, 1868, ordered by the Subordinate Judge to be released.

Subsequently a suit was brought by the Appellant, the present Defendant, against the Respondents, the present Plaintiffs, to set aside the deed of sale as collusive, and as having been executed whilst the *mouzah* was under attachment and been illegally registered. The subordinate Judge on the 29th of May, 1869 held that the *mouzah* was not under attachment at the time of the execution of the deed, but that inasmuch as the deed had been registered in the absence of the vendors it must be considered as an unregistered document and was not admissible in evidence, and consequently that it could not take effect in opposition to the rights of the decree-holder so as to preclude him from selling the property in execution of the decree. The case was appealed to the High Court, who on the 10th of November, 1869, affirmed the decree. They said:—

"The law directs (sect. 36) that no document shall be registered under the Act unless the persons executing such document, or their representatives, assigns, or duly authorized agents, appear before the registering officer. The registrar was not authorized, therefore, to register this deed in the absence of the vendors and of their agents, merely because he was satisfied that there had been a sale pursuant to a previous agreement for purchase, and further, a power given to the vendors' agents authorizing them to procure registration. The 40th section of the Act contains powers for compelling the attendance before the registrar of persons whose presence is necessary for the due registration of deeds, but there is no provision enabling registering officers to proceed of their own authority to register in the absence of such persons.

"We are of opinion that the opinion of the Subordinate Judge is correct. It has been argued that the deed, having been, in fact, registered, is entitled to the privileges of a registered deed, notwithstand-

ing any error on the part of the registrar; but it is clear (sect. 49) that unless a deed has been registered in accordance with the provisions of this Act, it must be regarded as unregistered, notwithstanding that it may, in fact, have been improperly admitted to registration."

On the 29th of August, 1870, the Plaintiffs again applied to the registering officer to have their deed registered, but the application was refused by the registrar (September 20). His grounds for refusal were thus stated:—

"This deed has been declared to have been illegally registered, and was to be treated as not having been registered. Application is now made for registration, but is refused as being presented beyond the proper period."

The refusal to register was not indorsed on the deed.

On appeal to the Registrar-General he refused (October 17) to order the deed to be registered, upon the ground that it must be deemed to have been duly registered on the 10th of November, 1868; whereupon the Plaintiffs petitioned the High Court, who on the 24th of February, 1871, held that the Plaintiffs were entitled to have the deed resistered, and directed its registration in the proper manner after the usual inquiries. They said:—

"The deed was duly presented for registration within four months from the date of execution, but it was not then duly registered in accordance with the provisions of the Act, as we have already determined. Having considered the reasons given by the registrar and the Registrar-General for subsequently refusing registration, we think them insufficient. The deed is entitled to registration, no legal impediment appearing, and we direct its registration in the proper manner, after the usual inquiries."

On the 18th of March, 1871, the Plaintiffs petitioned the Judge of *Cawnpore*, stating that the sale of the property under the Defendant's execution had been fixed for the 20th of that month, and relying upon the order of the High Court prayed that the sale of the property under the execution might be postponed; but the application was refused upon the ground that the deed had not then been registered. The sale accordingly took place on the 20th of March, 1871, when the property now in question was purchased by the Defendant for Rs.11,015, of which Rs.10,081 were retained in satisfaction of decrees which he had obtained against the vendors and their representatives, including the decree of the 24th of August, 1868, and the remainder was paid by him in cash.

On the 20th of April, 1871, more than thirty days after the order of the High Court, the Plaintiffs petitioned the registrar that the vendors and the heirs of the deceased vendors might be summoned, and the deed registered according to the requirements of the law. Thereupon compulsory process was issued, and the deed was registered on the 10th and 25th of May, and the 5th of June, 1871.

On the 20th of April, 1872, the present suit was commenced. The case was heard by the Subordinate Judge, who held that the deed had then been legally registered, but that the sale to the Plaintiffs was collusive, and that the claim to set aside the auction sale could not be maintained, inasmuch as in the former suit between the same parties it had been held that the Defendant, the present Appellant, was entitled as against the Plaintiffs, the present Respondents, to bring the property to sale under the execution; and he dismissed the Plaintiffs' suit.

Upon appeal the High Court held that the deed was not collusive; that it was executed *bonâ fide* for a valuable consideration; that it had then been registered, and that the rights created by it must be held to have come into existence at the time the deed would have commenced to operate had no registration been required; and they reversed the decree of the Subordinate Judge, and decreed the claim of the Plaintiffs for the establishment of their rights. They also held that the present suit was not barred by the decision in the former suit, as the point therein decided was not whether the Respondents would have been entitled to resist the sale in execution if their deed had been duly registered, but whether or not the deed had at that time been duly registered.

The only questions now to be determined are

1. Whether the subsequent registration of the deed was valid and effectual to render the deed admissible in evidence and operative; and

2. Whether the suit is barred by limitation under sect. 246, Act VIII., of 1859, in consequence of its not having been commenced within one year from the date of the order of the Subordinate Judge of the 18th of March, 1871, refusing to postpone the sale.

There can be no doubt that the registering officer acted in contravention of sect. 36 in registering the deed without the vendors having appeared before him; but it is not necessary for their Lordships to determine whether the registration was a nullity, or whether the error was one of which a stranger to the deed could take advantage. It may, however, be observed that there are no words in sect. 36 declaring that the registration of a deed shall be null and void if made without the appearance of the persons who executed it; and it is very doubtful whether the words of that section are not merely directory to the registering officer for the benefit of the parties to the deed, and whether his acting without the appearance of the parties, and upon evidence, instead of the admission of the parties of the execution of the deed, was more than a defect in procedure within the meaning of sect. 88. Again, it is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in sect. 49, are not, especially as regards strangers to the deed, confined to the procedure on "admitting to registration" without reference to any matters of procedure prior to registration, or to the provisions of sects. 19, 21 or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to sect. 49, that section must be read in conjunction with section 88, and with the words of the heading of part 10, "Of the Effects of Registration and Non-Registration." Now, considering that the registration of all conveyances of immoveable property of the value of Rs.100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sects. 19, 21, or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in sect. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under sect. 83, or upon petition under sect. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights. It is unnecessary, however, to express any opinion upon this point, as it has been decided between these parties that, notwithstanding the first registration, the deed must be considered as unregistered. Neither of the parties appealed from the decision, and therefore whether right or wrong in point of law they are both bound by it in this suit, and it must be assumed as against them in this appeal that the first registration was a nullity.

The Plaintiffs do not rely upon the registration of the 10th of November, 1868, but on the registration of the 16th and 25th of May, and the 5th of June, 1871.

The Defendant contends that those acts of registration were inoperative.

"1. Because in ordering the subsequent registration the High Court acted without jurisdiction, and their order and all proceedings had thereunder are nullities, and the Respondents' alleged deed is inadmissible in evidence.

"2. Because, irrespective of the question of jurisdiction, the High Court, in so ordering registration after the lapse of more than eight months from the alleged date

of the deed, impugned the express provisions of the *Registration Act;* and their order is not binding upon this Appellant, who was not a party before the High Court at that time.

"3. Because, assuming that the High Court had jurisdiction, and that their order was in accordance with the provisions of the *Registration Act,* the Respondent did not present his alleged deed within thirty days after the making of the said order."

As to the first of those reasons, their Lordships are of opinion that the High Court in ordering the registration of the deed acted without jurisdiction under sect. 84. That section authorizes a petition to the "District Court," which is defined to mean the "Principal Court of original jurisdiction in a district, and includes the High Court in its ordinary civil jurisdiction." The High Court of the North-West provinces, however, has no ordinary civil jurisdiction, either in *Cawnpore,* or in any other district.

It was not, however, necessary to have an order from the District or other Court to authorize the re-registration. The deed had been presented for registration within the period required by sect. 22, it had been accepted for registration, and it had been registered in fact. The vendors having neglected to appear before the registering officer on the 10th of November, 1868, that officer might have proceeded, under sect. 40, to compel their attendance; but instead of doing that, he, by mistake, registered the deed, after satisfying himself that it had been executed. When it was declared by a competent Court that the registration was invalid, the registering officer might still have proceeded to compel the appearance of the vendors, and upon their appearance and admission of the execution of the deed to register it Though the Statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for registration must be registered; and, indeed, from the nature of the requirements of the Act, the period within which the registration must be completed could not have been fixed.

It does not appear to their Lordships that the orders of the Registrar-General and of the Registrar of the 17th of October and the 20th of September, 1870, respectively, imposed upon the Plaintiffs the necessity of petitioning the District Court, under sect. 84, to order the registration of the deed, or precluded the registering officer from voluntarily registering it, after the appearance of the vendors and their admission of its execution. Those orders, made while there was a *de facto* registration in existence, do not appear to amount to a refusal to register or to order registration within the meaning of the 82nd section. The latter of those orders assumes that there was a registration. Indeed, it was not even stated as one of the reasons for this appeal that the registrations made on the 16th and 20th of May, and the 5th of June, 1871, were invalid because they were made after those orders. If the registering officer was influenced by the order of the High Court to do that which he might have done without it, the fact that the High Court acted without jurisdiction did not invalidate the registration.

The High Court having acted without jurisdiction, the second and third objections to the registration fall to the ground.

As to the objection on the ground of limitation, their Lordships are of opinion that the refusal of the Subordinate Judge of the 18th of March, 1871, to postpone the sale under the execution was not an order under sect. 246, but was a mere refusal to order a postponement of the sale under sect. 247.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

7th May, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

OMRAO BEGUM AND ANOTHER (Defendants) ... } *Appellants,*

versus

THE NAWAB NAZIM OF BENGAL, (Plaintiff) ... } *Respondent.*

Contract by Ladaveenamah, (deed of disclaimer) and Perwannah—Mutual bonâ fide mistake—Setting aside document—Consideration—Non-payment of allowance, on repudiation of the arrangement, Effects of.

An estate was purchased by A, widow of a grand-uncle and predecessor as *Nawab Nazim*, of the Plaintiff. *A* died on January 21, 1858, leaving *M*, one of her half-brothers and heirs according to the *Mahomedan* law, who submitted an *Urzee* on February 10th, 1858, to the Plaintiff, disclaiming all right to the estate, left by *A*, and praying for some provision for his maintenance and that of his children; and an order was passed upon it by the Plaintiff, on February 12 following, fixing a certain monthly stipend. To put what had been recited in the *Urzee* in a legal form, a *ladaveenamah* was executed by *M*, on February 24, 1858, in the terms of the *Urzee*, and, to secure the rights of *M*, it was followed by a *perwannah*, executed by the Plaintiff, the very next day; *M* also receiving on that day Rs. 2,000 on account of the allowance granted to him:

Held that the *ladaveenamah* and the *perwannah* amounted to a valid contract by which the *Nawab* (Plaintiff and *M* were respectively bound.

That, even if *M* executed the *ladaveenamah*, in ignorance of his strict rights, still, if the *Nawab* acted *bonâ fide* under the belief that he had succeeded to the property of the *Begum* and executed the *perwannah* upon the faith of the *ladavee* disclaimer, *M* and his heirs would be bound by them.

That, the *ladaveenamah* being founded on a sufficient consideration, *M* and his heirs could not assert any title to the property, without setting aside the document, and that they could not do, except upon returning the Rs. 2,000, paid in advance, on account of the allowance.

Held further that *M* and his representatives having subsequently repudiated the arrangement, the fact of the Plaintiff's not having continued to make the monthly allowance, according to the terms of the *perwannah* did not release *M* and his heirs from the *ladaveenamah*.

This is an Appeal from a decision of the High Court of Bengal in a suit in which the Respondent, His Highness the *Nawab Nazim* of Bengal, was the Plaintiff, and the Appellants and others were the Defendants. The suit was brought to recover possession of the *zemindary*, *Pergunnah Gopeenathpore*, in the district of *Moorshedabad*, and to set aside an award made by the Deputy Magistrate of *Jamooa Kandee*, on the 2nd March, 1865, under Section 318 of the Code of Criminal Procedure (Act XXV. of 1861). The suit was against the widows, mother, and daughters of *Sayud Mehdi Ally Khan*, deceased. The Defendants Nos. 1 and 2, *Baooh Russoolee* and *Dowlut-oon-nissa Khanam*, are described in the plaint as alleging themselves to be widows of the late *Sayud Mehdi Ally Khan*: the Defendent No. 3, *Fuzelut-oon-nissa Khanam*, as his mother: the Defendant No. 4, *Azeem-oon-nissa*, as another widow: and the Defendants Nos. 5 and 6, *Omrao Begum* and *Zuhoora Begum*, as daughters of the said *Sayud Mehdi Ally Khan*. The last two Defendants, Nos. 5 and 6, are the only Appellants to Her Majesty in Council, and the Defendants, Nos. 3 and 4, are made co-Respondents with the *Nawab Nazim*; but the *Nawab* alone has appeared on this Appeal. The principal Defendants, Nos. 1 and 2, are no parties to the appeal either as Appellants or Respondents.

The *zemindary* to which the *Nawab Nazim* laid claim was purchased by *Ameer-oon-nissa alias Doolhin Begum*, the widow of *Nawab Ally jah*, deceased, a grand-uncle of the Plaintiff, and who preceded him as *Nawab Nazim*. The estate was purchased by *Ameer-oon-nissa benamee*, in the name of the said *Mehdi Ally*, at a sale for arrears of revenue, and it must now be taken that it was her property at the time of her death, although one of the issues raised by the Defendants Nos. 1 and 2 was, whether she had a right to it as against *Mehdi Ally*, the ostensible pur-

* From the judgment of Loch & Mitter, J. J. 26 April, 1869.

chaser. The said *Mehdi Ally* was one of her half-brothers and heirs according to the *Mahomedan* law. *Ameer-oon-nissa* died on the 21st January, 1858, and *Mehdi Ally Khan* on the 4th January, 1865. The suit was commenced on the 29th of April, 1867. The *Nawab* put in a written statement in which he alleged, amongst other things, that the said *Ameer-oon-nissa* —"Was, after her husband's death, in the receipt of a stipend of Rs. 8,000 per mensem out of the funds allotted by the state to the support of the members of the Plaintiff's family; that, out of the savings of this and other *sultanut* property which she had inherited, she purchased various properties in the names of various relations, and amongst the rest purchased at a sale for arrears of Government revenue on the 7th day of April, 1842, the said *zemindary* of *pergunnah Goopeenathpore*, in the name of her half-brother and dependant, the said *Mehdi Ally Khan*; that, after her purchase and down to the time of her death, which took place on the 21st day of January, 1858, she continued in undisputed possession and enjoyment of the said property; that upon her death, the Plaintiff, according to the long established custom of his family, recognized by the Government of *India* on various previous occasions of the demise of *Begums* of his house, succeeded as her heir to the said *zemindary*, together with the other estate of the said *Ameer-oon-nissa Begum*, and entered upon possession thereof, and continued to hold the same until he was wrongfully dispossessed thereof; that the said *Mehdi Ally Khan* had never, at any time during the life-time of the said *Ameer-oon-nissa Begum*, put forward by claim on the ground of his holding any title or interest in the said estate; but, on the contrary, in the letter which he wrote under his seal and signature to the said *Ameer-oon-nissa Begum*, he disclaimed all interest in *Goopeenathpore*, and admitted her full right thereto; that, upon the death of the said *Ameer-oon-nissa Begum*, the said *Mehdi Ally Khan* did not make any claim either as heir to the said *Ameer-oon-nissa Begum*, or otherwise, to the said estate or any part thereof; but, on the contrary, agreed to receive an allowance of Rs. 600 per mensem from the Plaintiff, in pursuance of which an order was passed by the Plaintiff, on the 12th day of February, 1858, for the payment of that sum to the said *Mehdi Ally Khan*, and payment was accordingly made; and on the 24th of February, 1858, the said *Mehdi Ally Khan*, together with his wife, the Defendant *Azim-oon-nissa*, executed and delivered to the Plaintiff in the presence of several persons a document by which he disclaimed all right to the estate of the said *Ameer-oon-nissa Begum*"

The Defendants Nos. 1 and 2 and the Defendant No. 3 put in written statements but no written statement was put in on behalf of the Defendants Nos. 5 and 6. Both the Lower Courts decreed in favor of the Plaintiff, but upon different grounds. The both held that the *ladaveenamah*, or deed of disclaimer, was a genuine document. The First Court held that in consequence of it the Defendants, as heirs of *Mehdi Ally*, could not claim a right to succeed to the property, and consequently that it was unnecessary to come to any finding as to the custom set up by the *Nawab*, under which he claimed the right to succeed to the property of the *Begum* (Record, p. 832); on the other hand, the High Court, having found for the *Nawab* upon the question of the custom, treating the *ladaveenamah* as strong evidence in support of it, considered it necessary to come to any decision as to the effect of the *ladaveenamah*. They, however, expressed an opinion that the *ladaveenamah* was not executed without a valuable consideration. (Record, p. 845.)

Mr. Justice *Dwarka Nath Mitter*, in delivering Judgment, said:—

"We are of opinion that the *ladavee* in question was not executed without a valuable consideration. The *urzee* of the 10th February, 1858, submitted by *Mehdi Ally Khan* to the Plaintiff, praying for some provision for his maintenance, together with the order passed thereupon by the Plaintiff on the 12th February following, fixing a monthly stipend of Rs. 600, clearly point to the consideration for which the *ladavee* in question was executed a few days afterwards; and this consideration is made still more manifest when we come to

the receipt granted by *Mehdi Ally Khan* on the 25th February, 1858,—that is to say, on the day following the execution of the *ladavee*, whereby *Mehdi Ally Khan* acknowledged the receipt of a sum of Rs. 2,000 on account of the stipend hereinbefore referred to. But be this as it may, it is perfectly clear that *Mehdi Ally Khan* executed the *ladavee* in question of his own free will and accord, and without giving any decisive opinion as to whether that document can be treated as an estoppel or not, it is sufficient for us to say that the Appellants can have no reasonable ground to complain, if we use it as strong piece of evidence in the cause."

With reference to the 8th objection, which was that the evidence produced by the Plaintiff to prove the alleged custom was altogether very unsatisfactory, he said:—

"We observe that the direct evidence produced by the Plaintiff to prove the family custom in question consists of the depositions of two witnesses, namely, *Sayud Mahomed Mehdi and Darub Ally*. We have also got the evidence of *Sayud Hossein Ally*, one of the half-brothers of the late *Ameer-oon-nissa Begum*, who says that he had heard it from his father that such a custom did really exist, and it is to be borne in mind that such a statement coming from this witness is entitled to very great consideration, inasmuch as he is one of the parties who would be entitled to succeed to the estate of the deceased *Begum*, if the family custom set up by the Plaintiff is disproved. We are fully prepared to admit that the testimony of these witnesses, if there were nothing else to support it, would have hardly sufficed to enable us to declare in favour of the custom, the effect of which would be to disturb the natural course of the ordinary law of inheritance; but not only is this testimony wholly uncontradicted by any counter-evidence produced by the Appellants, but it acquires an irresistible force when we couple it with the *ladavee* so often referred to. If that *ladavee* is to be treated as a contract between the Plaintiff and *Mehdi Ally Khan*, based upon good and valuable consideration on both sides, it is perfectly clear that the Defendants, as the legal representatives of *Mehdi Ally Khan*, and therefore deriving their title through him, are precluded from disputing the claim of the Plaintiff founded upon that instrument. If on the other hand, we are to hold that *Mehdi Ally Khan* executed that instrument without intending to give to it the operation of a positive contract, but merely for the purpose of declaring what was the true state of facts to the best of his knowledge and belief, too much value cannot be attached to it as a piece of evidence in the cause. No counter-evidence of any kind has been given by the Appellants to show that the facts recited in this instrument are not true, or that their ancestor *Mehdi Ally Khan* was in any way misled or imposed upon when he acknowledged them as true, in a solemn instrument under his own seal and signature. Taking all these circumstances into consideration, we find it impossible to decide this point in favour of the Appellants."

There are many cases in which under *Mahomedan* law, acknowledgements are not treated as merely matters of evidence, but have certain legal consequences attached to them, and are binding on third parties, as well as on those who make them (see *Ballie's* Digest of *Mahomedan* law, 1st part, pages 403-406, and 2nd part, pages 290.) It is not necessary, however, to determine what legal effect would be given by the *Mahomedan* law to the *ladavee* of the 24th February, 1858, if it were held to be merely a voluntary acknowledgment and disclaimer of title, for their Lordships concur with the High Court in thinking that it was founded upon a valuable consideration, and are of opinion that the *ladaveenamah* and the *perwannah* taken together, amounted to a contract by which both the *Nawab* and *Mehdi Ally Khan* and his heirs were bound.

It appears from the evidence of *Rajah Prasonno Narain Deb*, who, from October, 1853 to June, 1861, was the *Dewan Nizamut*, and also had the general superintendence over the private affairs of the *Nawab*, that shortly after the death of *Ameer-oon-nissa*, *Mehdi Ally* came to him nearly every day in a state of great

alarm, and begged that he would intercede on his behalf in placing him under the protection of His Highness as he was under that of *Ameer-oon-nissa*, and that the *Urzee* was presented under his advice. By that document, which is set out at page 33 of the record, *Mehdi Ally* acknowledged that neither he nor his heirs, except for his support and maintenance and that of his children and dependants, had any sort of claim to the property, goods, estate, or *zemindaries* of the said *Ameer-oon-nissa*, and prayed that proper orders might be passed for the support of himself and of his children and dependants. Upon that *Urzee* an order was passed by the *Nawab Nazim* on the same day to the effect that out of the properties, *mehals* and *zemindaries* of the late *Begum* a monthly allowance of Rs. 600 should be fixed for the said *Mehdi Ally*, and that help in every way and at all times should be afforded to him.

The order was merely indorsed on the *Urzee* and was not drawn up as a separate formal instrument. The *Rajah Prasonna Narain Deb*, who was called as a witness for the Defendants, as well as for the Plaintiff, stated in his evidence that ten or twelve days after the presentation of the *Urzee*, *Mehdi Ally*, in his presence and at his house, executed a *ladavee ikrar* in favour of His Highness the *Nawab Nazim*. He said:—"This was at my suggestion, and with the permission of the *Nawab*. The intention was to have that had been recited in the *Urzee* executed in a proper legal manner, and to avoid any future misunderstanding or difficulty on account of the *Benamee* nature of the transactions." He then described the mode in which the document was prepared, copied on stamped paper, and attested in his presence (Record, pp. 785, 786.) He went on to say:—"The *ikrar* was brought to me by *Sarib Ally Khan*, *Meer Bussunt*, and *Meer Yakoob*. Shortly afterwards *Mehdi Ally* came to my house. He took the deed in his hand, and we went together to His Highness' *deoree*, and presented it to His Highness. Then His Highness ordered a *perwannah* to be delivered to *Mehdi Ally*, of the same nature as the order passed on the *Urzee*. The *perwannah* has been prepared beforehand, and was brought by the *Moonshees* who were sent for. It was delivered to *Mehdi Ally*. The *perwannah* declared that His Highness should grant to *Mehdi Ally* and his heirs, from generation to generation, Rs. 600 per month, upon condition that he should always remain submissive to the *Nazim*, and never depart from his arrangement (*guheh na burzan*). On the day that the *ladavee* was executed, either Rs. 1,000 or 1,500 were paid in my presence, there and then, and Rs. 500 were paid on the following day, and a receipt taken from *Mehdi Ally* for Rs. 2,000." Further on he says:—"The receipt mentions the payment as an advance of Rs. 2,000 on account of the monthly allowance of the Rs. 600 granted. On account of the immediate emergency the advance was made from the *Bekla* Treasury, but was deposited in the *Mehalot* account, in accordance with the order that the allowance of Rs. 600 should be given from the profits of *Dulhim Begum's zemindary*."—A copy of the receipt was produced, and is set out at p. 41 of the record. The *perwannah* is set out at p. 731 of the record, and in their Lordships' opinion amounts to a grant by the *Nawab* by which he was bound.

Their Lordships see no reason to doubt that both *Mehdi Ally* and the *Nawab*, at the time of the execution of the *ladaveenamah*, and of the *perwannah bonâ fide*, believed that the *Nawab* had a right to succeed to the property of *Ameer-oon-nissa*.

They are of opinion that the object of the *ladaveenamah* and of the *perwannah* was to carry out in a formal legal manner the arrangement contained in the *Urzee* and order of the 12th February, 1858, so as legally to bind both parties to it. By the *perwannah*, however, an additional grant was made by the *Nawab* to provide for *Mehdi Ally's* expenses of the *Mohurrum*. It is to be observed that the order indorsed upon the *Urzee* was not acted upon until after the *ladaveenamah* was executed. That document having been executed on the 24th February, 1858, the rights of *Mehdi Ally* were not left to depend upon the order indorsed on the

Urzee, but on the following day, viz., on the 25th February, 1858, the *perwannah* was executed (p. 731), and on the same day *Mehdi Ally* received Rs. 2,000 as an advance on account of the allowance granted to him.

Their Lordships are of opinion that the *ladavecnamah* and the *perwannah* amounted to a valid contract by which the *Nawab* and *Mehdi Ally* were respectively bound. It is not necessary to decide whether upon the death of the *Begum* her property went over to the *Nizamut* according to usage, as stated in the *ladavecnamah*; for even assuming it did not, and that *Mehdi Ally* executed the *ladavecnamah* in ignorance of his strict rights, still if the *Nawab* acted *bonâ fide* under the belief that he had succeeded to the property of the *Begum* (and the evidence appears to their Lordships at least to establish this), and executed the *perwannah* upon the faith of the *ladavee* disclaimer, the Defendants would be bound by them. Even if the *ladavecnamah* did not amount to a grant, it contained an agreement not to set up any claim to the property, and being founded upon a sufficient consideration, was binding upon the heirs of *Mehdi Ally*, and precluded them from setting up a claim to the property (Good title. *vs. Barley*, *Cowper's* Reports, 597). In any view of the case, *Mehdi Ally* or his heirs could not assert any title to the property without setting aside the *ladavecnamah*, and this they could not do, except upon the terms of returning the Rs. 2,000 which were paid upon the faith of the arrangement, and as a payment in advance on account *of the allowance granted to him* by the *Nawab*. As to the Plaintiff's not having acted upon the *ladavecnamah* since the payment of the Rs. 2,000, it appears that *Mehdi Ally* and representatives subsequently repudiated the arrangement, and the facts of the Plaintiff's not having during that period continued to make the monthly allowance according to the terms of the *perwannah*, did not release *Mehdi Ally* and his heirs from the *ladavecnamah*.

It was contended in the High Court on behalf of the Appellants that the *ladavecnamah* was extorted from the said *Mehdi Ally* by force and other unfair means; but that objection was so completely answered by Mr. Justice *Dwarka Nath Mitter* in his Judgment in the High Court (Record, pp. 844 and 35) that it is unnecessary for their Lordships to say more than that they entirely concur with the High Court with reference to that contention.

It was further urged before their Lordships on behalf of the Appellants, that the only object of *Rajah Prasonna Narain Deb* in getting the *ladavecnamah* executed was, according to his own evidence, to obtain an admission that the property, though in the name of *Mehdi Ally*, was held by him *benamee* for *Ameer-oon-nissa*. Probably that was the principal object, for at that time *Mehdi Ally* does not appear to have claimed as heir of *Ameer-oon-nissa*. The whole arrangement seems to have proceeded upon the assumption by all parties that the estates of *Ameer-oon-nissa*, upon her death, went over to the *Nizam*, or more properly speaking, to the *Nizamut*. That fact was admitted both in the *Urzee* and in the *ladavecnamah*, and it is clear that the *Nawab* could not have derived any benefit from the admission that the property was held *benamee* for *Ameer-oon-nissa*, unless he was entitled to succeed to her property. The *Urzee*, as well as the *ladavecnamah*, which was intended to give formal legal effect to it, both contained an admission of the *Nawab's* title. Upon the whole their Lordships are of opinion that *Mehdi Ally* and his heirs were bound by the *ladavecnamah*, and that the decree of the first Court was correct, except so far as it decreed mesne profits to the Plaintiff as against Defendants Nos. 5 and 6.

The decree was general, and awarded mesne profits against all the Defendants (Record, pp. 814), whereas there was no evidence to prove that the present Appellants, Defendants Nos. 5 and 6, dispossessed the Plaintiff or ever had possession of any part of the *zemindary* in question.

Indeed, the Defendants Nos. 5 and 6 were not parties to the proceedings before the Deputy Magistrate, whose award the Plaintiff sought to set aside, nor did the Deputy Magistrate find that they were in possession. On the contrary, he consider-

ed that the second party in the proceedings before him, viz., the 1st and 2nd Defendants, who are not now Appellants, were alone in possession, and his order was that their possession should not be interfered with. Further more, the Plaintiff did not in his plaint even allege that the Appellants dispossessed him or show any grounds for making them parties to the suit, except for the purpose of binding them as to the title. He merely stated that he had been dispossessed by Defendants Nos. 1 and 2 under the award of the Deputy Magistrate.

It appears to their Lordships to be extremely questionable whether even the magistrate's finding as to the fact of the possession of Defendants Nos. 1 and 2 was correct, and whether, on the contrary, the *Nawab* was not in possession at the date of the order. It is further to be observed that the Defendants Nos. 1 and 2, by the 14th paragraph of their written statement, set up a title adverse to the Appellants, and insisted that were entitled to the property by virtue of a deed of gift from *Mehdi Ally*. This shows that Defendants Nos. 1 and 2 were not holding for the benefit of *Mehdi Ally's* heirs, of whom Nos. 5 and 6 were two.

Upon the whole their Lordships are of opinion that the decree of the High Court ought to be reversed so far as it affirmed that part of the judgment of the Lower Court which awarded mesne profits against the Appellants, Defendants Nos. 5 and 6, and that it be affirmed as to the residue, and that it be ordered that that part of the judgment of the first Court which awarded mesne profits against the Appellants, the Defendants Nos. 5 and 6, be reversed.

Their Lordships will advise Her Majesty accordingly.

Under the circumstances they consider that each party ought to bear his own costs of this appeal.

1st, 2nd, & 22nd June, 1875.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On appeal from the High Court of Judicature at Madras.

SADASIVA PILLAI (Plaintiff)* ... ... } *Appellant,*

versus

RAMALINGA PILLAI (Defendant)... ... } *Respondent.*

Act XXIII. of 1861, s. 11—Execution—Mesne Profits and Interest—Estoppel.

In construing the provisions of s. 11, Act XXIII. of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognised it to be settled law that, where the decree is silent touching interest, or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest or mesne profits, but that the Plaintiff is at liberty to assert his rights thereto by a separate suit.

The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res integra*, the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding.

The Plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the Defendant, execution was from time to time stayed by the Court on the Defendant giving security, to abide the event of the appeal, for the execution of the decree, and for payment of the mesne profits accruing, while the Plaintiff remained out of possession. The decree having been confirmed on appeal, the Plaintiff applied for execution in respect of the *interim* mesne profits.

Held in the Court below that, as these were not provided for by the decree, they could not, under s. 11, Act XXIII. of 1861, be awarded in execution, but must be made the subject of a separate suit.

Held by the Judicial Committee that the proceedings whereby the Defendant led the Court to stay execution and continue him in possession, laid

* 2 Cowell's I. A., p. 219; 15 B. L. R., p. 388.

him under an obligation to account in the suit for the mesne profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to section 11; since even if the Defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne profits in question were not payable under the decree.

Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*.

22nd June, 1875.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

Shunmooga Pillai and *Chiddunbrun Pillai* were cousins, and the only members of a joint and undivided Hindu family. *Shunmooga* died first, and in 1858 the Appellant, claiming to be his adopted son, brought a suit to enforce his rights against *Chiddunbrun*, who denied the validity of the alleged adoption. The suit was in its nature one to establish the Plaintiff's title as the heir of his adoptive father, and to obtain a partition of the joint family estate. It specifically claimed the mesne profits of the landed property from the date of the alleged exclusion, that is to say, from the *Fusli* year 1267, corresponding with 1857-58, but did not claim mesne profits for the subsequent years.

On the 11th of June, 1859, the civil Judge of *Cuddalore* made a decree in the Plaintiff's favour, which affirmed his title as adopted son of *Shunmooga*, awarded to him a moiety of the joint estate, including certain lands, and the sum of Rs. 4395 6*a*. 7½*p*. as his share of the mesne profits of such lands for the Fusli year 1267, but was silent as to the mesne profits which had accrued since the institution of the suit. Both parties appealed against this decree to the *Sudder* Court of *Madras*, which, by its decree dated the 24th of September, 1860, dismissed the Defendant's appeal and modified the decree of the Civil Court by awarding to the Plaintiff a further sum of Rs. 349 4*a*. 1*p*. as the value of his share in certain jewels and other moveable property. It left the decree of the Civil Court untouched in respect of the mesne profits of the immoveable property.

The Defendant appealed against the decree of the *Sudder* Court to Her Majesty in Council. His appeal abated on his death in 1862, but was revived by his son, the present Defendant, and was finally dismissed by an Order in Council in February, 1864 (1). This antecedent litigation, therefore, has conclusively established the title of the Plaintiff to whatever he can claim under the decree of the 11th of June, 1859, as varied by that of the 24th of September, 1860.

In September, 1864, the Plaintiff commenced the proceedings out of which this appeal has arisen, in order to obtain execution of the decree made in his favour. By his petition he prayed to be put into possession of his share of the lands; to have execution for the ascertained sums awarded to him by the decree, including the mesne profits for the Fusli year 1267, with the interest thereon; and also to have execution for the two further sums of Rs. 48,075 14*a*. 1*p*. and Rs. 15,890 15*a*. 7*p*., the first being the alleged amount of mesne profits for the six years from Fusli 1268 to Fusli 1273; and the latter the estimated amount of interest due on such mesne profits. He has been put into possession of his share of the lands, and may be assumed, subject to what may be said hereafter touching his share of the outstanding debts due to the joint estate, to have obtained all to which he can be entitled under the decree except the two last-mentioned items; or such other sums, if any, as may be due to him for the mesne profits for the years in question, and interest thereon. His claim to such subsequent profits and interest was litigated between him and the Respondent in the proceedings which will be hereafter more particularly considered. The result of these was an order of the Civil Court dated the 31st of January, 1872, which awarded to the Plaintiff the sum of Rs. 36,223 6*a*. 2*p*. for mesne profits, but rejected his claim for interest thereon.

(1) See 9 Moore's I. A., p. 506.

Against that order both parties appealed, the Plaintiff insisting that he was entitled to more than had been awarded to him for mesne profits, and also to interest on such profits; the Respondent for the first time contending that inasmuch as the mesne profits in question were neither asked for in the plaint, nor awarded to the Plaintiff in the decree, the civil Judge had no jurisdiction to award them under sect. 11 of Act XXIII. of 1861, the enactment under which he had proceeded, and taking other objections to the order.

On the 28th of June, 1872, the High Court of *Madras* disposed of these appeals by reversing the order of the Civil Court on the ground that under the decree in the original suit mesne profits subsequent to 1858 were not recoverable. The present appeal is against the last-mentioned order.

The first question to be considered is the construction to be put upon the 11th section of Act XXIII. 1861, of which the material portion is in the following words: "All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit, between the date of the suit and the execution of the decree, . . . and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

It is contended on behalf of the Appellant that the words "all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the suit and the execution of the decree," are wide enough to embrace, and ought to be taken to embrace, the claims now under consideration. On the other hand, the learned counsel for the Respondent insist that the word "payable" is to be read as "payable under the decree," and have cited numerous cases to shew that, notwithstanding some earlier decisions to the contrary, all the High Courts of *India* have now accepted as settled law these propositions: first, that where the decree is silent touching interest or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot under the clause in question assess or give execution for such interest or mesne profits; and secondly, that the Plaintiff is still at liberty to assert his right to such mesne profits in a seperate suit. That this construction has now for several years prevailed in the High Court of *Calcutta* is shewn by the Full Bench ruling of the 13th of September, 1866 (1), the decision of the 18th of June, 1868 (2), and numerous other cases. That it has been adopted by the other High Courts is shewn, as to that of the *North-West Provinces*, by the decision of the 10th of November, 1869, cited by Mr. Justice *Kemp* (3); as to that of *Madras*, by the Full Bench ruling of the 10th of December, 1867 (4); and as to that of *Bombay*, by the Full Bench ruling of the 10th of December, 1867 (5), followed by the decision of the 15th of June, 1869 (6).

The alleged *concensus* of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been had the question been *resintegra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely a question of procedure,—it being admitted that the Plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the Bar, suffices to dispose of the claim to interest on the subsequent mesne profits which is raised by the present appeal.

It was however contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the Plaintiff's claim out of the general rule; and are sufficient to support the order of the Civil Court of the 31st of January, 1872. And their Lordships will

(1) Suth. 6 W. R. Misc. 109.
(2) 1 Beng. Law Rep. A. C. 188.
(3) 22 W. R. 260
(4) 4 Madras, H. C. R., 257.
(5) 4 Bomb. H. C. R. 181.
(6) 6 Bomb. H. C. R. 109.

now proceed to consider what those circumstances are, and the legal effect of them.

The decree of the 11th of June, 1859, conclusively established the right of the Plaintiff as against the Defendant to a share in the lands forming part of the joint estate, and to the mesne profits attributable to that share for the *Fusli* year 1267, being the year next preceding the institution of the suit. His title, therefore, to the lands of which he has obtained possession, and to mesne profits on those lands from a certain date, cannot be impugned. Had there been no appeal, and the decree had been followed by immediate execution, the Plaintiff would have been put into possession of his lands, and would ever since have received the rents and profits of them. The only mesne profits touching which any question could have arison, would have been those for the year which elapsed between the date of the institution of the suit and that of the decree. Execution was suspended, but not necessarily suspended, by the appeals, and the Defendant could only remain in possession on the terms of giving security for the execution of the decree should it be affirmed against him.

Such being the legal position of the parties, the Plaintiff, on the 8th of December, 1859, presented a petition to the Civil Judge of *Cuddalore*, claiming, in addition to the mesne profits specifically given by the decree, a certain sum as the then ascertained mesne profits for the *Fusli* year 1268 (being that which immediately followed the institution of the suit), and a further sum for the mesne profits not yet ascertained for the *Fusli* year 1269; and praying that, should the Defendant fail to give security for the subsequent profits, security to abide the event of the appeals should be taken from the Plaintiff, and that he should be allowed to take out immediate execution. A counter petition was filed, and other proceedings had; but ultimately an order of the Court was made under which the Defendant executed the instrument of the 26th of January, 1860 (1).

The *Sudder* Court made its decree disposing of the appeals in August, 1860; and on the 11th of December in that year the Plaintiff, contemplating the possibility of the appeal to Her Majesty in Council, which was afterwards preferred, made a second application to the Civil Court of *Cuddalore*, praying that the Defendant might give further security to cover both the additional sum awarded to the Plaintiff by the decree of the *Sudder* Court, and the mesne profits of the lands for the current *Fusli* year 1270; and that in default of his doing so security to abide the event of the appeal might be taken from the Plaintiff, and he be allowed to execute the decree. Upon this second application an order of the Court was made, under which,

(1) "No. 7.

"Miscellaneous Petition No. 3 of 1860.

"In Civil Mis. Regular Appeal No 182 of 1872.

"To the Civil Court of *Cuddalore*.

"Security Bond executed by *Chinnapannai Chidambara Pillai*, residing at the *kasbah* (chief village) of *Mannargudi*, 1st Defendant in original suit (No. 1 of 1858.)

"Pursuant to the order passed by the Court upon a petition presented by the Plaintiff *Sadasiva Pillai*, praying that security may be taken from me for the nett produce, assessment, and costs as per the decree by this Court, mesne profits, assessment, and costs for the subsequent years, and property, in all for Rs 28,063 7*a*. 11*p*., by reason of my having preferred an appeal to the *Sudder* Court, dissatisfied with the said decree. I myself stand as security for Rs. 4395 6*a*. 7*p*. mesne profits mentioned in the decree, Rs. 4395 6*a* 7*p*. mesne profits for *Fusli* 1268 subsequent to the decree, Rs. 4395 6*a*. 7*p*, the probable amount fixed for the mesne profits for *Fusli* 1269, Rs. 3099 3*a* 9*p*. Government assessment for the current year, Rs. 1038 7*a*. 10*p*. costs of suit, with interest, Rs. 5025 1*a*. the estimated value of the house, garden, etc., in all, Rs. 23,249 7*a*. 5*p*.; and for the amount of costs and for the interest accruing subsequent to the date of the petition, and give a security lien on my lands herebelow mentioned. Should this Court's decree be upheld in the appeal, I agree to pay up the other amounts (the assessment that this Defendant paid, or may hereafter pay, and the mesne profits for *Fusli* 1269 being set aside), the property interest on certain items, and such amount as may be ascertained to be the value for *Fusli* 1269 at the rates which may hereafter be fixed. Failing so to do, the Court shall deliver to the Plaintiff his share in the landed property, and recover the amounts which as aforesaid have to be paid by me from the responsibility of the property hereunder mentioned.

(Here follows a list of properties).

(Signed) "*Chidambara Pillai*."

"26th January, 1860."

on the 19th of March, 1861, the Defendant executed a further security (1).

The original Defendant died, and the appeal was revived by the Respondent as his son and heir some time in 1862.

On the 29th of January, 1863, the Plaintiff applied again to the Civil Court of *Cuddalore*, praying that the Respondent, as the heir of the original Defendant, should give security for the mesne profits for the *Fusli* years 1271 and 1272, with the usual alternative that if he should fail to do so security to abide the event of the appeal should be taken from the Plaintiff, and he be allowed to have execution. On this application an order of the Court was made, under which, on the 25th of April, 1863, the Respondent executed a third document,

That instrument is addressed to the Civil Court of *Cuddalore*, is entitled "A Ready Money Security Bond respectfully executed by the Respondent as son and heir of the original Defendant," and is in these words:—

"Pursuant to the order passed by the Court requiring me to furnish security for the two *Fuslies* 1271 and 1272, the probable amount whereof has been put down at Rs. 9880 12*a*. 11*p*. for both the *Fuslies*, in original suit (O. S.) No. 1 of 1858 of the said Civil Court, I agree to pay up the same when the original decree comes to be executed. Failing to do so, I consent to my property hereunder mentioned being proceeded against, and the amount recovered. Deducting, therefore, from the said amount of Rs. 9880 12*a*. 11*p*. Rs. 4616 15*a*. 11*p*., which is the surplus in the security furnished in 1270, the remainder is Rs. 5264 13*a*. 0*p*.; for this amount I give you a security lien upon the property hereunder mentioned, and indisputably belonging to my share." Then follows a list of property.

The two former instruments executed by the original Defendant are substantially to the same effect. They are also addressed to the Civil Court; they contain an obligation to pay subsequent mesne profits for the years which they respectively cover, and point even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realisation, if not then paid, by the Court. The effect then of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question. That such was the understanding of the parties is shewn by the earlier proceedings in execution, and in particular by the Respon-

(1) "No. 11.

"In Civil Miscellaneous Regular Appeal. No.
"182 of 1872 To the Civil Court of *Cuddalore*.
"Security Bond executed by *Chinnapannai Chidambara Pillai*, residing at the *kusbah* (chief village) of *Mannargudi*, 1st Defendant in original suit No 1 of 1858.

"For the amount for which the Plaintiff moves that security be now taken from me, minus the amount disallowed, namely, for Rs. 10,411 2*a*. 9*p*, made up of the excess provided for in the decree in Special Appeal No. 101 of 1860 on the file of the *Sudder* Court, costs and interest in the said suit No. 101 and Special Appeal No. 239 of 1859, and the probable amount of mesne profits for *Fusli*, '70, and for the interest accruing on the amount of costs from the date of the petition,—I myself stand as security. Deducting Rs. 23,249 7*a*. 5*p*., the amount of the former security, from Rs. 30, 510 9*a*. 7*p*, the proper value of the property mentioned therein, there remains a surplus of Rs. 7261 2*a*. 2*p*. This, together with my property hereunder mentioned, I give as security. Should the appeal decree be confirmed in the special appeal I have preferred therefrom to HerMajesty the Queen, I agree to pay in cash the whole amount, excluding the mesne profits for the current *Fusli* '70, interest on costs, and such amount as may be fixed as the probable value of the mesne profits for *Fusli* '70, with reference to what may be ascertained to be the value at the final investigation in respect of the probable net profits subsequent to the decree provided for in the former security bond. Failing so to do, I agree to the same being recovered upon the responsibility of the property mentioned in the former security bond, and the property hereunder mentioned.

"Deducting the surplus in the former security bond (*i. e.*) Rs. 7261 2*a*. 2*p*. from Rs. 14,411 2*a*. 9*p*. for which security is required, the remainder is Rs. 3150 0*a*. 7*p*.

(Here follows a list of properties).

(Signed) *Chidambara Pillai*.

"19th March, 1861."

dent's counter petitions of the 13th of October, 1864, and the 25th of April, 1868. By the first of these the Respondent, not disputing his liability for the six years' mesne profits claimed, though he did dispute his liability for interest thereon, offered terms of compromise, and only suggested that the account, by reason of its complexity, would be better taken in a regular suit. The second contains this statement: "The Plaintiff now claims mesne profits for the year subsequent to the decree. Though this petitioner is bound to pay the same, still the amount asked by the Plaintiff is excessive, and has been fixed by him at his pleasure;" and then follows a plea *ad misericordiam*. The objection now taken to the recovery of these subsequent mesne profits by proceedings in execution was first taken by the Respondent in the grounds of appeal filed by him in May, 1872. That the Respondent should have come under the obligation supposed; that the Plaintiff should have failed to apply either to the Civil Court or to the Appellate Court for the amendment of the original decree by making it a decree for mesne profits subsequent to the institution of the suit; and that the Respondent should have omitted whilst the proceedings in execution were pending in the Civil Court to take the objection now taken to them, are all circumstances which the fact that up to December, 1867, the wider construction for which the Appellant contends was put upon the 11th section of the Act of 1861 by the Courts of the Presidency of *Madras*, and regulated their practice, goes far to explain. But if the Respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it the course and practice of the Courts proceeded upon a construction of a statute which has since been pronounced to be erroneous.

Their Lordships will now consider some of the objections which have been taken to the conclusion that the Respondent has, by the proceedings in question, incurred the obligation supposed.

It was said that the last (so-called) "security bond" was alone the act of the Respondent, and a distinction was taken between his obligation under that, and those incurred by his father under the two other instments. Their Lordships however, observe that these are not mere bonds of the father, in respect of which Respondent, as heir, might be liable in the ordinary way. They are proceedings in Court importing a certain liability to be enforced in the suit against the Defendant to that suit. By reviving the appeal the Respondent substituted himself for his father as Defendant in the suit; and assumed the position of Defendant, with all the rights and liabilities which had previously attached to it. And that he intended to do so is further shewn by the claim in his security bond to take credit for a sum which he alleged to be surplus security given by the preceding bond.

Again, it was suggested that the proceedings in the Lower Court which resulted in these security bonds were irregular; that after the appeal to the High Court, the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the Appellate Court. Their Lordships are by no means clear that this objection is well founded; but, whether it be so or not, it comes too late. It was never taken in the Lower Court where the proceedings were had. There was no appeal from the orders of that Court, which directed security to be given. It would be in the highest degree unjust to allow such an objection now to prevail against the Appellant.

Again, Mr. *Norton* argued that the proceedings of the Civil Court of *Cuddalore* in the appointment of the commission and the assessment of the mesne profits were irregular, because its powers were spent, at all events as to the mesne profits, by the execution issued by Mr. *Ellis*, the then Judge, in January, 1865. Their Lordships can see no ground for this objection. It would seem that the intention of the Court, whether under Mr. *Ellis*, or his successor, Mr. *Hodgson*, was to give the Plaintiff execution as prayed by his petition, but to give it piecemeal and as it could conveniently be given. The order in question gave him execution for the as-

certained sums to which he was entitled under the decree. In December, 1863, he was under a later order put into possession of the land. The amount of the subsequent mesne profits could only be ascertained by inquiry. The same proceedings would probably have been had if the decree had expressly given the mesne profits subsequent to the institution of the suit under sect. 196 of the *Code of procedure*.

Upon the whole, their Lordships are of opinion that the Respondent, by the proceedings in question, did come under an obligation to account in this suit for the subsequent mesne profits of the Appellant's land, which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act of 1861, which now prevails in *Madras*. They conceive that this liability made the accounting "a question relating to the execution of the decree," within the meaning of the latter clause of the section. But even if it did not, they think that upon the ordinary principles of estoppel the Respondent cannot now be heard to say that the mesne profits in question are not payable under the decree. Nor do they feel pressed by the observations made by Mr. Justice *Markby* in the case reported in the 4 B. L. R., A. C. J. p. 113.

The Court here had a general jurisdiction over the subject matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* v. *Attorney-General of Gibraltar* (1), in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*.

(1) Law Rep. 5 P. C. 516.

From what has been said it follows that, in their Lordships' opinion, the order of the High Court which is under appeal ought to be reversed. Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the Plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the Plaintiff; if it were unsuccessful, the Respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal; since in such a suit the Plaintiff might recover interest.

With the claim for interest made by the present appeal their Lordships have already dealt. They can see no grounds for the other objections taken by the Appellant to the order of the Civil Court. They are of opinion, in particular, that, in the circumstances of the case, that Court could not have dealt otherwise than it has dealt with the Plaintiff's share in the outstanding debts. On the other hand, the Respondent has not insisted on any of the objections taken in his grounds of appeal to the High Court other than that on which the High Court made its order. Their Lordships, therefore, will humbly advise Her Majesty to reverse the order of the High Court of the 28th of June, 1872, and in lieu thereof to order that the appeal against the order of the Civil Court of *Cuddalore* of the 31st of January, 1872, do stand dismissed, and the said order affirmed, and that each party do pay his own costs, both of the appeal to the High Court and of this appeal.

2nd and 4th June, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal and cross Appeal (Consolidated) from the High Court at Bengal.

RANEE KHAJOOROONISSA (Defendant)* ... } *Appellant,*

versus

RANEE RYEESOONISSA (Plaintiff) ... } *Respondent.*

Mahomedan Law—Exigible Dower—Demand—Application to sue in formâ pauperis—Cause of Action—Limitation—Act VIII. of 1859, ss. 299, 308.

The prompt or exigible dower of the Mahomedan law may be regarded as a debt always due and demandable during the subsistence of the marriage, and certainly payable on demand. On a clear and unambiguous demand by the wife for payment, and refusal by the husband to pay such dower, a cause of action accrues, against which limitation begins to run.

An application under s. 299, Act VIII. of 1859 by a Mahomedan woman for leave to sue her husband for exigible dower *in formâ pauperis*, may be taken to express her intention of bringing an action for dower, only if she obtains leave to do so as a pauper. Until she has the Court's permission to sue, her application does not amount to a demand by way of action.

A counter-petition by the husband objecting to the pauper suit being allowed, and denying his liability to pay the dower, does not alter the character of the proceedings, since no opposition on his part can constitute a cause of action, unless there has been a previous demand by the wife; the option being with her to demand the dower or not, and to elect her time for demanding it.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

These cross appeals arise in a suit brought by the *Ranee Ryeesoonissa* against the *Ranee Khajooroonissa*, the Defendant being the representative of the estate of *Rajah Enajet Hossein*. The suit was brought to recover the sum of a *lac* of rupees in respect of dower, less certain payments which had been made in the lifetime of the *rajah*, and which reduced the total claim under the contract of dower to Rs.91,875. The two *ranees* were the widows of the *rajah*. The Plaintiff *Ryeesoonissa* was the elder wife; and it appeared that she had separated from her husband several years before his death, and before his marriage with the *Ranee Khajooroonissa*. The claim for dower is divided into two parts. By the *kabeennamah*, under which the dower was agreed to be paid, one-fourth was declared to be prompt, and the remaining three-fourths deferred dower. The Principal *Sudder Ameen* gave judgment for the Plaintiff for the full amount of her claim, that is, both for the prompt and for the deferred dower. On appeal the High Court affirmed so much of the judgment of the Principal *Sudder Ameen* as related to the deferred dower, but reversed it as to the prompt or exigible dower; being of opinion that there had been a demand of that dower in the lifetime of the *rajah*, and a refusal of it, and that the claim was barred by the *Statute of Limitations*. Both the *ranees* appealed from that decision. The *Ranee Khajooroonissa* appealed upon the ground that the *kabeennamah* itself, which was the foundation of the *ranee* Plaintiff's claim, was not a genuine document, and also upon the ground that the deferred dower was barred by the *Statute of Limitations*. The ground upon which the deferred dower was alleged to be barred was that there had been a divorce between the parties, and that the deferred dower then became payable. It was also said that the *rajah* had made an *aila* or vow that he would have no further intercourse with his wife, and that that also made the dower payable at a period which would render the *Statute of Limitations* a bar.

On the opening of the appeal for the *Ranee Khajooroonissa* by Mr. *Leith*, it clearly appeared that the facts entirely failed the Appellant, and that no question

* 2 Cowell's I. A., 235; 15 B. L. R., 306.

really arose for their Lordships' decision. The genuineness of the deed was entirely a question of fact, which had been decided by both the Courts below in favour of the *ranee* the Plaintiff. With regard to the divorce and the *aila*, these also were questions of fact which had, in like manner, been decided against the *ranee* Defendant. Her appeal therefore must be dismissed, and dismissed with costs.

The only question in the cross appeal, and it is a question of some importance, is whether the prompt dower is barred by reason of there having been, as alleged on the part of the Defendant *ranee*, a demand and a refusal of that dower in the lifetime of the *rajah*, beyond the period prescribed by the *Statute of Limitations*.

It is not necessary to decide whether the limitation to be applied is that in the 9th clause of the 1st section of the Act XIV. of 1859, or that in the 16th, because whether the term be the three years mentioned in the one, or the six years mentioned in the other, the interval between the alleged breach or cause of action and the commencement of the suit has been longer than either. For the present purpose, the terms used in the two sections, although differing in language, are the same in substance. The limitation in one runs from the breach of the contract, in the other from the cause of action. If there had been a breach, there would be a cause of action; therefore the terms may be regarded as identical so far as the decision of the present appeal is concerned.

The question is, whether certain proceedings, which were taken by the *Ranee Ryessoonissa* in Court with a view to obtain leave to sue her husband for this dower *in formâ pauperis*, amount to such a demand as would be sufficient to constitute a cause of action within the meaning of the statute. It is unnecessary to say what would have been the effect of an abortive suit brought at that time, because their Lordships are disposed to come to the conclusion that these proceedings did not arrive at the stage when they became a suit. The object of the *ranee* was to place herself in a position to maintain a suit as a pauper, without incurring the expense, which she alleged she was unable to pay, of a regular suit. Her application to the Court was for that purpose; but in making it she was obliged to conform to the *Civil Procedure Code*, Act VIII. of 1859. The portion of the Act which relates to pauper suits requires that the application when made shall be by petition, containing the particulars required in regard to plaints, the object being that if the application be ultimately successful, the petition is to be deemed the plaint in the suit. But the application to the Court is really only for permission to sue *in formâ pauperis*. Sect. 299 says:—"The application to the Court for permission to sue *in formâ pauperis* shall be by petition which shall be written on a stamp paper of eight *annas*." Then sect. 308 enacts: "If the application of the petitioner be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as an ordinary suit, except that the Plaintiff shall not be liable to any further stamp duty in respect of any petition, appointment of a pleader, or other proceeding connected with the suit, or with the execution of any decree passed on it." Therefore, if the application of the *ranee* had been successful, the petition would have been turned into and would have become a plaint. But it was unsuccessful. The Principal *Sudder Ameen* was of opinion that she had sufficient means to pay the expenses of the Court, and ordered that "the petition of pauperism be rejected." Her application, therefore, fell to the ground, and the petition never became a plaint.

Since the decisions which have taken place at their Lordships' board, there is really no doubt as to what is the nature of prompt or exigible dower, and under what circumstances the *Statute of Limitations* will run. Prompt or exigible dower may be considered a debt always due and demandable, and certainly payable upon demand, and therefore, upon a clear and unambiguous demand and refusal a cause of action would accrue, and the statute would begin to run. The question here is, whether the proceedings to which reference has been made really do amount to such a

demand. No doubt the form of the proceedings takes the shape of a demand in a plaint, but their Lordships think that, with a view to ascertain the intention of the *ranee*, and the force to be attributed to her application, they must look at the substance and nature of the proceedings, and consider that the form is that prescribed by the law, and is not the voluntary choice of the parties. So regarding them, what the *ranee* says to the Court is no more than this: "I desire to make a demand against my husband in the form of a suit, if you will enable me effectually to do so by allowing me to sue *in formâ pauperis*." The Court rejects her application, and says, "We will not allow you to make a demand in that way." The petition of the *ranee* seems to their Lordships to be an expression, and a strong expression, of an intention to sue the husband in that form if she is permitted to do so, but it does not appear to them to amount to a demand by way of action until she has that permission. The application she makes to the Court to be allowed to bring an action is made conditionally only upon her obtaining leave to do it as a pauper.

It is said that the husband, by his counter-petition, denied his liability to pay the dower, raising several objections both to the deed and to the amount claimed; but their Lordships think that his opposition does not alter the character of the proceedings. No amount of opposition on his part would be sufficient to constitute a cause of action, unless the wife had made a previous demand. The option lay with her to demand the dower or not. It was for her to elect the time at which she would do it, and if she has not done it, his opposition, however strongly expressed, would be immaterial.

It is to be observed that there is no evidence of any demand other than the proceedings referred to.

Under these circumstances, their Lordships think that the ground upon which the Court held that the *Statute of Limitations* applied fails, and that the appeal on the part of the Plaintiff *Ryessoonissa* ought to succeed. In the result, therefore, they will humbly advise Her Majesty to dismiss the appeal of the *Ranee Khajoorooniessa*, and to allow the appeal of the *Ranee Ryessoonissa*, and to direct that the judgment of the High Court be reversed, and the decree of the Principal *Sudder Ameen* affirmed. Their Lordships are also of opinion that the *Ranee Ryessoonissa* should have the costs incurred in *India*, and the costs of these appeals.

5th June, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MUSSUMAT BHAGBUTTI DAEE (Defendant)* } *Appellant,*

versus

CHOWDRY BHOLANATH THAKOOR and Others (Plaintiffs) ... } *Respondents.*

Hindu Law—Construction of Deed—Accumulations by Hindu Widow—Alienation.

A Hindu widow has no greater power of alienation over the profits than she has over the *corpus* of her husband's estate: whatever she purchases out of those profits is an increment to that estate; *secus*, where she holds under a deed which in express terms gives her an estate for life with a power to appropriate the profits.

Such a deed must be construed according to the plain ordinary meaning of its terms; and words may not be imported into it, from any conjectural view of its intention, which would have the effect of materially changing the nature of the estate thereby created.

Sreemutty Kabutty Dossee v. *Sibchunder Mullick* (1) explained.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

In order to make this case intelligible,

* 2 Cowell's I. A., p. 256.

(1) 6 Moore's Ind. Ap. Ca. 1; 1 P. C. J., 484.

the following facts require to be stated *Odan Thakoor* was one of three brothers. Shortly before his death, which occurred in February, 1827, he had adopted a son of the name of *Girdhari Thakoor*, who was a son of his brother. At that time he had a wife, *Mussumat Chunderbutti*, and he had a daughter, *Mussumat Suntbutti*. He shortly before his death, on the 21st of January, 1827, executed a document which will have to be referred to hereafter, upon which the question in this case arises, and a document of a similar character and very similar in terms was also executed by *Girdhari*. Under these documents the present Defendant, *Mussumat Bhagbutti Daee*, who is the granddaughter of *Odan Thakoor* and of *Mussumat Chunderbutti*, claimed all the land in question, being thirty-four lots. The Plaintiffs, who are nephews or grand-nephews of *Odan Thakoor*, brought their suit to obtain possession of these lots, and they have succeeded with respect to the first twelve of them in both Courts. As far as the lots up to No. 12 are concerned there is now no dispute. Those lots were, in fact, lots of real property which belonged to *Odan Thakoor* in his lifetime, and which, it is now agreed, upon the death of *Mussumat Chunderbutti* reverted to the Plaintiffs as the heirs of *Odan Thakoor*, or at all events of *Girdhari*, his adopted son; nor is there now any dispute as to lots Nos. 15, 16, and 17, which both Courts have given to the Defendant.

With regard to the greater part of the other lots, the Plaintiffs contend that the *Mussumat* held the property out of the proceeds of which these lots were purchased as a Hindu widow, and that they were an increment to that property, and did not descend to her heir.

The question arises upon the construction of these documents. The first is that executed by *Odan Thakoor* himself on the 21st of January, 1827, and is in these terms: "I am *Odan Thakoor*, proprietor of one-third share of the whole 16 *annas*" of certain *mouzahs* "which I inherited from my forefathers," and so on. "Whereas no son is born to me except one daughter, by name *Mussumat Suntbutti*, whom I have reared up like my son, and have still got in my house, and not allowed to go to her husband's house, and as on account of my dotage I have given up all hopes of my existence, consequently, in order to evade all future disputes I have made a partition in this wise: that a one-third share out of the whole 16 *annas* of *mouzah Munkowli usli* with *dakhili*, Rs. 1100 in cash, and *Bhichuck* slave with his children, I have granted to *Mussumat Suntbutti*, my daughter, for her maintenance, in order that she may enjoy possession of the same with her children, as proprietress, and thus pass her days," giving to *Suntbutti* an estate of inheritance in this particular property—"that the remaining '*milkiut*' and '*minhai*' estates, together with the amount of ready money, articles, slaves, and all household furniture I have placed in the possession of *Mussumat Chunderbutti Thakoorain*, my wife, to be enjoyed during her lifetime, in order that she may hold possession of all the properties and *milkiut* possessed by me, the declarant, during her lifetime, and by the payment of the Government revenue, appropriate the profits derived therefrom, but that she should not by any means transfer the *milkiut* estates and the slaves; that after the death of my aforesaid wife the *milkiut* and household furniture shall devolve on *Girdhari Thakoor*, my *kurta* (adopted son), and that no objection thereto raised by any one shall be ever held valid." On the same day a similar document, no doubt slightly differing in terms, but in their Lordships' judgment in no material particular, was executed by *Girdhari*, the adopted son. It does not appear to their Lordships necessary to enter into the question as to the effect of the particular form of adoption: it is enough to say that it gave him a right to the inheritance.

The Subordinate Judge has construed this document in what would certainly appear to be its plain ordinary meaning, namely, that it was in the nature of a family settlement, giving to *Chunderbutti* an estate for life, with a power to appropriate the profits; and to *Girdhari* what would be termed in the phraseology of English law a vested remainder on her death. According to this construction,

she would have the power of making whatever use she chose of the proceeds of her estates; and if she bought land or personal property with them, that land and that property would be hers, and would devolve on the Defendant who represents her. Applying this principle he gave the Plaintiffs a decree for the first twelve lots of the thirty-four lots claimed, affirming the title of the Defendant to the remainder. The view of the High Court was different; they indeed agreed with the finding of the Subordinate Judge with respect to the first twelve lots, in which he was manifestly right, for the documents referred to certainly gave to *Cunderbutti* no more than a life estate. They also affirmed, but on different and special grounds, his judgment as to Lots 15, 16, 17. But they differed from him upon the construction of these instruments, expressing their opinion in these terms: "Shortly, the effect of the two *ikrarnamahs* which have been read to us appears to be this, that by an understanding between *Odan Thakoor* and his adopted son, carried out in those instruments, it was agreed that notwithstanding the adoption *Chunderbutti* should take and enjoy the estate of her husband, whose death was then apprehended, and which did shortly afterwards occur, in the same mode as she would have taken and enjoyed it if no adoption had taken place," that is, in her character as a Hindu widow.

Their Lordships, on considering this instrument, together with the surrounding circumstances, which no doubt are proper to be regarded, have come to the conclusion that there is no sufficient reason for departing from what appears to be the plain and obvious construction of its language. There is no evidence whatever, extraneous to it, of any such understanding as that supposed by the Court to have been come to between *Odan Takoor* and his adopted son. If there had been it would have been easy to express it; but as no such understanding is expressed, or is in their Lordships' judgment to be inferred by necessary or even reasonable implication from the language of the instrument, they do not feel justified, upon mere conjecture of what might probably have been intended, in so interpreting it as materially to change the nature of the estate taken by *Chunderbutti*. If she took the estate only of a Hindu widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased out of them would be an increment to her husband's estate, and the Plaintiffs would be entitled to recover possession of all such property, real and personal. But, on the other hand, she would have certain rights as a Hindu widow; for example, she would have the right under certain circumstances, if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether. She certainly would have the power of selling her own estate; and it would further follow that *Girdhari* would not be possessed in any sense of a vested remainder, but merely of a contingent one. It would also follow that she would completely represent the estate, and under certain circumstances the *Statute of Limitations* might run against the heirs to the estate, whoever they might be.

Their Lordships see no sufficient reason for importing into this document words which would carry with them all these consequences, and they agree with the Subordinate Judge in construing it according to its plain meaning.

A case has indeed been called to the attention of their Lordships in which a somewhat limited construction was put by this Board upon words in a deed whereby a Hindu widow was given an estate for her sole and absolute use and benefit: *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (1). The circumstances of that case were these, as far as they are material to the present purpose. A deed of arrangement and release had been entered into between members of a Hindu family in respect of a joint estate which was claimed by a childless Hindu widow, in the character of heiress and legal personal representative of her deceased husband, and that being so, and her claim in that character being recited in the deed, their Lordships thought that the terms

(1) 6 Moore's Ind. Ap. Ca. 1; 1 P. C. J., p. 481.

"her sole absolute use and benefit" must be construed with respect to the character in which she claimed, in which she sued, and in which she was described in the deed. That case does not appear to their Lordships to have any material bearing on the present. This is not a case in which the widow claimed any right as a widow—in fact she had none; nor is she any party to the deeds, nor are they drawn under circumstances at all similar to those in that case.

Under these circumstances, their Lordships have come to the conclusion that whatever property, real or personal, was bought by *Chunderbutti* out of the proceeds of her husband's estate, belongs to her, and consequently to the Defendant.

This view of the case disposes of all the items in the cause, except No. 20, and from No. 30 to 34; all the items subsequent to No. 12 except these comprise either real or personal property which has been found by the Subordinate Judge to have been bought by *Chunderbutti* with the proceeds of her husband's estate, and which finding their Lordships uphold. No. 20 comprises the house in which *Odan Thakoor* lived, and must in their Lordships' opinion be recovered by the Plaintiffs on the same principle on which they established their claim to Lots 1 to 12. As to the last four items, the Subordinate Judge finds that the Plaintiffs gave no evidence of their right to them. The Defendant must therefore retain them.

Their Lordships will, therefore, humbly advise Her Majesty that the decrees of both the lower Courts be discharged, and in lieu thereof that it be ordered that the Plaintiffs recover the *mouzahs* numbered in the plaint from 1 to 12, both numbers inclusive, and the property numbered 20, and that as to the residue of the properties mentioned in the plaint the suit ought to be dismissed. Their Lordships will further direct that the costs of the Plaintiffs in the Court of the Subordinate Judge, in proportion to the amount decreed by Her Majesty in Council, be paid by all the Defendants, and that the costs of each of the Defendants in the said Court of the Subordinate Judge, in proportion to the claim disallowed by Her Majesty in Council, be paid by the Plaintiffs, and that the costs in the High Court be borne by the Plaintiffs and the Defendant *Mussumat Bhagbutti Daee* respectively, in proportion to the value of the property decreed and disallowed by Her Majesty in Council. The costs awarded as above mentioned are to carry interest at the rate of 6 per cent. per annum from the date of the decrees of the Lower Courts, respectively, to the dates of realization. There will be no costs of this appeal.

5th, 8th, 9th, and 26th June, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

THUMBASAWMY MUDELLY and Another (Defendants)* ... } *Appellants,*

versus

MAHOMED HOSSEIN ROWTHEN and Others (Plaintiffs) .. } *Respondents.*

Mortgage by conditional Sale—Equity of Redemption—Course of decisions in Madras and Bombay Presidencies.

The contract of mortgage by conditional sale is a form of security known throughout *India*, and which by the ancient law of *India*, which must be taken to prevail in every part of *India* where it has not been modified by actual legislation or established practice, is enforceable according to its letter.

The decision of the Judicial Committee in *Puttabhiramer v. Vencatarow Naicken* (1), considered and approved.

From the year 1858, the Courts of the Madras Presidency, and from the year 1864, the Courts of the Presidency of *Bombay*, have erroneously and in contravention of the law of *India* as declared by the earlier decisions, adopted with regard to this class of securities doctrines which the English Courts of Equity have applied to mortgages in *England*.

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2 Cowell's I. A., p. 241.

(1) 7 B. L. R. 136; S. C. 13 Moore's I. A. Cs 560; 2 P. C. J. p. 623.

Quære, whether in dealing with future cases the Judicial Committee ought to follow the new course of decision which has sprung up in these Presidencies, or their own decision in the case of *Pattabhiramier* v. *Vencatarow Naicken* (1)?

The essential characteristic of a mortgage by conditional sale, is, that on the breach of the condition of repayment the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them.

Where land was mortgaged on a condition that the rents should be applied first in payment of the Government revenue, next in payment of the salary of a manager, and afterwards in reduction of the debt, and it was further stipulated that instalments of a fixed amount should be paid up to a certain date by the mortgagor to the mortgagee, and that on that date a settlement of accounts should be made, and in the event of there being a balance against the mortgagor and his not paying the same on a date fixed the mortgagee should become the purchaser at a fixed value of so much of the land as would satisfy such balance retaining his right to sue the mortgagor personally for any further sum that might remain due owing to the whole of the land as valued growing insufficient to satisfy such balance: *Held*, that this was not a contract of mortgage by conditional sale.

26th June, 1875.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

In the year 1815 certain persons described as the *mirasi* proprietors of eight shares in *Rajagiri* executed the deed of the 2nd of July of that year (*which is set out above*). It purports on the face of it to be a deed of usufructuary mortgage of certain lands in the hamlet of *Manmoda*, which is attached to *Rajagiri*, and to be made in favour of one *Appavoo Modaliar*, for the purpose of securing the repayment of 2500 *pons* in the manner therein specified.

The name of *Appavoo*, was, however, used for that of *Saminadha Modaliar*, who was the real mortgagee, and is now represented by the Appellants. The Respondents are the representatives of the mortgagors. This deed must now be taken to comprise all the terms of the contract; and the only question is whether by force, and according to the tenor of its provisions, the mortgagees became in 1820 the absolute proprietors of the property; or whether they continued to hold it as mortgagees, subject to the right of redemption, in which case the mortgage debt is admitted to have been liquidated by the usufruct at the close of the year 1866-67. The Civil Court at *Tanjore*, and the High Court of *Madras*, have taken the latter view of the transaction, and have given the Respondents the Plaintiffs in the suit, a decree for the lands with mesne profits from the above-mentioned date.

In impugning this decree the Appellants have chiefly relied upon the law as laid down by this Committee in the case of *Pattabhiramier* v. *Vencatarow Naicken and Another* (1). And the contention before us has raised two questions, first, whether that case, if assumed to contain a correct exposition of the law prevailing in the Presidency of *Fort St. George*, governs the present; and, secondly, how far that exposition is to be taken to be of binding authority, regard being had to one passage in their Lordships' judgment, and to the course of decision in the Courts of *Madras*.

Their Lordships will in the first instance proceed to determine the first of these questions.

Now, what was really decided by the case in the 13th *Moore*, Ind. Ap.? It was that the contract of mortgage by conditional sale is a form of security known under various names throughout *India*; that according to the ancient law of *India* it was enforceable according to its letter; and that whether it was embodied in one instrument or in two separate instruments, and whether or not the transaction appeared on the face of the instrument to be in its inception a mortgage; and further, that this law must be taken to prevail in every part of *India* in which it had not been modified either by actual legislation or by established practice.

The subject matter of the decision, therefore, is the contract of mortgage by conditional sale.

Mr. Justice *Mac Pherson*, in his work upon mortgages thus defines, and, as their Lordships think, accurately defines, this form of security. He says: "The mortgage by conditional sale, '*kutkubula*' or

(1) 13 Moore's Ind. Ap. Ca., 560; 2 P. C. J., p. 623.

(1) 13 Moore's Ind. Ap. Ca., 560; 2 P. C. J., p. 623

'bye-bil-wufa,' is that in which the borrower, not making himself personally liable for the repayment of the loan, covenants that, on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee." Such a mortgage might or might not be usufructuary. If usufructuary, it usually contained a stipulation that the usufruct should be in lieu of interest. The effect of such a stipulation was modified by legislation in consequence of the laws against usury, but has, by Act XXVIII. of 1855, been resorted in its integrity as to all contracts made subsequent to the passing of that Act. The essential characteristic of a mortgage by conditional sale was, that on the breach of the condition the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. That it still has this effect in the Presidency of *Madras* was what was decided by the case in the 13th *Moore's* Ind. Ap.

Such a security, however, seems to be very distinguishable from that which is in question in this suit. By the deed of the 2nd of July, 1815, the mortgagors stated that by reason of urgent need they had mortgaged to the mortgagee and put him in possession of the lands in question; and that they had agreed to pay the principal sum of 2500 *pons* (which was made up of 1000 *pons* borrowed in cash, and a debt which they had undertaken to pay) with interest at 1 fanam per 10 *pons* per mensem; they then stipulated that the rents should be applied first in payment of the Government revenue; next in payment of the salary of a manager; and afterwards in reduction of the debt. So far the security does not differ from a simple usufructuary mortgage. Then follows this clause: "The instalments for this money are as follows:—To be paid on the 30th *Panguni* of *Yuva* (corresponding to 9th April, 1816), 500 *pons;* on the 30th *Panguni* of *Dhata* (corresponding to the 10th of April, 1817), 500 *pons;* on the 30th *Panguni* of *Iswara* (corresponding to), 500 *pons;* on the 30th *Panguni* of *Bahudhania* (corresponding to), 500 *pons.*" These payments, if made, would reduce the debt by 2000 *pons.*

The satisfaction of the balance, which might include 500 *pons* of principal money, was left to be made by an adjustment of accounts. The deed goes on thus: "and in the year *Pramadhi*, corresponding to 1819-20, a settlement of the accounts of the receipts and disbursements shall be made, and any amount that may be due after deducting payments out of the principal and interest as aforesaid, we undertake to pay in cash in full on the 30 *Panguni* of the said year (corresponding to the), and to redeem the mortgage." The obligation, therefore to pay the balance before a day fixed was not to attach until that balance should have been ascertained by an account, in which the mortgagee was necessarily to be the accounting party. And what was to be the consequence of the breach of this obligation if it did attach? Not that thereupon that which was a mortgage in its inception was to become an absolute sale as from the beginning, finally closing the transaction between the parties, as in the case of an ordinary mortgage by conditional sale; but that the land should be valued at so much per veli; that the mortgagee should become the purchaser at that rate of so much of it as would satisfy the balance due to him, taking the whole if such balance amounted to 1269 *pons* and $3\frac{3}{4}$ fanams, but retaining his right to sue the mortgagors personally for any final balance of the original debt and interest that might remain due after the completion of that purchase.

It is admitted that the mortgagors never paid any of the several instalments of 500 *pons*, and Mr. *Mayne* called upon their Lordships therefore, to presume that on the 9th of April, 1820, at least the sum of 1269 *pons* remained due. But on the other hand it has been found by the Lower Court, and it is admitted in the Appellants' case, that no settlement of accounts took place in 1820, or subsequently thereto. Their Lordships are therefore of opinion that this case (the security not being a mortgage by conditional sale) stands clear of the decision in the 13 *Moore's* Ind. Ap.; and, further, that there is no

reason for presuming, even at this distance of time, that the very special agreement contained in the deed of the 2nd of July for the purchase of the property in certain events was carried out between the parties according to its terms, the contemplated settlement of accounts being a necessary preliminary to the performance of that contract. Indeed, the Appellants have not distinctly rested their case on any such presumption.

The conclusion at which their Lordships have thus arrived being of itself sufficient to determine this appeal, it is not absolutely necessary for them to consider the second of the questions raised concerning the decision in the 18 *Moore's* Ind. Ap. The great importance however, of the principles involved in that question induces them to notice it.

The passage of the judgment in the case of *Pattabhiramier* v. *Vancatarow Naicken* (1), which seems to have led the Courts of *India*, in some of the cases which will be afterwards cited, to the belief that it had not that binding force upon them which an unqualified ruling of this tribunal of ultimate resort would unquestionably possess, is in these words: "It must not then be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon." In order, then, to see how far this reservation, taken in its fullest sense, can qualify the effect of the judgment, it is necessary to consider what has been the course of decision upon mortgages by conditional sale in the Courts of *Madras*.

Mr. *Mayen* has shewn that up to 1858 the decisions of the late *Sudder* Court of *Madras* were, with one exception, perfectly consistent with that of this Board in *Pattabhiramier's* case. Indeed, this is almost admitted in the judgment of the High Court of *Madras* of the 11th of December, 1871, which will be afterwards referred to. But in 1858 the current of decision seems suddenly to have turned. In the case No. 49 of 1858, decided on the 28th of August in that year (*Madras Sudder Adawlut* Decisions for 1858, p. 142), the Judges said: "The Court observes that the transaction was a loan of money on the security of certain property, and that the established practice of the Courts of Equity in *England* is to recognise in the mortgagor a right of redemption, notwithstanding that the time stipulated for foreclosure may have passed by, and they do so on the ground that the repayment to the mortgagee of the money lent by him, with interest, is an equitable discharge of his claims. The Court of *Sudder Adawlut* recognises the justice of this principle. They remark that there is an obvious distinction between a conditional sale with power to redeem and a mortgage. The parties in the first instance fix a value on the property, and the transaction is a true arrangement for the sale thereof for such consideration. In the latter instance, a sum is borrowed not representing the value of the property, and it may be far within such value, the only care being that the property shall be of such value as will cover the loan by way of security. It is therefore strictly equitable that on the failure to pay off the loan by the time stipulated the lender should fall back upon the security, not to absorb the whole, but to take his money out of it. The clause of forfeiture in a mortgage deed the Court views as introduced *in terrorem*, by way of a penalty, and it is not the practice of the Courts of Equity to enforce penalties. They merely accord to the several parties their just and equitable rights, ascertained on consideration of the value that has passed from the one to the other, and which has to be recovered back."

It appears, then, that the Judges of the late *Sudder* Court in 1858 took upon themselves, in contravention of the law of *India*, as declared and enforced by the decisions of their predecessors, to apply to this class of security for the first time the principles which the English Courts of Equity have for centuries applied to mortgages in this country. It would seem, however, that they did not adopt those principles in their integrity, since they treated the stipula-

(1) 18 Moore's Ind. Ap. Ca., 560; 2 P. C. J., p 623.

tion in favour of the mortgagee as a mere penalty, and made no provision for his getting the benefit of it by the machinery of a foreclosure suit. They apparently contemplated no remedy against the mortgaged property but that of sale.

This case was followed by the late *Sudder* Court, notwithstanding the vigorous and well-reasoned protest of one of its Judges (Mr. *Morehead*), which is to be found at page 150 of the S. A. D. for 1859, in three cases decided in 1859, and in three more, of which one was the very case of *Pattabhiramier*, decided in 1860. And so the course of decision in the Courts of *Madras* stood when special leave to appeal was granted in *Pattabhiramier's* case by this Board in April, 1861. Now, if that appeal had been prosecuted without delay, and those who constituted the Committee that heard it had had before them all the cases in favour of the decree which had then been decided in the *Madras* Court, their Lordships believe that the Committee would nevertheless have allowed the appeal, and, so far from treating those cases as establishing a course of practice inconsistent with that which had previously prevailed, would have overruled them as decided on erroneous principles.

It unfortunately happened, however, that the appeal slept for nine years, and that in the interval the *Sudder* Court, and afterwards the High Court which succeeded it, continued the course of decision which the former had begun in 1858. This appears by the judgments of the High Court in 1 *Madras* High Court Rep., p. 460; 2 *Madras* High Court Rep., 420; and 7 *Madras* High Court Rep., p. 6. In the first of those cases Chief Justice *Scotland* recognised the mortgagee's right to a decree for foreclosure, which does not seem to have been admitted by the earlier decrees. In the second the Judges treated the law as settled in almost absolute conformity with that administered by the Court of Chancery; observing, however, that in *India*, as in *England*, there may be sales with a condition for re-purchase within a fixed time, against the breach of which equity will not relieve. On this point they said, "it is the intention of the parties which governs, and that intention may be shewn by the deed itself, by other instruments, or even by oral evidence." In the last case the Judges held that the security in question was one of the latter class, and accordingly gave effect to it according to its strict tenor. But in giving their judgment, which was delivered late in December, 1871, they took occasion to say, of the case in 13 *Moore's* Ind. Ap.:—

"If we were bound by a case recently decided in the Privy Council, the Appellant must necessarily succeed, for the Judicial Committee observe that there has been no course of decision in *Madras* admitting of relief after the time. They base their judgment upon this, and intimate that it would have been the other way if the fact were otherwise. It is otherwise, for the decisions of the late *Sudder* Court since 1858 have carried the doctrine so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule which the *Sudder* Court intended to follow, and have held the question to be one of construction, admitting, however, for the purposes of the construction, other documents and oral evidence."

A similar alteration by judicial decisions of the antecedent law seems to have been effected at *Bombay*, though at a later period. In the case No. 608 of 1871, reported 9 Bomb. H. C. R., p. 69, *Westropp*, C. J., reviews the law and its changes both at *Madras* and *Bombay*. He states that the change in the latter Presidency dates only from 1864, when the case of *Ranji* v. *Chinto* (1) was decided. And the Chief Justice observes: "The recognition of the right to redeem was, having regard to the previous decisions of the *Sudder Adawlut*, perhaps somewhat a strong measure. It had, however, for a long time previously been considered a desirable course to adopt, and eminent Judges of the High Court, who had formerly been judges of the S. A., regretted that their predecessors had, for the most part, enforced the conditions, for purchase in *gahan lahan* mortgages, as such a course had been found

(1) 1 Bombay H. C. R. 192.

to promote most oppressive and grasping conduct on the part of money-lenders in the *Mofussil*." It would be difficult to have a more candid admission of the assumption by the Courts of the functions of the Legislature. This case also shews that the *Bombay* as well as the *Madras* Court has come to the conclusion that the modern course of decision is to prevail against that of this Committee in *Puttabhiramier's* case.

The next case reported in this volume, No. 85 of 1871, rules that the right of redemption subsists, and will be enforced, although any number of years may have elapsed since the mortgagee's title under the terms of the deed would have become absolute, unless the right to redemption is barred by the 15th clause of sect. 1 of the *Limitation Act* XIV. of 1859.

It appears to their Lordships that this action of the Courts of the Minor Presidencies is open to grave objection; not only because in so altering the existing law they usurped the functions of the Legislature, but also because the change, as effected, involved very mischievous consequences. Under the law as laid down by them, persons who fifty years before had acquired, as the law then stood, an indefeasible title in lands, which they had ever since held and enjoyed *in optimâ fide*, became liable to be dispossessed, and compelled to account for mesne profits at the suit of the representatives of the mortgagor against whom the sixty years' rule of limitation has not yet run. Nor is this an imaginary case. In the latest decision cited at the Bar (No. 551 of 1874, 7 Mad. H. C. R., 395), the mortgage deed was executed in 1811, the title of the mortgagee became absolute in 1816; there had been since 1811 uninterrupted possession by him, or by a purchaser from him; and the suit to redeem must have been brought but just within the sixty years' period of limitation. The Reports shew that other instances of similar disturbance of title have occurred, and more may occur.

Again, the distinction between sales with a condition for re-purchase, and mortgages by conditional sale, is made to depend upon the intention of the parties to the original transaction, provable, if need be, by oral evidence. This seems to open a wide field of litigation, and to leave much to the discretion of the Judge in each particular case; and the inquiry is embarrassed by the circumstance that the parties whose intention is to be ascertained cannot, in the case of an ancient transaction, have contracted with reference to a state of law which the Courts of *Madras* have decided no longer exists.

In *Bengal*, where the possible mischiefs that might result from leaving mortgages by conditional sale to take effect according to their tenor early became apparent, the Legislature proceeded on sound principles to apply a remedy. By Regulation I. of 1798, it gave the mortgagor the means of avoiding any dispute as to tender, and of keeping alive his right of redemption by a payment into Court.

By Regulation XVII. of 1806, it made provision for redemption and judicial foreclosure by the procedure still in use. But this Regulation, as was properly decided in the case of *Sureefoonissa* v. *Shaikh Enayet Hossein* (1), had not a retrospective operation upon titles which had become absolute before it came into force. The contrast between this mode of proceeding and that followed by the Courts in *Madras* and *Bombay* is obvious.

The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases whether they will follow the decision in the 13th *Moore* which appears to them based upon sound principles, or the new course of decision that has sprung up at *Madras* and *Bombay*, which appears to them to have been, in its origin, radically unsound.

On a stale claim to redeem a mortgage, and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security executed since 1858 there would be strong reasons for recognising and giving effect to the *Madras* authorities, with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise. They deem it right, however,

(1) 5 Suth. W. R. 88.

to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature.

An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party.

In the present case, their Lordships can only recommend Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

30th June and 1st July, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

CHOWDHRY CHINTAMUN SINGH (Plaintiff)* ... } *Appellant,*

versus

MUSSUMAT NOWLUKHO KONWARIE (Defendant) } *Respondent.*†

Family Custom—Primogeniture—Mitakshara—Joint and Separate Property—Impartibility.

Although an estate be not what is technically known in the north of *India* as a *raj*, or what is known in the south of *India* as a *polliam*, the succession thereto may, under a *kulachar*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the *Mitakshara* law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is *impartible* does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general *status* of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between *Hindus* and in the *Mitakshara* itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes in the event of the holder dying without issue to *his younger brother or his eldest son*, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed.

1st July, 1875.

THE judgment of thier Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The only question raised by this appeal is whether the Appellant, the Plaintiff in the Courts below, or the Respondent, was entitled to succeed to the property called *talooka Gungore*, the Appellant claiming as the nearest collateral male heir of the last possessor, and the Respondent claiming as the widow of the last possessor.

It was admitted on the opening of the case, and seems to have been admitted throughout the proceedings below, that the enjoyment of this *talooka* has long been by a single member of the family, and that it has passed from father to son according to the rule of primogeniture for several generations. The existence of this family custom has moreover been litigated at various times from a very early period, and has been affirmed by repeated decisions.

By that of the 17th of may, 1809, it was held that the *talooka* was one which by custom descended according to the law of primogeniture; that it was one of those estates which were in the contemplation of the Legislature when it passed Regulation XI. of 1793; and that the rights of all parties under the custom were saved to them by the 5th section of that Regulation. It seems to their Lordships too late to question what is affirmed by many reported cases, that a custom of descent accord-

* 2 Cowell's I. A., p. 263.

† From the judgment of Phear and Morris, J.J., dated 9th July, 1873.

ing to the law of primogeniture may exist by *Kulachar* or family custom, although the estate may not be what is technically known either as a *raj* in the north of *India* or as a *polliam* in the south of *India*.

That being so, it is necessary next to consider what are the limits of the custom as established, and what would have been the course of descent of this property had the family remained wholly undivided.

There is some evidence in the *Tuksimnamahs* of 1832 of what the family understood to be the custom. To that reference will afterwards be made. It is to be observed, however, that if the evidence were wholly silent as to that point, the general law as laid down in decided cases seems to be that where the family, to which ancestral property held in this peculiar manner belongs, is governed by the law of the *Mitakshara*, that law in the event of a holder dying without male issue would, if the family be undivided, give the succession to the next collateral male heir in preference to the widow or daughters of the last possessor.

The cases upon this point are collected and reviewed in the judgment of Chief Justice *Couch* in the 9th volume of the Bengal Law Reports. In the last of them, which was decided here as late as the 2nd of February, 1870, viz. the case of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*, and is reported in the 13th *Moore's* Indian Appeals (1), the point which has been taken in the present case by the learned counsel for the Respondent appears to have been taken by Sir *Roundell Palmer* and Mr. *Leith*, who argued for the Appellants in that case. The judgment, however, says: "Accordingly the strength of the argument of the learned counsel for the Appellant has been directed to shew that this case should be governed by *Katama Natchiar* v. *The Rajah of Shivagunga*, in the 9th volume of *Moore's* Indian Appeal Cases (2), which is generally known as the *Shivagunga Case*. They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the *Shivagunga Case*, the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. The authority invoked, however, affords no ground for this argument. The decision in the *Shivagunga Case*, will be found to proceed solely and expressly on the finding of the Court that the *zemindary* in question was proved to be the self-acquired and separate property of *Gowary Vallaba Tavar*. It assumes that if this had not been so, the decision would have been the other way." In that case the estate was held to pass to a very remote collateral male heir in preference to the widow of the last possessor.

This authority seems to dispose of the arguments of the learned counsel for the Respondent, which went to shew that even while the family remained a joint and undivided family in the full sense of the term, this property would have been treated as separate property, and therefore governed by the law of the *Mitakshara* as to separate succession.

It is, however, found as a fact and cannot be denied, that there has been to some extent a separation of this family, and the question therefore is, whether this particular property after that separation lost the character which it before possessed, and became subject to a different rule of succession. According to the rule laid down by Sir *William Macnaghten* (Principles of *Hindu* Law, tit. "Partitions," vol. i. p. 53): "If at a general partition any part of the property is left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother." That authority was in fact one of those upon which this Board in the *Shivagunga Case* decided the converse of the proposition, viz., that though a family might be undivided, the separate property of any member would nevertheless go according to the law of succession to separate estate. It in fact goes to support the proposition that, whether the general *status* of the family be joint or divided,

(1) Page 333; 2 P. C. J., p. 546.
(2) Page 539; 2 P. C. J., p. 25.

property which is joint will follow one, and property which is separate will follow another course of succession. The question, therefore, really seems to be whether by reason of the acts of the parties on the several occasions of the partial partition in 1832, and of the compromise of the suit of 1852, the Plaintiff's father waived his rights of succession, or whether the parties by their joint action have impressed upon this *talooka* the character of separate property which must now pass according to the laws of separate succession.

As to the transaction of 1832, it appears to their Lordships that the partition then made was clearly intended to be confined to the property which was then admitted to be partible; that although the *talooka* of *Gungore* is mentioned in the *Tuksimnamahs*, it is mentioned only for the purpose of declaring that it is impartible, and that the clear intention of the parties was to leave that particular property in the condition in which they found it, and to set it aside out of the mass of the family estate. Being impartible in its nature it could not be the subject of partition, and the object of the transaction is declared at the foot of the deed, where it is said, "These few words in the way of a deed of partition of a 4-*anna* share of *mouzah Purmeswurpore* have therefore been written that they may be of use when needed." There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or transfer any right or contingent right of property which they might have; they only admitted that they had no claim to share in *talooka Gungore* as coparceners. This their Lordships think is made more clear from the special manner in which the nature of the family custom is referred to. The deed of *Ramdyal* and of *Soman* says, "*Talooka Gungore, pergunnah Pharkya*, comprising five *mouzahs*, both *usli* and *dakhili*, an ancestral estate, has been, in accordance with family custom from time immemorial, held by one person, the eldest son and the registered proprietor, from generation to generation, and in case the registered proprietor dies without issue, the younger brother of the deceased or his eldest son becomes the rightful proprietor of *talooka Gungore*." If it had been intended to make this property which had been joint, separate property, it would not have been necessary to enter into so detailed an account of the family custom, or of the manner in which it had previously passed. The statement of the family custom their Lordships are disposed to construe very much as it was construed by the Subordinate Judge, who decided this cause in the first instance. In a document between *Hindus*, and indeed in the *Mitakshara* itself, it is by no means unusual to find that the leading member of a class is alone mentioned when it is intended to comprehend the whole class. And their Lordships think that in the above statement of the family customs, it was not intended to confine the passing over of the whole, in the event of the proprietor dying without issue, to a younger brother of the deceased or his eldest son, and further, that the words "without issue" are to be taken to import "issue in the male line." Accordingly, the real effect of that definition of the family custom was that the property was ancestral property; that though ancestral property, it was held by special custom by one person at the time, according to the rule of primogeniture, with a provision that where the direct male line failed it should then go over to the collateral lines. It has already been shewn that this course of devolution was consistent with the general law. Their Lordships conceive that the partition which took place in 1852 of the other property cannot be held to have affected the character or the mode of descent of this property as thus defined.

It however appears that in the year 1852 *Ramdyal* was so ill advised, and it may be said so dishonest, as to seek to reopen the question of this family custom, and to bring a suit by which he claimed possession of the moiety of the *talooka* and certain other property. The mother and guardian of *Tilukdaree Singh*, the elder brother of *Runjeet Singh*, who was then the person next in succession to *Gurdyal Singh*, filed her answer, setting up, amongst other things, that *Gurdyal Singh* was "proprietor of the entire ancestral estate, in consequence of his being

the eldest son in accordance with family custom; and that the Plaintiff was not entitled to receive a share." She either included in that defence the whole of the property claimed in the suit, or the proceedings set out in the record fail to shew what specific defence she made in respect of the property other than *Gungore* which was claimed. The result of the suit was a compromise between the parties, which resulted in a decree that "The Plaintiff do obtain possession of the 3 *annas*, 12 *gundahs*, and a fraction above 4 *cowries* of *mouzah Purmeswurpore, pergunnah Chye*, including his former share,"—meaning the share specifically given him on the partition,—"and 100 *bighas* of *kamut* land long held by him in *mouzahs Gungore, Oolapore*, and *Jehangira*, and seven *bighas* of land, together with the orchard situate in *Ismaelpore, talooka Gungore*, in accordance with the petitions of the parties; and that after *Runjeet Singh* attains his majority, he shall have his name enrolled in respect of the share of *Purmeswurpore*." The decree, therefore, is upon the face of it merely one made to give effect to a compromise whereby the Plaintiff receded from his claim to any share as coparcener with a present right of possession in *talooka Gungore*. No doubt the words of the petition of compromise, if taken by themselves, are considerably stronger, and are capable of being read as if he were giving up all rights whatever in *talooka Gungore*. But looking to the position of the parties, and to what was done upon the petition, and to the absence of any evidence to shew that there was any negotiation for a compromise, or any terms of compromise arranged between the parties whereby the character of this estate and the mode in which it was to descend was to be changed, or that *Ramdyal* undertook to transfer any contingent rights of succession which he possessed, their Lordships cannot but think that this transaction really amounted to no more than an agreement to waive the claim to a share in, and to the consequent right to a partition of, the *talooka Gungore*. They think that this construction is confirmed by the reference which the petition itself contains to the partition and arrangement of 1832. It says: "The said *Runjeet Singh* will continue in possession under the said guardian, and on his attaining his majority he and his heirs will remain in possession according to the deeds of partition dated the 31st January, 1832, one executed by me, *Ramdyal Singh*, and the other executed by *Gurdyal Singh*, in accordance with which the name of *Gurdyal Singh* was enrolled in the Government records, in respect of the entire 16 *annas* of *talooka Gungore*.

If this be so, their Lordships are further of opinion that the written statement of *Chintamun Singh*, which was filed in the suit afterwards brought in 1863 by *Rowshur Singh*, can be taken only to be a disclaimer of any interest in the *talooka* as claimed by *Rowshur Singh* in that suit, which of course, if *Rowshur Singh* had succeeding in establishing his claim, would have brought in *Chintamun Singh* as a coparcener entitled to a partition. It cannot carry the case further than the act of his father, and it seems only to be an admission that he was content to abide by whatever his father had agreed to in the earlier suit of 1852.

This being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise Her Majesty to reverse that decision, and in lieu thereof to decree that the decree of the Subordinate Judge be confirmed, and that the appeal to the High Court be dismissed, with costs. The Appellant must also have his costs of this appeal.

2nd & 3rd July, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On appeal from the High Court of Judicature at Fort William in Bengal.

BAIJUN DOOBEY and Others (Defendants)* } *Appellants,*

versus

BRIJ BHOOKUN LALL AWUSTI (Plaintiff) ... } *Respondent.*†

Hindu widow—Sale of Right, Title, and Interest of widow—Execution of Decree—Arrears of Maintenance—Rights acquired by Auction-Purchaser.

C, a *Hindu*, inherited from his father property charged, under the *Mitakshara* law, with the maintenance of *N*, his mother. *C* dying without issue, his property passed to *D*, his widow, who allowed the maintenance of *N* to fall into arrears. *N* brought a suit against *D* personally for the amount of the arrears, and obtained a money decree, in execution of which *D*'s right, title, and interest in the property, left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionery heir of *C*, after the death of *D*, to establish his right of inheritance to, and to recover possession of, *C*'s estate, *Held*, that the purchaser at the execution sale took only the widow's interest, and not the absolute estate, and therefore the Plaintiff was entitled to recover.

3rd July, 1875.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is a suit brought by *Brij Bhookun Lall* against *Baijun Doobey*, to declare his right to the inheritance of lot *Mowrawan*, and to obtain possession of that estate. The Plaintiff claims the estate by right of inheritance from *Chintamun* as reversionary heir after the death of *Doorga Konwar*, the widow of *Chintamun*. The Defendant claims by purchase under an execution of a decree against *Doorga*, the widow, and the question is whether, under that decree, only the widow's interest or the absolute estate was sold. If only the widow's interest, then upon the death of the widow the Plaintiff succeeded to the estate as reversionary heir of *Chintamun*, and is entitled to recover; if, on the other hand, the whole interest passed under the sale, then the Plaintiff as reversionary heir upon the death of the widow took no interest, but the estate passed to the Defendant *Baijun* by reason of his purchase under the decree.

Now it appears that *Sheo Churn* and *Muddun Mohun*, two brothers, the sons of *Deo Kishen*, separated in estate. *Muddun Mohun* took one share of the estate and *Sheo Churn* the other. *Muddun Mohun* therefore obtained a separate estate. The lands are situate in the district of *Gya*, and are subject to the rules of the *Mitakshara* law. *Muddun Mohun* having got this separate estate died, leaving two sons, *Balgobind* and *Chintamun*; *Balgobind* died childless and the whole estate came to *Chintamun*. *Chintamun* consequently acquired the estate by inheritance, and it was ancestral estate derived from the father, *Muddun Mohun*. *Chintamun* died childless, leaving two widows, *Doorga Konwar* and *Radha Konwar*. *Muddun Mohun*, the father, left a widow, who was the mother of *Chintamun*. The mother, *Net Konwar*, the widow of *Muddun Mohun*, was entitled to be maintained out of the estate held by *Chintamun*. The maintenance of *Net Konwar*, the widow of *Muddun Mohun*, was a charge upon the inheritance which came from *Muddun Mohun*. The liability to maintain the mother passed to *Chintamun* when he got the estate of his father, and when the estate passed from *Chintamun* to his widow the liability to maintain *Net Konwar* still attached to the inheritance, and *Doorga* was bound to maintain her out of the inheritance. It appears that she allowed the maintenance of the mother, which had been fixed by the two brothers at Rs. 200 a year, to fall into arrear for about five years,

* 2 Cowell's I. A. p. 275.

† From the judgment of Lock and Anslie J. J., dated the 22nd March 1872.

making Rs. 1000 for the five years. In consequence *Net Konwar* brought a suit against her personally for the amount due for maintenance with interest.

The Plaintiff obtained a decree whereby it was ordered that the Plaintiff should recover from the Defendant on account of her claim *Sicca* Rs. 1033. 5*a*. 6*p*., which is equivalent to Company's Rs. 1102. 3*a*. 6*p*. The plaint prayed that the Defendant be ordered to pay that amount, and by the decree it was ordered that the Plaintiff do get from the Defendant that amount.

Now the decree being a personal decree against the widow, according to the case in the High Court cited from the 6th *Weakly Reporter* (1), all that would be sold under it was the interest of the widow. It was there held that where only the rights and interest of a Hindu widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale proceedings declared the property itself liable for the debt, the purchaser obtained an interest in the estate only during the widow's lifetime. This was a personal debt of the widow, and there is nothing to shew that the estate of *Muddun Mohun* was charged by the decree. The sale against her in discharge of her personal liability was of the interest which belonged to her, and not of the estate which belonged to her husband. It was the widow's property only that was liable to be sold, or was sold, in discharge of her personal debt.

The notification of the sale under the decree was that a sale would be held of whatever right and interest the judgment debtor had in the estates. It does not say that it is to be levied by sale of the husband's assets, but that it is to be realised by the sale "of whatever right and interest the judgment debtor had in the estates." Then it is specifically pointed out: "Besides the right and interest of the judgment debtor the right and interest of no other person will be sold at the said auction." The right and interest of the judgment debtor which was to be sold, was that to which she was entitled, that which was liable to make good her default in non-payment of the maintenance. The sale took place under that notification, and it is clear, if that is important, that *Brij Bhookun*, the Plaintiff, understood that what was to be sold was the widow's estate, not his own reversionary interest as the heir of his uncle. He wanted to sell the widow's estate, not his own interest. The real question is what was liable to be sold under the decree, and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which it did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the Defendant in the estate, and that besides that interest no other interest was being sold. The Plaintiff having purchased the interest of the judgment debtor obtained a certificate of the purchase, which stated that whatever right title and interest the judgment debtor had in the said property had ceased from the date of the sale, and had become vested in the auction purchaser.

It appears therefore to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate in the lot, and that consequently upon the death of the widow the lot descended to the Plaintiff as the reversionary heir of her husband, and that the purchaser did not obtain the absolute estate, but only the widow's interest in it, which continued only so long as the widow lived.

Several cases have been cited. The first case which was referred to was the case in *Marshall* (1). That case was fully gone into, and it was explained in the course of the argument that the suit was against the widow not in her own right as widow, but as representative of her son. In that case the widow had no estate at all to be sold, and when the decree and the order for sale are examined, it is clear that what was intended was the sale of the interest of the debtor, that was the interest of the son to whom the widow was the guardian; and when it was said that the interest of the Defendant was sold, the widow's in-

(1) Page 304.

(1) Page 614.

terest was not intended, but the interest of the person who was liable, and that was the son. That decision was subsequently approved by this Board (1). It appears to their Lordships that those cases are no authorities to show that, under the judgment and execution in this case, anything further passed to the purchaser than the widow's interest. Then two cases were cited, one from the 12th *Weekly Reporter* (2). That was a very different case from the present. It was there held, that "Where a widow's estate is sold for arrears of rent it is not merely the widow's life interest that is transferred, and the reversionary heir cannot follow the estate after her death." There the widow was sued for rent under Act X. of 1859. Section 105 of that Act enacts that, "If the decree be for an arrear of rent due in respect of an under-tenure which by the title deeds or the custom of the country is transferable by sale, the judgment creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree." The rent was due to the landlord. He recovered a decree and under it the tenure, not the widow's interest, was sold.

The other case which was cited was from the 15th *Weekly Reporter* (3). That was the case of a suit brought for arrears of rent. It was there held, that "When neither the Hindu widow who has succeeded by inheritance nor the reversioner chooses to pay the arrears of rent which have fallen due upon a tenure, the tenure, if sold for such arrears, passes to the purchaser by the sale;" that is to say, if the rent is not paid the tenure is answerable, and the landlord has a right to look to the tenure. Those cases therefore are not at all applicable to the present, and are no authorities in favour of the Defendants.

Then another case was cited which, in their Lordships' opinion, bears out the position already laid down. It is in the 11th *Moore's* Indian Appeals (4). It was there held that the decree in that case was not a decree against the land but a personal decree. It bears out the view which their Lordships have taken with regard to this decree, that it was a decree in a suit against the widow personally, that the decree was against her personally; that the attachment was to sell her property, that is, the interest which belonged to her in the estate, and which was liable to make good her default.

Looking therefore to the whole case, their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty that that decree be affirmed, with the costs of this appeal.

(1) 14 Moore's Ind. App. Ca., p. 605.
(2) Page 504.
(3) Page 264.
(4) Page 257.

13th, 15th, 20th July, 1875; 16th February and 28th March 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. the Lord Chancellor (Lord Cairns), the Right Hon. Lord Selborne, the Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

DAMODAR GORDHAN (Defendant)* ... } *Appellant.*

versus

DEORAM KANJEE (deceased by his sons and heirs) (Plaintiff) ... } *Respondent.*

British territory in India, Power to cede—Proof of cession—Transfer of Jurisdiction—Re-arrangement of Jurisdiction within British territory—Statutes 3 and 4 Will IV., Cap. 85 Sections 43; 24 and 25 Vic., Cap. 67 Section 22; and 24 and 25 Vic. Cap. 104 Sec. 9—The Indian Evidence Act of 1872, Section 113—Territorial Jurisdiction of British Court ceases on cession.

Semble that the general and abstract doctrine laid down by the High Court at *Bombay* that it is

* 3 Cowell's I. A., p. 102.

beyond the power of the British Crown, without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in *India*, in time of peace, to a foreign power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part on the Government of *India* purporting to transfer uncertain villages forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory.

A re-arrangement of jurisdiction within British territory in *India* by exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control, cannot be carried out except by legislation under the provisions of the Imperial Statutes 3 and 4 Will IV., Cap. 85, Section 43, 24 and 25 Vic., Cap. 67, Section 24, and 24 and 25 Vic., Cap 104, Section 9.

The Governor General in Council being precluded by the Act 24 and 25 Vic., Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in *India*, or as to the allegiance of British Subjects, cannot by any legislative Act (e. g. by "The Evidence Act of 1872," Section 118) purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of the cession.

Where the foundation of the jurisdiction of the British Court over the subject matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised whatever be the stage or condition of the litigation at the time of such cession.

THIS was an appeal from a decree of the High Court of *Bombay*, made on review on the 24th of March, 1873, whereby that Court refused to vary their previous decree, dated the 2nd of December, 1870, affirming, on special appeal, a decree of the Assistant Judge of *Ahmedabad* of the 11th of August, 1867, which affirmed a decree of the *Moonsiff's* Court, dated the 19th of April, 1865.

On the 3rd of September, 1864, *Deoram Kunji*, deceased, an inhabitant of *Gangli*, filed his plaint in the *Moonsiff's* Court at *Gogo*, against the Appellant, *Damodar Gordhan*, and *Naran Kalyanji*, and *Laoji Kalyanji*, claiming to redeem a piece of land situate in the village of *Gangli*, which had been, as *Deoram* alleged, in the year 1812 given by him in *ghas-gharemya*, or mortgage, for the purpose of securing Rs. 60 to one *Gordhan Harnath*, the father of the Appellant *Damodar Gordhan*. *Ghas-gharemya* was explained to be "a mortgage with possession, under which the produce of the land is taken instead of interest."

At the date of the institution of the suit the village of *Gangli* formed part of the *pergunnah* of *Gogo*, in the *zillah* of *Ahmedabad*, in the Presidency of *Bombay*.

On the 26th of September, 1864, the Appellant and the other Defendants filed their written statement whereby they disputed the mortgage, and alleged that the property had been given to *Gordhan Harnath* in absolute sale in the year 1813. Issues were settled for trial on the 26th of September, 1864, and documentary and oral evidence at great length was adduced on behalf of the Plaintiff and the Defendants on each side, principally with the view of shewing that the document of title relied on by the opposite party was a forgery. On the 19th of April, 1865, the *Moonsiff* of *Gogo* made a decree whereby it was ordered that, on payment of Rs. 60, the Plaintiff should recover possession of the property in dispute, and that the Defendants should bear the costs of the suit.

On the 18th of January, 1866, the Assistant Judge of *Ahmedabad* reversed the the *Moonsiff's* decision with costs. Subsequently, on the 12th of December, in the same year, the High Court reversed this decree, and remanded the case for a fresh decision.

On remand, by a decree dated the 11th of August, 1869, the district Judge of *Ahamedabad* confirmed the decree of the *Moonsiff* of *Gogo* with costs.

On the 17th of November, 1869, the Appellant preferred a special appeal from the decision of the district Judge of *Ahmedabad* to the High Court of Judicature, *Bombay*, mainly on the ground that the Judge had no jurisdiction to try the appeal, as the village in which the land was situated had been removed from the jurisdiction of the Civil Courts before the appeal was decided.

On the 2nd of December, 1870, the High Court pronounced a decree confirming the decree of the lower Appellate Court with costs.

The material part of the judgment of the High Court was as follows :—

"The disputed land is situated in the village of *Gangli*, within the *pergunnah* of *Gogo* (*vide* Act. VI. 1859), and that *pergunnah* forms part of the *zillah* of *Ahmedabad* as established by sect. 16, Reg. II. of 1827.

"But it is argued that the village of *Gangli* had been removed from the jurisdiction of the Civil Courts of the *Bombay* Presidency previous to the disposal of the case by the district Judge of *Ahmedabad*, and that, consequently, his decree is illegal.

"This argument is founded on a notification dated the 29th of January, 1866, and published at page 197 of the *Bombay Government Gazette* for that year. It runs as follows :—

"Revenue Department.

"It is hereby notified that, in accordance with a convention made between His Excellency the Governor of *Bombay* and His Highness the *Thakoor* of *Bhownuggur*, the undermentioned villages belonging to the *Thakoor* of *Bhownuggur*, and situated in the *pergunnahs* of *Dhandooka*, *Ranpore*, and *Gogo*, *zillah Ahmedabad*, are from and after the 1st of February, 1866, *Sanwat* 1922, *Mahavud* 2nd, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency, and transferred to the supervision of the Political Agency in *Kattywar* on the same conditions as to jurisdiction as the villages of the *talook* of the *Thakoor* of *Bhownuggur*, heretofore in that province.

"*Sehore Talook.*

"*Gangli.*

"By Order,

"(Sd.) *F. S. Chapman*,

"Chief Secretary to Government.

"*Bombay Castle*, 29th January, 1866."

"This notification, it may be observed, though signed by the chief secretary to Government, does not state by what authority it was issued, merely 'by order.' Appearing, however, as it does in the *Government Gazette*, and under the signature of the highest ministerial officer under Government, it may be assumed that it was issued by order of His Excellency the Governor in Council; but the notification is defective in a far more material point, for it omits to recite the law which was supposed to confer on the Governor in Council the power to limit the jurisdiction of the Civil and Criminal Courts of this Presidency.

"It has not been shown to us that any such law exists, and, on the contrary, we find that at the time this notification was issued sect. 6, Reg. I. of 1827, which provides that 'regulations are to be in force at such places and from such periods as may be declared in a regulation actually in force' was unrepealed; and as the regulation establishing the *Ahmedabad zillah*, of which the village of *Gangli* forms a part, was also unrepealed, it follows that a legal enactment was necessary to effect the object which Government had in view when issuing the notification referred to. It was suggested in the course of the argument that the notification might have been issued under c. 2, sect. 16, Reg. II., 1827; but even admitting that this law gives the Governor in Council power to cede territory, no authority, could be assumed to exist in that body summarily to abrogate any law in force in such territory in the face of sect. 6, Reg. I., 1827.

"That this notification is inefficacious is still more apparent when we come to look at the full force it was intended to have, for it purports to affect not only the local Courts, but also the High Court, which, under sect. 1, Reg. II. of 1827, and sect. 9 of 24 & 25 Vict. c. 104, has jurisdiction over all the territories subordinate to the Presidency of *Bombay* in which the code of regulations has operation by enactment. It seems to us, therefore, that the notification referred to is, as far as the argument in this case is concerned, of no effect whatever, and that the village of *Gangli* not having been legally removed from the jurisdiction of

the district Court of *Ahmedabad*, the decree of the Judge must be upheld."

On the 31st of January, 1872, the Appellant presented a petition of review in the High Court. The grounds on which the petition was presented, so far as material, were as follows :—

1. That the Court was wrong in considering that the Judge had jurisdiction to decide the case. 2. That the additional evidence which the petitioner had obtained from Government since the decision of the case would shew that the village in question was removed from the jurisdiction of the Civil Courts, and transferred to *Bhownuggur* by the Government of *Bombay*, with the consent and sanction of the Governor-General of *India* in Council and the Secretary of State, and that the Government had authority to remove it from the jurisdiction of the Civil Courts.

On the 25th of April, 1872, a rule *nisi* was granted on the ground of jurisdiction to shew cause why the decree of the High Court (December 2, 1870) should not be reversed or varied, and on the 16th of December, 1872, the rule was made absolute with costs.

The additional evidence referred to comprised the following documents, which were filed in the Court with the petition of review. The first was a copy letter from the Secretary of the Foreign Department of the Government of *India* to the Acting Secretary of the Government of *Bombay*, dated the 31st of May, 1865, in these terms:—

"I have the honour to acknowledge the receipt of your letter dated the 10th instant, No. 80, forwarding copy of a communication from the *Thakoor* of *Bhownuggur*, asking for an early settlement of the arrangements entered into with him by Sir *George Clerk*.

"2. The *Thakoor's* present application is understood to refer to the contemplated transfer of the town of *Bhownuggur*, of the district of *Sehore*, and of the villages in *Dhandooka* and *Gogo*, to the supervision laws and regulations of the *Kattywar* Political Agency.

"3. His Excellency in Council observes that this matter, in common with the general question of the future administration of *Kattywar*, was referred for the final consideration of the *Bombay* Government in my predecessor's letter No. 132, dated the 13th February, 1865. As Her Majesty's Secretary of State for *India* has decided that *Kattywar* is not British territory, the projected transfer will have been legalised by the agreement concluded between Sir *George Clerk* and the *Thakoor*, which subsequently received the sanction of the Secretary of State, with the reservation that, in the event of gross misconduct on the part of the *Thakoor*, these territories shall revert.

"4. His Excellency in Council authorizes the contemplated arrangement being at once carried into effect. The Government of *Bombay* will be judges of what shall constitute gross misconduct, and will be careful to append to the original agreement a stipulation embodying the Secretary of State's reservation upon that point."

The second document was a copy resolution of the Revenue Department of the Government of *Bombay*, dated the 28th of January, 1871:—

"Revenue Department,

"*Bombay Castle*, 28th of January, 1871.

"Memorandum from the Oriental translator to Government, No. 1169, dated the 18th of November, 1870: submitting substance of a petition from *Damodhar Gordhan*, praying that he may be ordered to be furnished for production in the High Court, with a copy of letter from the Secretary of State or other authority under which certain villages of the *Gogo*, *Dhandooka*, and *Ranpore talooks* were transferred to *Bhownuggur* with the civil and criminal jurisdiction over them; as the Judges of the High Court have, in a suit filed against petitioner, to recover certain land in one of the transferred villages in which he contended want of jurisdiction, declined to recognise the legality of the transfer, exempting the villages from the jurisdiction of Her Majesty's High Court, on the ground that the *Bombay* Government had no power to remove them from the jurisdiction of the Civil Court without legal authority.

"Memorandum from the Revenue Com

missioner N.D. No. 343, dated the 20th of January, 1871; submitting with his remarks, a report by the Acting Collector of *Ahmedabad*."

"Resolution.—Her Majesty's Government, in concurrence with the opinions of the law officers of the Crown, have decided that the Government of *India* has power to cede territory to native states, and 'is the sole judge of the considerations of state policy by which grants of territory must be determined.' The cession of certain villages in the *Gogo*, *Dhandooka*, and *Ranpore pergunnahs* from British territory to the jurisdiction of the *Thakoor* of *Bhownuggur*, was directed to be made by the Government of *India*. Amongst these is the village of *Gangli*, situated in the *pergunnah* of *Gogo* of the *Ahmedabad zillah*."

The third document was an extract from the proceedings of the Government of *Bombay* in the Revenue Department, dated the 14th of April, 1870:—

"The Viceroy and Governor-General in Council has considered with much attention the important papers forwarded with the resolution of the *Bombay* Government in the Revenue Department, No. 3, dated the 3rd of January, 1870, and desires me to convey to you the following observations for the information of his Excellency the Governor of *Bombay* in Council.

"2. The Governor-General in Council, as at present advised, is of opinion that a Legislative Act of the Government of *India* is not required to give effect to the arrangements made between the *Bombay* Government and the state of *Edur* and sanctioned by the Secretary of State.

"3. Her Majesty's Government, in concurrence with the opinion of the law officers of the Crown, have decided that the Government of *India* has power to cede territory to native states, and 'is the sole judge of the considerations of state policy by which grants of territory must be determined.' It is a necessary inference from the possession of this power that no Act of any Legislature is necessary to give effect to such a fact. The jurisdiction of British Courts must cease as soon as the territory over which it was exercised ceases to be British territory.

"4. The only question which can possibly arise is whether the Indian Courts would recognise the validity of the arrangement if it ever came before them; and on this point His Excellency in Council does not see how the question of the validity of such a cession of territory could come before the Courts, or in the event of their refusal to recognise it, how any decree which they might issue as to land or property could be executed outside of British territory.

"5. The arrangements with the *Edur* State, however, of which the first intimation received by the Governor-General in Council was in the copy of the despatch from the *Bombay* Government to the Secretary of State, No. 21, dated the 6th of July, 1869, forwarded to the Home Department with your No. 2784, dated the 8th idem, are such as ought not to have been made without the previous sanction of the Government of *India*. They are in substance a treaty by which each party transfers to the other certain rights and certain portions of territory. But it is provided by 33 Geo. 3, c. 52, s. 43, that the Government of *Bombay* shall not negotiate or conclude any treaty with any Indian Prince or State without the authority of the Governor-General of *India* in Council or of the Court of Directors, for which that of the Secretary of State is now substituted.

"6. The defect arising from the want of previous sanction may be considered as cured by the subsequent sanction which the Secretary of State has extended to the transaction in his revenue despatch to the *Bombay* Government, No. 67, of the 16th of September, 1869. But I am to point out that it would have been more in accordance with the requirements of the law if the proposed arrangements had been previously submitted for the orders of his Excellency the Viceroy and Governor-General in Council, and I am to request that this course may in future be pursued before any such negotiations are entered on with any Indian Prince or any foreign state or power."

On the 1st of September, 1872, the

Indian Evidence Act came into operation, sect. 113 of which contains the following provision:—"A notification in the *Gazette of India* that any portion of British territory has been ceded to any native state, prince, or ruler shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification."

On the 4th of January, 1873, a notification appeared in the *Gazette of India* in these terms:—"The Governor-General hereby notifies the fact that the villages mentioned in the schedule here below appended were on the 1st of February, 1866, ceded to the State of *Bhownuggur*." Among the villages enumerated in the schedule was *Gangli*.

On the 24th of March, 1873, the High Court at *Bombay* pronounced judgment on the Appellant's petition of review. The material portions of that judgment are as follows:—

"The question of jurisdiction has now been formally argued before us.

"The Appellant's arguments put shortly amount to this: that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for *India* succeeded under the provisions of sect. 3, chap. 106, of 21 & 22 Vict.; that this Court, under sect. 57, sub-sect. 10, of the *Indian Evidence Act*, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette*; and further that this Court, being bound by the law, cannot but hold the cession to be valid under sect. 113 of the same *Evidence Act*, coupled with a notification in the *Gazette of India*, 4th January, 1873, as follows:—'The Governor-General of *India* in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st of February, 1866, ceded to the State of *Bhownuggur*' (the village of *Gangli* being included in the same schedule).

"Whereas on behalf of the Respondent it was urged with much force and ability that the power to cede territory, and therewith to transfer the allegiance of subjects, was never possessed by the Court of Directors, and therefore could not be transferred to the Secretary of State, such power residing in the Imperial Legislature alone; that, therefore, the cession was invalid, and the recent notification in the *Gazette of India* made for the purposes of sect. 113 of the *Evidence Act* was worthless, it being *ultra vires* of the Legislative Council, as in various ways in defiance of Acts of Parliament; that the Legislature had no power to make retrospective laws; and, lastly, that even though the question of jurisdiction be decided against the Respondent, the Appellant having already attorned to the jurisdiction cannot now be heard to object.

"With regard to attorning to the jurisdiction, the Respondent's argument appears altogether untenable; it is advisable, therefore, at the outset, to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory, but none of those cases go to the length of shewing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give any Court a jurisdiction not before possessed over the subject-matter in dispute; and it is also manifest that if the legal effect of the cession of territory notified was to remove the village of *Gangli* out of the jurisdiction of the district Court of *Ahmedabad*, sects. 3 and 37, Act XXIII. of 1861, provided an absolute bar to the Judge's hearing this appeal.

"Two main questions arise in this case; one, as to the effect of the declaration in the *Gazette of India* in January last, that territory has been ceded, and the other as to the validity and legality of the cession itself.

"The power of the Indian Legislature to create such a statutory presumption having been challenged on the ground that it affects the authority of Parliament, we find that the first of these questions in-

volves an inquiry into the very serious one of the Crown's prerogative to cede territory.

"We prefer then first to consider, with regard to the second question, what rights for cession of territory were vested in the *East India Company*; for it is clear that only those powers which the Company possessed 'either alone or by the direction and with the sanction of the Commissioners of the Affairs of *India*,' devolved upon Her Majesty's Secretary of State.

"We know that from the time of their first charter, granted by Queen *Elizabeth* in 1600, down to 1767, the Company were merely recognised as traders, but as their struggles with the French company left them at the peace of 1763 masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a committee to inquire into the nature of the Company's charters, the inquiry resulting in their being continued by 7 Geo. 3, c. 57, s. 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February, 1769, on condition of the payment of a certain annual sum.

"From this date the Company's exclusive trade and government were renewed from time to time, until by 3 & 4 Will. 4, c. 85, their trade was suspended, except in so far as it might be carried on for purposes of government, their term of government being continued until the 30th of April, 1854, and finally this term was renewed 'until Parliament should otherwise provide, until in fact the passing of 21 & 22 Vict. c. 106, which transferred the government of *India* to Her Majesty.

"We see, then, that from the year 1767, when the *East India Company's* territorial acquisitions were first recognised as British territory, they were from time to time continued in possession of them subject to the authority of Parliament.

"It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatover powers the Company and Board possessed were derived from Parliament. All the charters from 1767 expressly entrust the Company with possession and government of the British territories, and appropriation of the revenues (as a necessary means of governing) for the Crown, and the Board of Commissioners was created with 'full power and authority to superintend, direct, and control all acts, operations, and concerns which anywise relate to or concern the civil and military government and revenues of the said territories and acquisitions in the *East Indies*.' And though it may be inferred that the Company and Board had power to levy war or make peace, and to make treaties with native princes and states in *India* for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power under the direction and control of the Board of Commissioners to 'declare and appoint what part or parts of any of the territories under the government of the Company should from time to time be subject to the government of each of the several presidencies then subsisting or to be established, and to alter from time to time the limits of the presidencies and lieutenant-governorships.' If, therefore, special enactments were necessary to enable the government of the country to make internal arrangements and distributions of British territories, *à fortiori* would it appear that without such special enactment they were incompetent to cede any portion of them?

"Mr. *Forsyth* in his Cases and Opinions on Constitutional Law, p. 185, gives two instances of cession (not under treaty of peace) by the *East India Company* to a foreign state previous to 1858:—

"1. In 1817, a cession by treaty in full sovereignty to the *Sikhumputtee Rajah* of a part of territory formerly possessed by the *Rajah* of *Nepaul*, but ceded to the *East India Company* by a treaty of peace.

"2. In 1833, a cession by treaty to *Rajah Poorunder Singh* of a portion of *Assam* lying on the south of the *Burrum-*

pooter river, by which the *Rajah* bound himself 'in the administration of justice in the country now made over to him to abstain from the practices of former *Rajahs* of *Assam* as to cutting off ears and noses, extracting eyes, and otherwise mutilating and torturing.'

"Alluding to the latter case Mr. *Forsyth* adds: 'This is not a very satisfactory precedent, and it shews the kind of risks to which British subjects might be liable on being transferred to a semi-barbarous power.'

"And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company's status and powers.

"Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of *India* to Her Majesty, we turn to consider the effect of the *Gazette of India* notification.

"Sect. 113 of the *Evidence Act*, which received the assent of the Governor-General on the 15th of March, 1872, runs thus: 'A notification in the *Gazette of India* that any portion of British territory has been ceded to any native state, prince, or ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification.'

"This section was first introduced in the Amended Bill, presented on the 30th of January, 1872, to the Legislative Council of the Governor-General, with these remarks by the Select Committee: 'A conclusive presumption is a direction by the law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided in sections 112 and 113,' and 'we have provided in the chapter on the Burden of Proof that a notification in the *Gazette* that a territory has been ceded to a native prince shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.'

"Our judgment in this case was passed on the 2nd of December, 1870, when there existed only the notification of the *Bombay Gazette*, dated the 29th of January, 1866, and we granted the review on the 16th of December, 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession.

"But on the 4th of January, 1873, appeared in the *Gazette of India* the notification that the village of *Gangli*, with several others, had been ceded seven years before; and we are now told that even though the approval by the Secretary of State of the cession be not all sufficient, we cannot consider that question. No doubt this would be the effect of sect. 113, provided that it lay within the power of the Legislative Council to make such a law.

"What, then, are the powers of the Council of the Governor-General? By sect. 43, 3 and 4 Will. 4, c. 85, the Governor-General in Council was empowered to legislate for *India*, except that he 'shall not have the power of making any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament . . . or any part of the unwritten laws or constitution of the *United Kingdom of Great Britain and Ireland*, whereon may depend in any degree the allegiance of any person to the Crown of the *United Kingdom*,' or to the 'sovereignty and dominion of the said Crown over any part of the said territories.'

"This section was repealed by sect. 2, Act 24 and 25 Vict. c. 67, the *Indian Councils' Act*, but by sect. 22 of this Act it was again provided 'that the Governor-General in Council shall not have the power of making any laws or regulations . . . which may affect the authority of Parliament . . . or any part of the unwritten laws or constitution of the *United Kingdom of Great Britain and Ireland*, whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty and dominion of the said Crown over any part of the said territories.' Further on, in sect. 24 of the same Act, we find that 'no law or regulation made by the Governor-General in Council (sub-

ject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogative of the Crown.'

"It is a notable circumstance that the wording of the repealed section of 3 and 4 Will 4, c. 85, and of sect. 22 of the *Councils' Act* substituted for it, differs only in one particular, *i.e.*, that in the latter the words 'prerogative of the Crown' are omitted, nor is it easy to understand the reason for this omission. Prior to this Act no general power was given to the Crown to disallow laws made by the Legislative Council.

"Sect. 26 of 16 and 17 Vict. c. 95, declared that 'no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown, signified in a prescribed form,' and the *Councils' Act* which repealed this made express provision for the transmission to the Secretary of State for *India* of copies of all laws and regulations assented to by the Governor-General, and for their disallowance by Her Majesty.

"In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that before the passing of the *Councils' Act* the Crown had previously sanctioned it, or that, after that period, it had not been disallowed.

"But the law expressly prohibiting the Legislative Council of *India* from making any law affecting the authority of Parliament is in no way varied or altered by the *Indian Councils' Act*.

"The value, therefore, of sect. 113 of the *Evidence Act* depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its powers, and that sect. 113 was and must continue to be bad law.

"On this point we have been referred to the opinions of *Grotius*, *Vattel*, *Puffendorf*, *Chalmers*, *Wheaton*, *Phillimore*, and *Twiss*, who all appear to support the proposition that no power resides in the Crown to cede territory save under circumstances of necessity. Most of these writers are referred to by Mr. *Forsyth* in the work to which we have alluded above, and the conclusion at which he appears to arrive is, that while the Crown can by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. *Vattel*, *Puffendorf*, and *Grotius* may or may not be accepted as authorities, but Mr. *Forsyth* strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative. The case of the *Orange River* territory, and the sale of *Dunkirk*, by *Charles* II., and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the *Orange River* territory, we have been unable to consult the correspondence to which reference is advised, but as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which it had enacted by its letters patent without reference to Parliament. The cases, moreover, are not analogous, for the British territories in *India* have been the subject of parliamentary legislation from the time of their acquisition, and have become thereby a material part of the property, and, therefore, of the body, of the State. It appears to be considered by some, *vide* Lord *Palmerston's* speech in the debate on the Relinquishment by the British Crown of the Protectorate of the *Ionian Islands*, that a distinction exists between cessions of British freehold and of territory acquired by conquest during war, and not by treaty, or ceded by treaty and held as possessions of the British Crown, but the cases he quoted were all, observed Mr. *Forsyth*, cessions at the close of a war. On what principle can such a distinction rest?

"All subjects of the Crown possess the

same rights, and incur the same obligations. Allegiance by the English law is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

"That Her Majesty's subjects in *India* have the same rights with all her other subjects is clear from the Queen's proclamation of 1858; the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty's dominions.

"*Vattel's* arguments on the principles involved commend themselves to our reason. In his Book I., ch. 21, sect. 263, he says: 'A nation ought to preserve itself, it ought to preserve all its members, it cannot abandon them, and it is under an engagement to support them in their ranks as members of the nation. It has not, then, a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it. They submit to the authority of the State for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body if the public safety requires.' In considering further whether the Prince has power to dismember the State, he says that 'this depends on whether he has received full and absolute authority from the nation,' and proceeds: 'The nation ought never to abandon its members but in a case of necessity, or with a view to the public safety, and to preserve itself from total ruin, and the Prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the state requires.'

"We have no knowledge of the reasons which induced the transfer of *Gangli* and other villages to the State of *Bhownuggur*, but it is certain that there existed no such necessity as is recognised by the publicists.

"If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace.

"Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law as the one we are contemplating must of necessity affect the authority of Parliament, and those unwritten laws and constitution of the United Kingdom of *Great Britain* and *Ireland* whereon depends the allegiance of persons to the Crown of the *United Kingdom*.

"This being so, sect. 113 of the *Indian Evidence Act*, though not disallowed, is not protected by sect. 24 of 24 and 25 Vict. c. 67, and we cannot, therefore, follow its directions. For these reasons we decline to alter our decision, which will therefore stand."

In pursuance of special leave duly granted by the High Court the Appellant appealed to Her Majesty in Council against the last-mentioned decree.

28th March, 1870.

The judgment of their Lordships was delivered by .

THE RIGHT HON. LORD SELBORNE: —

In this suit, which was instituted in the British Court of *Gogo* for the recovery or redemption of certain land situate in the village of *Gangli*, on the footing of mortgage, a decree for the Plaintiff (whose representatives are the Respondents here) was made by the *Moonsiff* of *Gogo*, but was reversed on appeal by the Assistant Judge of *Ahmedabad*. On a special appeal by the Plaintiff to the High Court of *Bombay*, the case was

remanded to the Court of *Ahmedabad* for re-trial.

So far there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But, in 1866, after the remand by the High Court, the jurisdiction of all these Courts is alleged by the Appellant to have ceased by reason of the cession by the British Government of certain territory, within which *Gangli* was included, to a native potentate, the *Thakoor* of *Bhownuggur*. A notification that the territory so alleged to have been ceded was removed, from and after the 1st of February in that year, from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency, appeared in the *Bombay Government Gazette* of the 29th of January, 1866. The District Judge of *Ahmedabad* proceeded, nevertheless, to re-hear the appeal, and, on such re-hearing, he restored the original judgment of the *Moonsiff* of *Gogo* in favour of the Plaintiff. Thereupon the Defendant brought another special appeal to the High Court of *Bombay*, alleging the notification in the *Gazette* of the 29th of January, 1866, as proof that the re-hearing had been *coram non judice*; but the High Court, on the 2nd of December, 1870, rejected this special appeal, holding that notification to be insufficient to shew that the jurisdiction of the Court of *Ahmedabad* had ceased before the re-hearing. On a petition, however, by the Defendant for a review of that order, acompanied by some further documentary evidence, the High Court appears to have considered that a transfer of lands from British territory to the jurisdiction of a native prince, by the authority of the Secretary of State for *India*, might have been authorized by the statute 21 & 22 Vict. c. 106, s. 3; and a review of the order of the 2nd of December, 1870, was therefore directed. On the review, the Judges of the High Court held that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in *India*, in time of peace, to a foreign power; and on that ground, they made the order of the 24th of March, 1873, now under appeal, confirming their former order of the 2nd of December, 1870. The question, whether the law thus laid down by the High Court of *Bombay* is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion, which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But having arrived at the conclusion that the present appeal ought to fail without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of *Bombay*, as to be unable to advice Her Majesty to rest her decision on that ground.

Before, however, the judgment, rejecting the special appeal to the High Court of *Bombay* can be reversed, their Lordships must be satisfied that their was, in this case, an actual cession of territory, which had the effect, before the re-hearing by the District Judge of *Ahmedabad*, of depriving *Gangli* of the character of British territory, and its inhabitants of the status and rights of British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of *Bombay* as their Lordships think it deserved to be. It has now (on the 16th of February last) been the subject of a separate argument at this Bar.

The facts material to the determination of this question may be thus stated.

There are in the province of *Kattywar* one or more *talooks* of large extent and value belonging to the *Thakoor* of *Bhownuggur*, which (whether that province ought, or ought not, to be regarded as a part of Her Majesty's dominions) have never been brought under the ordinary administration of the British Government in *India*. The *Thakoor* is also the pro-

prietor of other large *talooks* (the town and port of *Bhownuggur*, and many other villages and places, including *Gangli*), forming part of the districts of *Dhandooka* and *Gogo*, &c., which, having previously been part of *Kattywar*, were ceded by the *Peishwa* to the British Government in 1802, by the treaty of *Bassein*. The territory so ceded was left, till 1815, under native administration; but in that year it was brought under the ordinary jurisdiction of the British Courts of the *Bombay* Presidency, and so remained until those proceedings in 1866 the effect of which is now in question. As to these latter estates, the *Thakoor*, and all his dependents residing thereon, were (beyond controversy) subject to British law and jurisdiction.

Before 1802 the whole province of *Kattywar* was divided between the *Peishwa* and the *Guikowar*, who claimed over it sovereign rights, chiefly consisting of the exaction of tribute. A small number of estates in the province were held rent-free; but far the greater part of the chieftains paid tribute of the same character (so far as their Lordships can judge) as the land-revenue which is paid to the Government in *British India*; and Mr. *Aitchison*, in a work of authority, referred to on both sides at the Bar (Treaties, vol. vi. p. 366), states that the sovereignty of the country was understood by the chiefs to reside in the power to which this tribute was paid. The rest of the rights of the *Peishwa* in those parts of *Kattywar* which had not been transferred to the British Government by the treaty of *Bassein* were ceded to *Great Britain* in 1817.

With respect to the *Guikowar* (leaving out of consideration one or more *talooks*, of which that prince is at the present day the direct proprietor), it appears that in 1807 a settlement was made between the *Guikowar* and the chiefs tributary to him, through the intervention, and under the guarantee, of the British Government; engagements being then taken for the payment of a fixed revenue by those chiefs whose estates were not held rent free. The amount of tribute then fixed for the *Kattywar* estates of the *Thakoor* of *Bhownuggur* was Rs. 74,000; and as it was thought expedient to consolidate the whole of the claims over all the *Thakoor's* estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the *Guikowar* for his *Kattywar* estates to the British Government, as part of the consideration for certain arrangements which were at the same time made for the support of a contingent force. In 1820, by a further agreement, the *Guikowar* engaged to send no troops into *Kattywar*, and to make no demands upon the province, except through the British Government. Since that date the supreme authority in *Kattywar* (as far as it had been previously vested in the *Peishwa* or in the *Guikowar*), has been exercised solely by the British Government. The tribute payable by the different chiefs has been collected by the British authorities, the *Guikowar* receiving from them the share of it to which he is entitled according to the existing agreements. The tribute payable in 1871 by the *Thakoor* of *Bhownuggur* (in respect of the aggregate of his *Kattywar* estates and of the estates included in the alleged cession of 1866) is stated in the *Kattywar* Local Calendar and Directory of that year (a book referred to during the last argument as containing correct information on public matters relating to the province) as amounting in the whole to Rs. 154,917 per annum, of which Rs. 128,060 were collected in right of, and retained by, the British Government; Rs. 3099 were collected in right of, and paid over to, the *Guikowar*; and the sum of Rs. 22,858 was a customary sub-tribute, paid, under the name of "*zortullubee*" to the *Nawab* of *Joonaghur*, one of the chiefs of the province, who appears formerly to have established some kind of superiority over the rest.

Their Lordships have now to refer to the judicial administration of *Kattywar*. Down to 1831 this appears to have been left, without any regular control, in the hands of the chiefs. But in that year (a Political Agency having been established at *Rajcote* in 1820) the British Government constituted a Criminal Court of Justice in *Kattywar*, under the presidency of the Political Agent, with three or four

chiefs as assessors, for the trial of capital crimes in the estates of chiefs who were too weak to punish such offences, and of crimes committed by petty chiefs upon one another, or otherwise than in the exercise of their recognised authority over their own dependents. Until 1853 every sentence passed by this Court was submitted to the *Bombay* Government for their approval. (*Aitchison*, vol. vi. p. 367.) In 1862 the whole of this administration was reorganized. The province was then divided into four districts (the eastern district including all the *talooks* belonging to the *Thakoor* of *Bhownuggur*), in each of which were placed officers called Political Assistants, with other British magistrates under them, all under the control of the Political Agent. The entire number of *Kattywar* states under separate chiefs (large and small) is 188, of whom 96 pay tribute to or in right of the British Government only, 70 to or in right of the *Guikowar* only, and 9 (of whom the *Thakoor* of *Bhownuggur* is one) to or in right of both Governments (*Kattywar* Directory, pp. 54—56). These chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the *Thakoor* of *Bhownuggur* is one,) unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over "British subjects" (however that expression ought to be interpreted) was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the four next classes was restricted in criminal matters to limited powers of fine and imprisonment; and in civil matters to the cognizance of suits of limited amount, the greatest powers (those of the chiefs of the third class) being to imprison for seven years, to impose fines of Rs. 10,000 and to decide civil suits of Rs. 20,000 value; while the sixth class could only imprison for three months, impose fines of Rs. 200, and decide civil suits of Rs. 500 value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction; but in criminal cases might imprison for not more than fifteen days and impose fines not exceeding Rs. 25. All other jurisdiction, both civil and criminal, throughout the province, beyond the limits of that allowed to the chiefs, was reserved to the British officers and magistrates, under the authority of the Political Agent; and in 1871 there was an establishment of thirty-one such officers and magistrates in the whole. (Directory, pp. 520—527.)

In 1863 two elaborate Codes of Regulations (based upon the Indian penal and other codes) were promulgated, with the sanction of the Indian Government, for the guidance of the British-judicial officers and magistrates in *Kattywar*. (Directory, pp. 176—253.) These Codes established, both in name and in substance, regular and fully organised Courts of Justice, with powers to execute warrants and issue commissions throughout the province, and to take security from suspected persons in the name of the Queen. (Arts. 39, 55, 154 of the Criminal, and Art. 104 of the Civil, Code.) It may be added that, on the face of these Codes (especially by Art. 10 of the Civil Code, which pointedly distinguishes the chiefs of *Kattywar* from "Sovereign Powers" and "Independent Chiefs"), and by several later Circular Letters of the Political Agents (No. 11 of 1866, No. 2 of 1867, No. 11 of 1869, and that of the 7th of May, 1868), the whole jurisdiction exercised by the chiefs of all the seven classes is treated as conferred upon them by the British Government.

These being the circumstances which their Lordships think material to a correct understanding of the arrangements between the Indian Goverment and the *Thakoor* of *Bhownuggur*, and of the steps taken to carry them into effect, it now becomes necessary to advert to those arrangements. It appears that the difference between the position of the *Thakoor* in his *Kattywar* estates, in which he continued to exercise his ancient powers, paying a fixed revenue, and his position in his British estates (including his two largest towns and his place of residence), in which since 1815 he had been subject to ordinary British laws, was (in the language of Mr. *Aitchison*, vol. vi. p. 374) "very

irritating to him." With a view (among other things) to remove or diminish this source of discontent, and agreement was concluded between him and the Indian Government in 1860, which is printed at pp. 416—420 of the same volume of Mr. *Aitchison's* work.

It is entitled, "Settlement, framed according to resolutions of the *Bombay* Government, Nos. 3826 and 3829, dated 23rd October, 1860:"—a title which has the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a sovereign state and a foreign or independent power. When the particular terms of this agreement are examined, they confirm that impression.

By the 1st and 8th Articles, the *Thakoor* of *Bhownuggur* and the British Government reciprocally agreed to cancel, from and after the 1st of May, 1861, "the lease of the villages of the *Thakoor's talooks* in the districts of *Dhandooka*, *Ranpore*, and *Gogo*, which was executed in A. D. 1848," and "instead thereof, the *Thakoor* agreed to pay, for the whole of the villages enumerated in that lease, a fixed *jumma* of Rs. 52,000 yearly for ever," which sum "shall not be in any way affected by the result of any action or other process brought by any party against the *Thakoor's* right of possession, in any part of the said *talooks*; nor shall the said estates (excepting *Bhownuggur*, with *Wudwa*, *Sehore*, and the ten villages thereof, about to be attached to *Kattywar*) be exempted on account of this payment from any general taxation, not coming under the head of land tax or rental, which Government may impose on their districts under the regulations.

It appears, therefore, that the *talooks* in *Gogo*, including *Gangli*, which were "about to be attached to *Kattywar*," had been included in the lease of 1848, which was then to be cancelled: and that, although the Government did not reserve as to those particular *talooks* the same right of "general taxation" which they expressly reserved as to the residue of the *Thakoor's* British estates, which were intended to continue subject to the *Bombay* Regulations, still those *talooks* were included in the estates in respect of which a fixed *jumma* of Rs. 52,000 was to be paid in perpetuity by the *Thakoor*.

By the 2nd Article the *Thakoor* agreed (certain questions of account between himself and the British Government being thereby adjusted) "to pay up his *Kattywar* tribute" (*i. e.*, the *jumma* for his *Kattywar* property, which had been fixed in perpetuity in 1807), yearly in full, according to settlement."

By the 3rd and 9th Articles it was reciprocally agreed that the port dues and customs of the port of *Bhownuggur* should continue to be collected at British rates, and by the British Government; but that when collected the whole net produce of the port dues and three-fifths of the net produce of the Customs (as "the share of the *Thakoor*") should be paid over to the *Thakoor* by the Government, who were to retain, as "the share of Government," the other two-fifths of those Customs.

The town and port of *Bhownuggur* were part of the territory to which the 7th Article (that directly bearing upon the present question) relates. That Article is in these words:—"Upon the above conditions Her Majesty's Government agree as follows: Government concede, as a favour, and not as a right, the transfer of *Bhownuggur* itself, with *Wudwa*, *Sehore*, and ten subordinate villages, from the district of *Gogo*, subject to the Regulations, to the *Kattywar* Political Agency.

This is not the language of cession. It is *primâ facie* nothing more than an engagement for the transfer of the places mentioned (including *Gangli*), which were then, beyond question, British territory, from a regulation province to an extraordinary jurisdiction. The other Articles are consistent with this view.

After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th Article; "owing" (as Mr. *Aitchison* states, vol. vi. p. 374) "to some doubts as to the precise status of *Kattywar* with respect to British laws." In 1865, however, the *Thakoor* pressed for the completion of the arrangement. In the letter

from the Secretary to the Government of *India* of the 31st of May, 1865, to the Acting Secretary of the Government of *Bombay*, the measure is described as "the contemplated transfer of the town of *Bhownuggur*, of the district of *Sehore*, and of the villages in *Dhandooka* and *Gogo*, to the supervision, laws, and regulations of the *Kattywar* Political Agency." By that letter the Governor-General in Council authorized "the contemplated arrangement" being at once carried into effect; with the reservation, however (for which the Government of *Bombay* were directed carefully to provide), that "in the event of gross misconduct on the part of the *Thakoor*" (of which the Government of *Bombay* were to be the judges) "these territories should revert." A reason was added for holding that "the projected transfer would have been legalised" by the agreement of 1860, viz., that "Her Majesty's Secretary of State for *India* had decided that *Kattywar* was not British territory."

Their Lordships think that if such an opinion had been expressed by the Secretary of State for *India* (of which no direct evidence is found in the papers before them), and if that opinion could be proved to be well founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulations of the *Kattywar* Political Agency," into a cession of British territory to a native state. Such a cession would be a transaction too important in its consequences, both to *Great Britain* and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

Their Lordships assume (though the precise language used does not seem to be quite apt for that purpose) that what was intended was to confer upon the *Thakoor* of *Bhownuggur* within the "transferred" districts as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the *Kattywar* Political Agency, subject only to the same supervision and control of the *Kattywar* Political Agent to which he was subject in respect of those estates.

But such a grant of jurisdiction (if the Government of *India* or the Crown, without a legislative Act, had been able to grant it), would not have deprived the Crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done (concerning which their Lordships will only observe that the documents of 1870 and 1871 take it for granted that a cession of territory to a native state had been made, which is the point to be determined), their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the *Bombay Government Gazette* of the 29th of January, 1866, (issued, no doubt in obedience to the directions of the Indian Government, contained in the letter of the 31st May, 1865); which merely declared, that "in accordance with the Convention, &c." (*i. e.*, with the agreement of 1860), the villages in question were, "from and after the 1st of February, 1866, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency, and transferred to the supervision of the Political Agency in *Kattywar*, on the same conditions as to jurisdiction as the villages of the *talook* of the *Thakoor* of *Bhownuggur* heretofore in that province."

Their Lordships agree in the reasons given by the Judges of the High Court of *Bombay*, on the 2nd of December, 1870, for holding this notification insufficient for the purpose intended; and they are unable to find in any of the other documents afterwards submitted to that Court on the application for a review any good reason for the subsequent departure of the High Court from that opinion, so far as to admit a review. The second notification of the 4th of January, 1873, which appeared in the *Indian Gazette*, after the review had been ordered, also left the case substantially where it stood before. That notification was merely to the effect that the

villages mentioned in the schedule "were on the 1st February, 1866, ceded to the State of *Bhownuggur*." The nature and effect of the act, so described as a "cession to the state of *Bhownuggur*," remains (as it was before) a proper subject for judicial inquiry. What was attempted was, in their Lordships' judgment, neither more nor less than a rearrangement of jurisdictions within British territory, by the exclusion of a certain district from the regulations and codes in force in the *Bombay* Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed. By the Imperial Statute 3 and 4 Will. 4, c. 85, s. 43, a general power of legislation (with certain exceptions not material for this purpose) was given to the Governor General in Council as to (among other things) "all Courts of justice, whether established by His Majesty's charters or otherwise, and the jurisdiction thereof." This power is, in substance, continued by 24 and 25 Vict. c. 67, s. 22, though the particular clause of the former statute is thereby repealed. By the 24 and 25 Vict. c. 104, s. 9, the High Courts of the several Presidencies were established, with such jurisdiction as Her Majesty should by her letters-patent confer upon them; and under the same statute each of those Courts was also to have and to exercise, "save as by Her Majesty's letters-patent might be otherwise directed, and subject to the legislative powers in relation to the matters aforesaid of the Governor General in Council," all jurisdiction, power, and authority previously vested in any of the *East Indian Company's* Courts within the same Presidency which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the *Bombay* Presidency over *Gangli* rested, in 1866, upon British statutes, and could not be taken away or altered (as long as *Gangli* remained British territory) so as to substitute for it any native or other extraordinary jurisdiction, except by legislation in the manner contemplated by those statutes.

Upon two subordinate points in this case their Lordships think it right to add that they agree with the view taken by the High Court of *Bombay*.

Nothing in their judgment turns in this case upon the *Indian Evidence Act* of 1872, s. 113. The Governor General in Council being precluded by the Act 24 and 25 Vict. c. 67, s. 22, from legislating directly as to the sovereignty or dominion of the Crown over any parts of its territories in *India*, or as to the allegiance of British subjects, could not, by any legislative act, purporting to make a notification in a Government gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession. And with respect to the competency of the Courts of the *Bombay* Presidency to proceed with the suit between these parties, if *Gangli* had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court that the foundation of the jurisdiction of those Courts over the subject-matter of this suit and the parties thereto was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time), after such a valid cession had been made.

Their Lordships will humbly advise Her Majesty to dismiss the appeal.

4th November, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

RAJAH JUGOJEEBUN LALL DHUBAL DEB ... } *Appellant,*

versus

KARTICK CHUNDER BONDOPADHYA (now CHUNDER CHURN BANERJEE) } *Respondent.*

Questions of Facts—Appeal to Privy Council.

Their Lordships refused to reverse a decision of the High Court upon a question of fact in which that Court had before it the documents and the evidence of the witnesses, and had an opportunity of judging of the demeanour of the witnesses.

This was a suit upon a bond, the execution of which was denied by the Defendant, and the sole question was whether the document was a genuine one or not. The Court of first instance found that it was genuine. The High Court, upon appeal, came to the conclusion that the evidence was not sufficient to establish its genuineness, and reversed the decision of the Court below. But consequently the Plaintiff produced further evidence,—evidence of a character which, if true, would be conclusive, namely, of an admission of the Defendant,—and sought for a review upon this new evidence. The High Court granted that review, and upon that new evidence, and further upon examination of both the parties, they came to the clear conclusion that the bond was genuine. The appeal is against that decision. Their Lordships are asked to reverse a decision of the High Court upon a question of fact, in which the High Court had the documents and had the evidence of the witnesses before them, and had an opportunity, which of course their Lordships have not, of judging of the demeanour of the witnesses of both sides.

Under these circumstances their Lordships are of opinion that the decision of the High Court ought not to be reversed. They will humbly advise Her Majesty to confirm that decision, and to dismiss this appeal.

* From the judgment of Bayley and Mitter JJ., decided on the 16th May, 1868.

17th November, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

KRISHNA BEHARI ROY (Plaintiff)† ... } *Appellant,*

versus

BENWARI LALL and others (Defendants) ... } *Respondents.*

Act VIII. of 1859, s. 2—Cause of Action—Res Judicata.

B, as adopted son and heir of *G*, instituted a suit to set aside certain *putni* leases, under which certain persons claimed to hold lands which had belonged to *G*. The defence was, that *B* was not the legally adopted son of *G*, and an issue on this point having been settled, *K*, who claimed to be the reversionary heir of *G*, was made a Defendant under s. 73 of Act XIII. of 1859; and it was eventually decided in that suit that *B* was the duly adopted son of *G*. *Held*, that a subsequent suit by *K* against *B* to set aside the adoption could not, on the principles laid down in the case of *Soorjeemonee Dayee* v. *Suddanund Mohapatter* (1) be maintained. *Kriparam* v. *Bhagwan Dass* (2) overruled.

* From the judgment of Kemp and Glover JJ., decided on the 4th January, 1873.

† 2 Cowell's I. A., p. 283.

(1) 12, B. L. R., 304; *Ante* pag 285.

(2) 4, B. L. R., A. C., 68.

The judgment of their Lordships was delivered by

THE RIGHT HON SIR MONTAGUE EDWARD SMITH —

This was a suit brought by the Appellant, claiming to be the heir of *Goursoonder Roy*, to set aside an adoption of the Respondent *Bunwari Lall*, alleged to have been made by the widow of *Goursoonder Roy* One of the defences set up by *Bunwari Lall* and by his mother, who was joined in the suit as Defendant, was that the question of the validity of the adoption of *Bunwari Lall* had been already decided in a former suit, to which the present Appellant *Krishna Behari Roy* was a party An issue was raised upon that defence Now it appears that a former suit had occurred which was of this nature *Bunwari Lall* had brought an action against some *putnidars* who claimed under *putni* leases granted by his adoptive mother The ground on which he sought to set aside the leases was that she had exceeded her power in granting them, inasmuch as she had only a widow's estate It is not necessary to state more respecting the object of that suit An issue was raised in it upon the question whether *Bunwari Lall* had been validly adopted The present Appellant and Plaintiff *Krishna Behari Roy* intervened in that suit, upon the ground that he was the heir of *Goursoonder Roy*, and, as the heir, had a right to intervene to dispute the title of *Bunwari Lall* as his adopted son It does not appear very clearly at what period of the suit that issue was raised—whether before or after *Krishna Behari Roy* intervened—but undoubtedly it was raised, and is in substance the same as the issue raised in the present suit The issue was tried, and the Principal *Sudder Ameen* found against the intervener and in favour of the adoption He also found in favour of the *putnidar*, that the *putni* could not be set aside The *putnidar* having a decision in his favour was, of course, satisfied with that decree, but *Krishna Behari Roy* being dissatisfied with the finding upon the issue as to the adoption, appealed to the Civil Judge On this appeal the decision of the Principal *Sudder Ameen* was affirmed Again he appealed from the Civil Judge to the High Court, which, after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below There exists, therefore, a final and complete judgment upon the issue raised either at the instance of *Krishna Behari Roy* or which he adopted upon the very question which he seeks again to raise in this suit

Both the Courts below have held that the present suit is barred by reason of the judgment in the former one The ground of the present appeal is that they are wrong, inasmuch as, it is said, that the case does not come within section 2 of Act VIII of 1859 Now the section is this —"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim" Their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense But however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them

It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Sooryomonee Dayee* v *Suddanund Mohapatter* (1) In that judgment it is said, after reference to the second clause of Act VIII, "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with But

(1) 12 B L R, p 304; *Ante* page 285.

even if this interpretation were not correct, their Lordships are of opinion that this clause in the *Code of Procedure* would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle '*nemo debet bis vexari pro eâdem causâ*.' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in vol. iii. of *Atkyns Gregory* v. *Molesworth* (1) in which Lord *Hardwicke* held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. *Smith* to the case of the Duchess of *Kingston*."

A decision of the High Court of *Bengal* has been referred to, the case of *Kriparam* v. *Bhawan Das* (2), as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it.

On reference to some notes of Mr. *Broughton* on this section of Act VIII. of 1859, it appears that the decisions have not been uniform in the Courts in *India*. Several of them are opposed to that referred to.

It was suggested by Mr. *Cave* that the former judgment ought not to be binding, because certain witnesses having been examined before the present Appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given.

In the result, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment below with costs.

(1) Page 626.

(2) 1 B. L. R., A. C. p. 68. In their Lordships' printed judgment, the case referred to is incorrectly given as Sheikh Rahmatulla v. Sheikh Sarimulla Kagchi.

1st and 2nd December, 1875; and 5th February, 1876.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

THE MAYOR OF LYONS (Plaintiff)† ... } *Appellant,*

versus

THE ADVOCATE-GENERAL OF BENGAL and others (Defendants) ... } *Respondents.*

Charitable Gift—Failure of object—Cy-près Performance.

The doctrine of *Cy-près* as applied to charities rests on the view of that charity in the abstract is the *substance* of the gift, and the particular disposition merely the *mode*, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.

It cannot be laid down as a general principle that the *cy-près* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is any thing analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or require so small an amount to satisfy it, that it would be absurd to

* From the Judgment of Kemp and Pontifex, JJ., dated the 10th September, 1873.

† 3 Cowell's I. A. p. 32.

allow a large fund bequeathed to a particular charity to fall into it.

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cy-près* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it fails should go to the residue.

In applying the *cy-près* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cy-près* scheme to benefit that locality.

Unless the *cy-près* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it.

5th February, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH :—

The questions in this appeal arise upon one of the bequests in the will of Major-General *Claude Martin*, whereby he gave the annual sums of Rs. 5000 and Rs. 1000 to be applied respectively to the discharge and relief of poor debtors detained in prison in *Calcutta*. The residue of his large property the testator bequeathed, in the special manner more particularly stated hereafter, to increase the funds of certain charitable establishments which, by previous clauses in his will, he had founded in *Calcutta*, *Lucknow*, and the city of *Lyons*, in *France*.

The bequests to poor prisoners in *Calcutta* having failed by reason of the abolition of imprisonment for debt, the point to be considered is, whether these gifts are to be dealt with by the Court upon the principal of a *cy-près* application of them, or whether, as the Appellants contend, they fall into the residue, so as to increase the endowments of the three establishments above referred to.

The testator was a Frenchman, born in *Lyons*. He entered the military service of the *East India Company*, and attained the rank of Major-general. With the sanction of the British Government he afterwards took service under the Ruler of *Oude*, and resided at *Lucknow*, where he died in 1801.

The will, dated the 1st of January, 1801, was composed and written by the testator himself in English, a language of which, it appears, he had only an imperfect knowledge. It contains numerous bequests, comprised in thirty-four articles or clauses, and has been the subject of many suits and much litigation. Several questions arising upon it, and notably the question whether the English law relating to aliens had been introduced into British *India*, were determined by this Committee on appeal in 1836. The judgment was delivered by Lord *Brougham*, and some passages of it will hereafter be referred to. The general history of the suits will be found in Mr. *Moore's* full report of the case. See the *Mayor of Lyons* v. *East India Company* (1).

By the will in question the testator bequeathed his property, which he valued at upwards of thirty *lacs* of rupees, partly to individual legatees, and more largely to various charitable objects. The most prominent of the charities were the institutions he founded in *Lucknow*, *Calcutta*, and *Lyons* for educational and other purposes, his desire being to perpetuate his memory in these cities. The purposes are not precisely alike in the three cities, owing to the different conditions of the countries to which they belong. The bequest to *Calcutta* is found in the 24th article of the will; that to the city of *Lyons* is contained in the 25th article, and is as follows:—"I give and bequeath the sum of 200,000 *sicca* rupees to be deposited in the most secure interest fund in the town of *Lyon*, in *France*, and the magistrates of that town to have it managed under theirs protection and control; that above-mentioned sum is to be placed, as I said, in a stock or fund bearing interest, that interest is to serve to establish an institution for the public benefit of that town; and the Academy of *Lyon* are to devise the best institution that can be permanently supported with the interest accruing of the above-named sum; and, if no better, to follow the one devised in the Article 24th as at *Lucknow*; the institution to bear the name of *Martinière*, and to have an inscription made at the house of the institution mentioning the same title as the one of *Calcutta*, and this

(1) 1 Moore's I. A. Ca., 175; S. C. 1 Moore P. C. 178.

institution to be established at the *Place St. Pierre—St. Sofurinn* being where I had been christened—there at that place to buy or build a house for that purpose; and to marry two girls every year, to each 200 livres tournois, besides paying about 100 livres for the marriage and fest of each of those who married; or if the institution, such as the *Lucknow* one, educating a certain number of boy and girl, then they are to have a sermon and a dinner for the schools-boys and those who are married, and they are to drink a toast in memory of the institutor; and a medial is to be given of the value of 50 livres, with a premium in cash, or in kind, to be about 200 livres to the boy or girl that has been the most virtuous and behaved better during the course of the year; and also to have a premium of the value of 100 livres for the second that behave better, and also a third premium of about 60 livres for the third that behave better. I am in hope that the magistrate of the town will protect the institution; and in case the sum above allowed of 200,000 *sicca* rupees is not sufficient for a proper interest to support the institution, and buying or building the house, then I give and bequeath an additional sum of 50,000 *sicca* rupees, making 250,000 *sicca* rupees. One of my male relations residing at *Lyon* may be made administrator or executor, joined with any one appointed by the magistrate, to be manager of the said institution; and these managers are to have an œconomical commission for their trouble, taken from the interest of the sum abovementioned. I also give and bequeath the sum of 4000 *sicca* rupees to be paid to the magistrates of the town of *Lyon*, for to liberate from the prison so many prisoner as it may extend, such that are detained for small debt; and this liberation is to be made the day of month I died, as that the remembrance of the donor may be known, and my name, Major-General *Martin*, is the institutor; and as given and bequeathed the sum of 4000 *sicca* rupees for to liberate some poor prisoners as far as that sum can afforded; this I mention to have it made known, as that if neglected that some charitable men may acquaint the magistrate of the town of *Lyon*, as that they might oblige my executor, administrator, or assigns to pay the sum above said, and be more regular in their payments."(1)

It is to be observed that this 25th article contains the gift of an annual sum of Rs. 4000 to be paid to the magistrates of *Lyons* to liberate poor prisoners detained for debt.

The analogous gift in favour of poor prisoners in *Calcutta*, which forms the subject of the present appeal, is not in like manner included in article 24, containing the principal bequest to that city, but is found in a separate article (the 28th), which is as follows:—"I give and bequeath the sum of 5000 *sicca* rupees to be paid annually to the magistrates, or Supreme Court of *Calcutta*, or to Government. This sum is to serve to pay the debt of some poor honest debtor, detained in jail for small sum, and to pay as many small debt and liberate as many debtor as the sum can extent; this liberation is to be made the day month I died, as a commemoration of the doner, and as being a soldier, I would wish to prefer liberating any poor officers or other military men detained for small debt, preferable to any other. And I also give and bequeath the sum of 1000 *sicca* rupees to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail on the same day as the one mentioned above, both sums making Rs. 6000 every year."(2)

The material part of the 33rd article, which contains what may be treated as a residuary disposition, is in the following terms:—

"After all accounts being settled, and sum insured for the interest for the payment of the several monthly pension, and the several payment of gift and others, as also the several establishment, if a surplus above £100,000 sterling, or about 10 *lacs* of *sicca* rupees, remain of my estate, that above surplus of 10 *lacs* of *sicca* rupees is to be divided in such a manner as to increase the several establishment of *Calcutta*, at *Lyon*, and *Lucknow*, as that they may be permanent and exist for ever. Besides the sum al-

(1) 3 Cowell's I. A. p. 35; and (2) page 36.

lowed for finishing all the building, and other of *Constantia House*, which I suppose may amount to 200,000 *sicca* rupees, I also give and bequeath the sum of 100,000 *sicca* rupees for the support of the college and other school, to be regulated as the *Calcutta* establishment, as per articles 24, as also as the establishment at *Lyon*, articles 25, the gift for the poor of *Lucknow*, to be conducted as mentioned in article 23. I also give and bequeath the sum of 4000 *sicca* rupees to be paid annually for to liberate as many prisoners for debt at *Lucknow* as it may extend, and if none, then that sum is to remain to the estate; any sum remaining is to be placed at interest for to accumulate, and improve the several establishment and concern of indigo."

This article, it may here be remarked, comprises a gift of 4000 rupees to be paid annually to liberate poor prisoners for debt at *Lucknow*, but with a direction, that "if none, that sum is to remain to the estate"

Without going into the details of the suits, it will be convenient to refer generally to the proceedings relating to the fund new in dispute.

It appears that by an order of the Supreme Court of Judicature at *Fort william* of the 11th of November, 1802, made in the cause of *Uvedale* v. *palmer*, a scheme which had been settled by the Master for the administration of the charities for the release and relief of poor prisoners at *Calcutta* was confirmed by the Court, and funds to satisfy these charities were, by orders of the Court, transferred to the credit of two accounts entitled respectively, "Distribution of General *Claude Martin's* Fund for the Release of Prisoners," and "Distribution of General *Claude Martin's* Fund for the Relief of Prisoners."

The above orders are not found in the record, but their existence was admitted by the counsel, and the substance of them is stated in the petition of the Officiating Advocate-General of the 3rd of August, 1865, and in a previous decree of the 21st of August, 1840. It also appears that the income of these funds, in excess of what was required for poor prisoners, had accumulated, and at the date of the petition of the Advocate-General above referred to, the fund amounted in the aggregate to about Rs. 351,000.

This petition, after stating that for many years past, owing to the passing of laws for the relief of insolvent debtors and other causes, the existing scheme "had become obsolete," submits that there were useful charitable objects of a kind not very different from those contemplated by the testator, and also charitable objects of other descriptions which the testator approved and made the subjects of other bequests, towards which the income of the funds might now be beneficially applied; and prays to be at liberty to submit a scheme for the application of the funds "in lieu and supersession of the former schemes."

On the 3rd of August, 1865, an order was made on this petition as prayed. This was done without citing the Mayor of *Lyons*; and in making it the Court evidently assumed it had power to deal with these funds on what is called the *cy-près* principle.

A scheme was accordingly settled and confirmed by an order of the Court on the 2nd of March, 1866.

This scheme provides, in substance, that a sum of Rs. 150,000, representing an annual income of Rs. 6000, should be reserved in an account to be headed, "The account of General *Martin's* Fund for the Release and Relief of Prisoners"; the income of which was to be applied by the visiting justices to assist convicts who had conducted themselves properly in prison upon their discharge; and that the corpus of the fund, after reserving the above sum of Rs. 150,000, should be applied as follows, viz.: "that one *lac* of rupees should be transferred to the credit of the governors of the *Calcutta* branch of *La Martinière*, and the residue (amounting to nearly a *lac* of rupees), after paying the costs of these proceedings, should be transferred to the credit of the *Lucknow* branch of *La Martinière* for the general purposes of these institutions respectively." Some special directions also were given regarding the disposition of the fund transferred to *Lucknow*.

It will be convenient to mention here what has been done with respect to the

charities for the liberation of poor prisoners in *Lyons* and *Lucknow*. With respect to *Lyons*, it was declared by the decree of the 23rd of February, 1832 (and this declaration was not disturbed on the appeal in 1836), "that a sum sufficient to satisfy the bequest of Rs. 4000 to be paid annually for the liberation of prisoners at *Lyons*, together with the accumulation of interest since testator's death, had been fully paid to the mayor and commonalty of *Lyons*." It appears therefore that this fund, instead of being carried to an account in the causes, as was done with the *Calcutta* fund, was, before the year 1832, paid over "fully" to the municipality of *Lyons*, and that the administration of it has since taken place without any control by the Court.

With respect to *Lucknow*, the decree of the 23rd of February, 1832, declared that it being impossible owing to the form of government at *Lucknow* and other causes to give effect to the gift in favour of poor prisoners at that place, the bequest was void. This declaration relating to the gift to poor prisoners of *Lucknow* was not disturbed on appeal, and the residue was increased by the amount which would have been required to satisfy it. No objection appears to have been made to the *Lucknow* gift going into the residue; but it is to be remembered that in the clause of the will relating to this legacy it is expressly directed that in case of failure "the sum is to remain to the estate."

The order of the 2nd of March, 1866, confirming the scheme for the application of the funds in dispute, appears to have been unquestioned until 1873, when the petition of the Mayor of *Lyons*, which gives occasion to the present appeal, was filed. That petition (dated the 21st of June, 1873), after stating the facts, and asking relief with respect to other sums which was granted in the Court below, prayed that it might be declared that the bequests in the 28th article of the testator's will had failed, and that the sum standing to the credit of the accounts for the relief and release of prisoners at the date of the order of the 2nd of March, 1866, fell into and formed part of the residue of the testator's estate. It also prayed for relief consequent on this declaration, to the effect that this amount with the accumulations should be ascertained and carried to the general credit of the causes, and divided between the petitioner, and the other residuary legatees.

The Judges of the High Court in a judgment fully stating their reasons, whilst granting relief to the petitioner on other matters, refused this prayer; and inserted in their formal decree a declaration containing the ground of their refusal in these terms:—"That the charitable gift in the 28th clause of the will was an absolute charitable gift, capable of being applied *cy-près*; and that the petitioner, the Mayor of *Lyons*, as one of the residuary legatees under the will, is not entitled to any of the funds appropriated to that gift."

It is to be noticed that the only question raised by the petition is, whether the Appellant, representing the city of *Lyons*, is entitled as one of the residuary legatees to a share of these trust funds, as having fallen into the residue. Whether the *Martinière* establishment of *Lyons* should have been included in the distribution provided by the scheme ordered by the Court is a different question, which is not raised by the petition.

Three points were made at the Bar by the Appellant's counsel.

1. That the doctrine of *cy-près* disposition of charitable legacies is inapplicable where the residuary bequest is to charity.

2. That if this be not true as a general proposition, the doctrine is inapplicable to the particular case, by reason of the special provisions of General *Martin's* will.

3. That the previous decrees have determined the question in the Appellant's favour.

I. The Appellant's Counsel did not dispute the general doctrine, and there is no doubt that although strongly disapproved of by Lord *Eldon*, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it. But their broad contention was that there was no room or necessity for the interposition of the Court where the residuary bequest is to charity, and they sought in the reason

of the rule the grounds for supporting this distinction. The rule, they said, was founded on the presumption that although the gift might be to a particular charity, the intention was to give to charity generally, and the Court therefore, when the particular disposition could not be carried into effect, undertook to make a *cy-près* application of the fund in order that charity should not be disappointed. The reason of the presumption, it was said, being to prevent funds given to charity from falling to residuary legatees or next of kin, and so disappointing the general intention of charity, altogether failed, and left no foundation for the interposition of the Court where the bequest of the residue itself was to charity. Why, it was asked, should the Court interfere to intercept a fund falling into a residue devoted to charity, substituting its own discretion for the testator's?

The question thus raised does not seem to have been distinctly before the Courts in any of the previous decisions; but their Lordships, after fully considering the argument, are unable to perceive satisfactory grounds for such a limitation of the *cy-près* doctrine: certainly not as a limitation applicable generally to all cases in which the residuary bequest is to charity, whatever its kind and nature may be. The principle on which the doctrine rests appears to be, that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse.

This seems to be what Lord *Eldon* understood to be the effect of the decisions, from the following passage of his judgment in *Mills* v. *Farmer* (1).

"With regard to charity, therefore, without going through all the cases, which I examined with great diligence in *Moggridge* v. *Thackwell* (2), a case that, bound by precedent, I decided as much against my inclination as any act of my judicial life, I consider it now established, that although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is of the substance of the legacy, but will effectuate the gift to charity, as the substance; providing a mode for *that legatee* to take which is not provided for any other legatee." This passage is reported in somewhat different language, but substantially to the same effect, in 1 Mer. 99.

Nor can the suggested distinction, as a general qualification of the doctrine, be, in reason, maintained. Cases may be easily supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cy-près* doctrine be established at all, to withhold the application of it in instances of this kind. It cannot, therefore, in their Lordships' opinion, be laid down as a general principle that the *cy-près* doctrine is invariably displaced where the residuary bequest is to charity.

II. But it was next contended that, however this may be, the Court below was wrong in applying the *cy-près* doctrine to the will in question. Undoubtedly the charitable establishments mentioned in the residuary bequest are of a comprehensive character, as well as prominent objects of the testator's bounty; and the argument of the Appellant's Counsel on this part of the case was strongly urged and has been carefully considered by their Lordships. The argument on this point really raises two distinct questions: (*a*), whether the *cy-près* doctrine is excluded; and (*b*), whether upon the construction of the will there was a bequest over of the legacy, in case of failure of objects, to the *Martinière* charities.

On the first (in the discussion of which

(1) 19 Ves. 486.
(2) 7 Ves. 30.

it must, of course, be assumed there was no bequest over, otherwise *cadit quæstio*) the argument was founded on the presumed intention of the testator to make the *Martinière* establishments the principal objects of his bounty, and to give them the benefit of all lapsed funds. There is certainly much to favour this presumption; but if it be granted for the sake of the argument that, looking at the whole will, it is probable the testator, supposing he had thought about it at all, would have wished the bequest in question to have gone to increase the funds of these establishments, can this conjecture of intention and upon the hypothesis that the will does not contain expressly or by implication a bequest over, it can be no more —exclude the operation of the doctrine? It seems to their Lordships that an answer in the negative is found in the explanation of the doctrine already given, and that on this point the contention of the counsel for the Respondent is supported both by principle and precedent. It was in effect that the Court, when deciding whether the *cy-près* doctrine applies, looks only to the particular gift, and if it finds charity to be the legatee, sustains the legacy as such, without regarding at this stage of the inquiry (whatever may be proper when a scheme comes to be framed) the rest of the will.

This view of the doctrine appears to have been present to the minds of the learned Lords who took part in the decision of the *Ironmongers' Company* v. *Attorney-General*(1), although the discussion in the House of Lords turned wholly on the propriety of the scheme for the distribution of the trust funds; it never having been doubted apparently that the doctrine itself was applicable. In the will in that case the testator had divided the residue of his property between three charities, and the question arose upon a scheme for the appropriation of one of them, viz., the gift for redeeming British slaves in *Barbary*, which had failed for want of objects. It was held that in applying the *cy-près* doctrine the Court was to look primarily to the object of the charity which has failed, and was not bound to apply the funds which were set free in that case to the two other charities mentioned in the residuary clause of the will. The counsel, in arguing, is reported to have said: "The proper application of the doctrine of *cy-près* is, that you are to look to the objects of the testator, and to what comes near to those objects." To which Lord *Cottenham* replied: "No, *cy-près* means as near as possible to the object which has failed." Although this opinion was expressed with reference to a scheme for the distribution of the fund, it is clearly to be inferred that this would have been the consideration by which Lord *Cottenham* would have been guided in a case where he had to decide whether the doctrine applied at all. And upon fully considering the operation as well as the principle of the rule, it is difficult to see that it could be otherwise. Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the *cy-près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

The question remains whether such an implication arises upon this will. It certainly cannot be inferred from the terms in which the respective gifts to poor prisoners in *Calcutta* and *Lyons* are bequeathed, that the testator had contemplated the failure of either of these charities, or had formed any intention in that case regarding them; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the benefit of the prisoners at *Lucknow* in which there is a direction that in the event of failure it shall remain to the estate, that he had not. If, then, such an implication can be made, it must be from the residuary clause itself, construed with the other parts of the will relating to the *Martinière* establishments. The frame of this clause is peculiar: "after the several payment of gift and others, as also the several establishment—if a surplus above 10 *lacs* remain, that above

(1) 10 Cl. & F. 908.

surplus is to be divided in such a manner as to increase the three establishments." Assuming this to be a residuary disposition into which, in case of failure, legacies other than to charity would fall, yet, in considering the present question, the peculiar frame and language of it cannot be disregarded, and from these it may be inferred that what was present to the testator's mind, and what alone he intended to dispose of, was a residue after the funds for these charities had been provided and set apart. It seems, therefore, to their Lordships, that there is not such a necessary inference of intention to be found in the terms and provisions of the will as is required to raise the implication of a bequest over by the testator of these legacies, upon the failure of the particular charities.

III. The third point argued at the Bar was that the decrees already passed are judgments in his favour on the questions above discussed. What the counsel mainly relied on was a general declaration as to the surplus funds contained in the decree of the 23rd of February, 1832, which was left undisturbed on appeal, and a disposition by a later decree of the 31st of August, 1840, of part of such surplus funds among the three *Martinière* establishments.

It is to be observed that the judgment of the High Court does not notice this point, nor does it appear to have been insisted on below. But however this may have been, their Lordships cannot find anything in the decrees referred to which decides the question. The declaration in the decree of 1832 was to the effect that after setting aside sufficient funds for the various charitable and other purposes of the will, the surplus, if amounting to 10 *lacs*, should be at once divided between the three establishments, and if it fell short of 10 *lacs*, should accumulate until it amounted to that sum, and be then divided. This is no more than an exposition of the will with regard to the surplus, after provision had been made for the particular gifts. The Court did not then contemplate the failure of the gift in question, and could not have intended to make any declaration regarding it. The disposition referred to in the later decree of 1840 was only a distribution of part of the surplus on the footing of the declaration in the decree of 1832.

Reliance was placed by the Appellant's counsel on some observations in the judgment of this tribunal, delivered by Lord *Brougham*, in the former appeal. A question had arisen whether the gift to found the establishment at *Lucknow* could, in the circumstances of the country, be carried into effect. The decree below, founded on reports of the master, declared the inability of the Court to give effect to that bequest, but the Court, considering that the Governor-General had the means of doing so, had ordered the funds to be paid to the Government for that purpose. This tribunal held that this part of the decree was not warranted by the master's reports, and directed a further reference upon the facts. In stating the questions which arose, Lord *Brougham* made the observations relied on: "Can the decree as to the application of the fund stand?—Shall the fund be applied to the establishment and support of a college at *Lucknow*?—Shall it sink into the residue and be divided between the two charities appointed to be established at *Calcutta* and at *Lyons*?—for the cases of *Attorney-General* v. *Bishop of Llandaff* (1), and *Attorney-General* v. *Ironmongers' Company* (2), make it clear that in this case, which is indeed stronger than either of those, the other two charities must take, if the gift fails as regards the third." It is obvious that the question of the ultimate disposition of the fund was not ripe for decision, the point then under consideration being the directions proper to be given for carrying into effect, if possible, the *Lucknow* Charity; and, indeed, the decree advised by this Committee, giving directions for that object, was expressly made "without prejudice to any question as to the final application of the same fund under the directions hereinafter contained or otherwise." The observations in the judgment, therefore, can only be regarded as an opinion, and not as a judgment. So regarded, however, they would have been entitled to

(1) Cited 2 My. & K. 586.
(2) Cr. & P. 208; 2 My. & K. 576; 10 Cl. & F. 908.

great weight, if their authority had remained unimpeached. But the subsequent decision in the case of the *Attorney-General* v. *Ironmongers' Company* in the House of Lords, in which Lord *Brougham* concurred, corrected the views his Lordship had expressed in an earlier stage of that case (1), and in the observations referred to. That decision was in effect that among charities there was nothing analogous to benefit of survivorship.

It was lastly submitted by the Appellant's counsel, that if a *cy-près* application was admissible, the actual scheme which excluded the *Lyons* Charity from participation in the fund is an improper one. The High Court held, and, as their Lordships think, rightly, that it was not competent for the Appellant, under his present petition, which is confined to the claim of a share of the residue, as residuary legatee, to open the scheme. But with a view to prevent further litigation and expense, the Judges expressed an opinion that if it was proper to reform the scheme at all, it might be right to confine it to charitable objects in the city of *Calcutta*, excluding both *Lucknow* and *Lyons*. Their Lordships have been invited to correct this view, and to declare that the *Lyons* Charity ought not to be excluded.

Agreeing with what was said in the House of Lords, in the case of the *Ironmongers' Company*, as to the care and circumspection to be exercised by a Court of Appeal in substituting its discretion for that of the Court below, their Lordships would be reluctant in any case to interfere with a scheme unless it were plainly wrong, and still more to unsettle, by a premature declaration, one which is not regularly before them. Besides, bearing in mind the opinions expressed in the House of Lords, so often referred to, they are not satisfied, as at present advised, that the view of the High Court does not accord with them. The sum of those opinions appears to be, that whilst regard may be had to the other objects of the testator's bounty in constructing a scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. If this be the rule, may not the gift to poor prisoners in *Calcutta* be considered to have a local character; and in that case, may not a scheme properly framed for the benefit of other poor persons in *Calcutta* be supported, as being *cy-près* to the original purpose. And if those questions are capable of being answered in the affirmative, it follows that it would not be a valid objection to the present scheme that it gives no part of the funds to *Lyons*. The contention upon this point, then, appears to come to this, that the inclination of the testator to benefit the *Martinière* institutions so strongly appears, that it ought to guide the Court in framing a scheme, in preference to the principle of selecting an object near to that which has failed. Opinions may well differ on such a point. Reasons are not wanting in favour of the Appellant's contention; but, on the other hand, much may be said in favour of the view that these gifts to poor prisoners bear the character of a charity for the relief of misery in the particular locality. The necessary funds for them were directed by the will to be set apart, and in the case of the *Lyons* Charity were, long ago, paid over to the municipal authorities of that city. It may well be doubted whether if such a contingency as the failure of the gift to *Lyons* should occur, it would be thought proper that any part of the funds paid over to the authorities there should be restored to *India*.

Their Lordships are not now called upon to decide whether the application of the gift which has failed to the relief of criminal prisoners, and the transfer of part of it to *Lucknow*, are proper, or the best possible disposition of the fund. All they need say about the actual scheme is, that they do not feel justified upon the present appeal in declaring, as they are invited to do, that it is necessarily bad, because no part of the fund has been appropriated to the *Lyons* Charity.

In the result, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

(1) See 2 My. & K. 586.

3rd December, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAJAH KISHEN DUTT RAM PANDAY, (Defendant)* ... ... } *Appellant,*

versus

NARENDAR BAHADOOR *SINGH, (Plaintiff) ... } *Respondent.*

Limitation of Suits in Oudh— Redemption of Mortgage—Act I. of 1869—Onus Probandi.

Under Act I. of 1869 a suit for redemption is not barred where the instrument of mortgage fixes a term within which the mortgage might be redeemed, and such term did not expire before the 13th of February, 1856.

In a suit for redemption, the mortgage deed, dated the 21st of July, 1840, having been lost, the Judicial Commissioner held that the *onus* lay, not upon the mortgagor to prove that the term did not expire before the 13th of February, 1856, but upon the mortgagee to prove that it did:—

Held by their Lordships, that the burden of proof was *primâ facie* on the mortgagor, regard being had, as respects the *quantum* of evidence required, to the opportunities which each party might naturally be supposed to have of giving evidence.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This was a suit for redemption of a mortgage made in the year 1840. The sole question between the Plaintiff and Defendant was whether or not the term for the redemption of this mortgage had expired in the year 1856. The statutes bearing on the question are the following:—First, the *Oudh—Limitation of Suits Act* (1). Sects 2 and 3 are to this effect,—"When a mortgagee shall under or by virtue of a mortgage executed before the said day," that is 13th of February, 1844, "have obtained possession of any land comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit in any Civil Court or any Revenue Court in the said province to redeem the mortgage of such land," and so on—"provided that any suit for the redemption of land which may have been rejected or dismissed upon the ground that the suit was barred under some rule of limitation in force or supposed to be in force in the said province may be revived," and so on—And thirdly, "nothing herein contained shall be taken to bar a suit for redemption in any case where by the instrument of mortgage a term was fixed within which the property comprised therein might be redeemed, and such term had not expired before 13th February, 1856, provided that if any such term had expired before that day, the suit shall be barred, whatever may have been the date on which the instrument was executed." Then in 1869 another Act was passed, the object of which was to define the rights of *talookdars* and others to certain estates in *Oudh*. The second part of that confirms to the *talookdars* certain rights. It says,—"Every *talookdar* on whom a summary settlement of the government revenue was made between the 1st day of April, 1858, and the 30th October, 1859, or to whom before the passing of this Act, and subsequently to the 1st day of April, 1858, the *talookdary sunnud* has been granted, shall be deemed to have thereby acquired a permanent, heritable, and transferable right in the estate," and so on. Then sect. 6 is to this effect:—"Nothing in sects. 3, 4, and 5, or in the said orders, or in any *sunnud*, shall be deemed to bar a suit for redemption where the instrument of mortgage was executed on or after 13th February, 1844, and fixed no term within which the property comprised therein might be redeemed;" which manifestly does not apply to this case,—"and (*b*) When the instrument of mortgage fixed a term within which the property comprised therein might be redeemed, and such term did not expire before the 13th

* Cowell's I. A., p. 85.
(1) No. XIII. of 1866.

February, 1856." Such was the issue between the parties, and such are the statutes bearing upon that issue.

The case was first tried before the Extra Assistant Commissioner, who believed the case of the Plaintiff, who called several witnesses for the purpose of proving that the term of redemption in the mortgage was the term of twenty years, which would not have expired at the date in question. Several witnesses were called for the Defendant, who deposed that the term expired in ten years. The Extra Assistant Commissioner, who had the advantage of hearing and seeing the witnesses, believed the witnesses for the Plaintiff and disbelieved those for the Defendant, and gave judgment for the Plaintiff. The case was brought on appeal before the Commissioner, who reversed that decision, taking a somewhat opposite view of the case; on the whole, being more disposed to believe the case of the Defendant, though he did not believe the whole of it, than the case of the Plaintiff. There was a subsequent appeal to the Officiating Judicial Commissioner. Whether or not it was treated by him as a general appeal does not very distinctly appear, but he appears to have decided mainly, if not entirely, upon the ground that according to his view there was a presumption of law in favour of the Plaintiff, and that the burden of proof lay, not upon the Plaintiff to prove that the term did not expire before the 13th February, 1856, but upon the Defendant to prove that it did; and upon this assumption he overruled the judgment of the second Court, and affirmed that of the first.

Their Lordships are not prepared to concur with the Judicial Commissioner in the view that he expressed, that the presumption of law is such as he has described it. It appears to their Lordships that in such a case as the present it lies upon the Plaintiff to substantiate his case by some evidence, by some *primâ facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *primâ facie* in this case in their Lordships' view is upon the Plaintiffs, still they think the consideration should not be omitted that the Defendant would naturally have the mortgage, and that it would be *primâ facie*, at all events, more in his power to give accurate evidence of its contents than in that of the Plaintiff. It is not a case in which two deeds, such as a lease and a counterpart, were executed, the Plaintiff keeping one and the Defendant the other, but it is a case in which it would appear that there is only one document, and that that would be, and was in this case, in the custody of the Defendant. The Plaintiff, by the hypothesis, would not have seen the document or probably have had access to it from the time of its execution, which in this case was the year 1840, whereas the Defendant would be assumed to have it and to be able to produce it, or, if he could not produce it, to show why he could not, and to give some evidence of its contents if it were lost.

Now, applying this view of the law to the present case, their Lordships have to see whether the Plaintiff, in their view, did give such *primâ facie* evidence as shifted the burden of proof on the Defendant. Although it may be that the evidence of neither side is altogether satisfactory, nevertheless their Lordships, after giving their best consideration to the case, are of opinion that the Plaintiff did give some such *primâ facie* evidence. He was himself examined. He called seven or eight witnesses, who deposed to the contents of the instrument, to its containing the term which he contended for, and further, to the admission of the Defendant or of his predecessors of the existence of some such term, and the Extra Assistant Commissioner believed those witnesses, having, as was before observed, the opportunity of seeing them and observing their demeanour.

Again, it appears to their Lordships that there was some confirmation of the case of the Plaintiff by that of the Defendant. The Defendant did not produce this document; he indeed gave evidence that it had been filed in some proceedings in the Settlement Court just before the outbreak of the mutiny, and had been lost

in the mutiny, but he neither gave any evidence himself, nor did he give any other legitimate evidence of its contents. It is true that a copy was put in by the Defendant, which purported to be a copy of the document in question. That is to be found in the record, and that describes the instrument as a deed of conditional sale. It contains these terms: "But should I fail to repay the mortgage-money at the time entered in this bond it will become a deed of sale, and the *Panday* will be entitled to hold permanent possession like me, without fear or annoyance," and so on. But this document put in was not proved in any way. No person was called who made a copy or who made the document; no person was called into whose hands this document was put, and who was able to say, "This, according to the best of my recollection, represents the contents of the lost mortgage deed." The case was wholly bare of proof, although that proof might have been given. At the same time it is not immaterial, as against the Defendant, to observe that the case which he set up was that of a mortgage by conditional sale, which would have become absolute in the year 1850.

It appears, further, that on the part of the Defendant, there was an attempt to shew that he had sent in a return to the Government in pursuance of a requisition from them with respect to certain *talooks*, and that he described the villages in question in this suit as having been mortgaged for a term of years to expire in 1850, that is, that they were mortgaged by a mortgage redeemable at the end of ten years. But the paper containing this return was said to have been abstracted from the records of the government office, and some attempt was made to give secondary evidence of it. But, again, their Lordships have to observe that what was put in with this purpose is described as an "unattested statement," and in this unattested statement, wholly unproved, no doubt there is what purports to be a copy of a document wherein the *talook* was described as having been mortgaged, and by a mortgage redeemable at the end of ten years. It is to be observed, however, that in another return which the Defendant gives about the same time no mention is made of these villages. And there is a statement in the government record somewhere about this time to the effect that the Defendant had not given the particulars of the mortgage, or described the terms or conditions of redemption.

Their Lordships observe that the Commissioner in giving his judgment reversing the judgment of the Extra Assistant Commissioner, makes this observation:—"Prior to the grant of the *sunnuds* a general inquiry was ordered with respect to villages mortgaged to *talookdars*, and in accordance with the Deputy Commissioner's order, two lists of Defendant's mortgaged villages were filed, one by Defendant's agent, and the other attested by himself; the original of the former has been abstracted from the file, but in an attested copy"—these are the words of the judgment—"filed by Defendant, the term of the mortgage is entered as ten years." Their Lordships fail to perceive any evidence whatever of this copy having been attested, and they cannot help thinking that if the Judge's view was founded, as it would appear partly to have been, on the impression that this supposed copy was an attested one, so far that judgment was wrong, and cannot be supported. But this appears, that in the settlement proceedings of 1857 the Defendant did describe himself as a mortgagee, and their Lordships have come to the conclusion that he did not then assert—at all events it is not shewn that he asserted—that the mortgage was subject to redemption in ten years or any particular time.

That being so, their Lordships are of opinion that there is some force in the remarks of the Extra Assistant Commissioner, which are to this effect. Referring to certain settlement proceedings in 1857, he says:—"The proceeding recorded in appeal dated 4th April, 1857, filed by the Defendant, shews that in appeal the Defendant countermanded his statement of the purchase of the estate, and simply called himself a mortgagee;"—it appears he had put forward some statement with respect to the purchase of the estate—"and there is an order conveyed in the proceeding that this fact should be inquir-

ed into. He now says that the transaction was a conditional sale, the term of which expired towards the close of 1257 *Fuslee*. Had the latter's statement been correct, he would, under the terms of the deed, have ranked as a purchaser and proprietor in 1258 *Fuslee*, and would not have called himself a mortgagee in 1857." Their Lordships therefore think that the evidence of the Plaintiff is to some extent corroborated by an admission of the Defendant, to the effect that there was in existence a mortgage in 1857. They therefore think that the Plaintiff gave some evidence calling upon the Defendant for an answer. It may be that the evidence was not very strong, and that it would have been rebutted by evidence of any force on the other side. But their Lordships are of opinion that the evidence of the Defendant, the main portions of which appear to have been disbelieved by all three Courts, and some documents connected with which have been treated by all three Courts as spurious, contains no answer to the case of the Plaintiff, which must therefore prevail.

For these reasons their Lordships will humbly advise Her Majesty to confirm the two judgments which have been given in favour of the Plaintiff.

16th and 17th December, 1875; and 1st February, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir John Barnes Byles.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

MUSSUMAT PHOOLBAS KOONWUR and another, (Plaintiffs)† ... } *Appellants,*

versus

LALLA JOGESHUR SAHOY and others, (Defendants) ... ... } *Respondents.*

Hindu Law—Mitakshara—Undivided Share of joint family Property—Succession—Decree in suit against Widow—Limitation— Act VIII. of 1859, s. 246—Disability under sects. 11 and 12, Act IV. of 1859—Misjoinder—Questions of Law referred to a Full Bench.

The limitation of one year, provided by s. 246 of Act VIII. of 1859, is subject, in the case of a minor, to be modified by ss. 11 and 12 of Act XIV. of 1859.

Mahomed Bahadur Khan v. *The Collector of Bareilly* (1) distinguished, on the ground that it was decided on an Act of a very special nature.

The benefit of ss. 11 and 12 of Act XIV. of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of the Hindu family joint in estate and subject to the *Mitakshara* law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.

Quære, where a member of a joint Hindu family governed by the *Mitakshara* law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the

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* From the Judgment of Kemp and Markby J J, dated the 18th November, 1870.

† 3 Cowell's I. A., p. 7.

(1) 13 B. L R., 292; *Ante* p. 363.

joint family, mortgages in his lifetime his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the *Mitakshara* law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-Defendant in the suit.

Where a Division Bench of a High Court refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the Respondent, without a cross appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.

1st February, 1876.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

The suit out of which this appeal has arisen concerns a moiety of the undivided share of one *Bhugwan Lall Sahoo* in certain immoveable property situate in *Zillah Sarun*. *Bhugwan Lall Sahoo*, who died in 1860, was the member of a Hindu family which was descended from a common ancestor named *Deepa Sahoo*, and was governed by the law of the *Mitakshara*, the general law of the province in which it was domiciled. He died childless, but left two widows, *Moheshee* and *Parbuttee*. They therefore would have been his general heirs had he been wholly separate in estate; and were in any case entitled to such part of his succession as had been acquired or was held by him as separate estate. On the other hand, if the status of the family continued at the time of his death to be that of a joint and undivided Hindu family, his interest in the joint family property survived to his male coparceners. The only persons who answered that description were *Sudaburt Pershad* and the Plaintiff *Hurreenath Pershad*. They, in some of the proceedings, are called his nephews, but according to the pedigree set out in the Appellant's case, and apparently proved in the cause, they were his first cousins, the sons of two different uncles.

It must now be taken to have been conclusively determined that *Bhugwan* at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with *Sudaburt* and *Hurreenath*, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by *Sudaburt* in 1861. The principal Defendants to that suit were the widows. The judgment of the *Zillah* Judge, confirmed on appeal by the High Court, on the 10th of March, 1863, made the distinction above-stated between the properties acquired before, and those acquired subsequently to 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that owing either to the frame of that suit, or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put *Sudaburt* into possession of one moiety of *Bhugwan's* share in the joint family property.

Subsequently the remaining half-share of *Bhugwan* in portions of the joint family property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th of April, 1865, the present suit was instituted by the mother and guardian of *Hurreenath* in order to recover possession, and to have his name entered as proprietor of his moiety of *Bhugwan's* share in the joint properties, and to cancel and set aside the execution sales under the decrees against the widows. The Defendants to that suit were the widows, the different purchasers under the execution sales, and, under the description of "precautionary Defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and *Sudaburt Pershad*, the Plaintiff in the former suit. As such Defendant *Sudaburt* filed a writ-

ten statement, in which he disclaimed all interest in the suit, on the ground that under the decree in his own suit he had been put in possession of his share in the property in dispute. The cause was tried between the Plaintiff and the other Defendants, and a decree was made by the Principal *Sudder Ameen* on the 9th of April, 1866, which, in so far as it related to the particular properties which are the subject of the present appeal, was in favour of the Plaintiff. Against this decree the parties Defendants, who were affected by it, appealed to the High Court. Their appeals were necessarily separate, inasmuch as the suit was so framed as to embrace interests, not only dependent on different titles, but confined to particular portions of the property in dispute. The High Court decided many of these appeals in favour of the Defendants, upon grounds of which some will be afterwards considered. This appeal to Her Majesty in Council originally embraced only eleven of the separate decrees so made. And of these Mr. *Cowie* has given up one, viz., No. 237. Accordingly their Lordships have now only to deal with the questions involved in the ten appeals, numbered respectively 170, 224, 235, 239, 244, 234, 243, 238, 240, and 245.

The course of proceeding in the High Court with respect to these appeals was as follows:—The Division Bench before which they came, conceiving that they involved points of law on which the authorities were conflicting, referred the following questions to the consideration of the Full Bench:—

1. *Bhugwan Lall*, a member of a Hindu family living under the *Mitakshara* law, and having joint family property, died entitled to an undivided share in such property, and leaving two widows him surviving. After the death of *Bhugwan Lall* his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these decrees, an interest in certain portions of the joint family property, to the extent of the share to which *Bhugwan Lall* was entitled in his lifetime, has been sold by auction, and the purchasers have taken possession. Can the nephew of *Bhugwan Lall*, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them?

2. *Bhugwan Lall*, in his lifetime executed an ordinary, *zurpeshgee* mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of *Bhugwan Lall* recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it?

The first of these questions the Full Bench unanimously answered in the affirmative. The result of their opinions is thus expressed by the Chief Justice, Sir *Barnes Peacock*, at the close of his judgment:—"I think, therefore, that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son and the estate had gone to him by inheritance, instead of to the survivors by survivorship. I think, then, that the question must be answered in the affirmative; that Plaintiff has a right to sue the purchaser under the decree to recover back the estate, inasmuch as the property belongs to him, and the title of the purchaser under the decree against the widows is an invalid title."

Upon the second and more difficult question the Chief Justice, after reviewing the authorities, came to the conclusion that, according to the law of the *Mitakshara*, as settled by authority in the presidency of *Bengal*, *Bhugwan Lall* had no

authority, without the consent of his co-sharers, to mortgage his undivided share in the joint family property in order to raise money on his own account, and not for the benefit of the family. He further observed that the facts were not sufficiently stated to enable the Full Bench to say whether the nephew of *Bhugwan Lall* could recover from the mortgagees, without redeeming the same, possession of the mortgaged share, or any portion of it. The other members of the Full Bench also concurred in this opinion.

The appeals, the parties not consenting to have them decided by the Full Bench, necessarily went back to the Division Bench, and were thus dealt with. Mr. Justice *Markby*, after going through the facts in each case, held that Nos. 170, 224, 235, 239, and 244, were wholly governed by the answer of the Full Bench to the first question, inasmuch as in each the title of the Appellant Defendant depended entirely on the validity of his purchase at a sale had in execution of a decree against the widows, and was consequently defective.

In No. 243 it was alleged by the Appellant that the property claimed, *Mouzah Telpakhoord*, was subject to a *zurpeshgee* lease, executed by *Mukhun Sahoo*, a member of the joint family who predeceased *Bhugwan Lall*. Mr. Justice *Markby*, however, seems to have found that the title of the Appellant did not depend on this alleged *zurpeshgee*, from which he had been ousted, but on a purchase at a sale in execution of the decree which he had obtained against the widows; and consequently, that this case was not distinguishable from No. 170.

In No. 234, however, the property in question was clearly subject to a subsisting *zurpeshgee* lease, created by *Bhugwan Lall*; and in this case, therefore, there necessarily arose the further question whether the Plaintiff could recover this parcel of land without redeeming the mortgage on it. And the learned Judge, accepting, apparently against his own judgment, the principle affirmed by the answer of the Full Bench to the second question, held that it would entitle him to do so. There remained three other cases, viz., Nos. 238, 240, and 245, which would have fallen into the first of the before-mentioned classes, if the learned Judge had not held, for reasons which will be presently considered, that the Plaintiffs' claim in respect of them was barred by the one year's rule of limitation, prescribed by the 246th section of Act VIII. of 1859. If, then, the case had rested there, the result would have been a decree in favour of the Plaintiff on all the appeals now in question, except the three last. Mr. Justice *Markby*, however, proceeded to lay down a principle which governed all the cases, and, as it seemed to him, justified in each the dismissal as against the Appellants of the Plaintiff's suit. That principle will be afterwards more fully stated and considered.

Mr. Justice *Kemp*, the other Judge of the Division Bench, concurred with Mr. Justice *Markby* on this last point, but expressed no opinion on the question of limitation which was raised in Appeals Nos. 238, 240, and 245. A decree was accordingly made in favour of the parties Appellant in each of the ten appeals. And this consolidated appeal is against those decrees.

Their Lordships propose in the first instance to consider whether the Appeals Nos. 238, 240, and 245 have been rightly disposed of on the ground of limitation. The facts proved are that in each of these cases the Plaintiff, through his guardian, preferred a claim to the property, when attached, under the 246th section of Act VIII. of 1859; that that claim was rejected; and that the present suit was not brought within one year from the date of the order of rejection. This objection would have been fatal to the suit had the party preferring the claim been an adult; and the only question to be determined was whether the Plaintiff, being under the disability of infancy, could claim the benefit of the 11th section of Act XIV. of 1859, which empowers him or his representative to bring a regular suit within the same time after the cesser of the disability as would otherwise have been allowed from the time when the cause of action accrued. This question, Mr. Justice *Markby* observed, involved several contested propositions, viz :—

1. That sections 11 and 12 of Act XIV. of 1859 apply to section 246 of Act VIII. of 1859.

2. That the Plaintiff is under disability within the meaning of these sections.

3. That the benefit of these sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

Upon the two first propositions, his opinion was in favour of the Plaintiff; upon the third he held that whatever benefit the minor was to have, was to accrue to him, not during the disability, but when the disability might cease; and accordingly that the present suit being brought by him whilst still a minor, through his guardian, must fail.

Upon the second of the propositions stated by Mr. Justice *Markby*, their Lordships cannot see how, in face of the plain language of the 12th section, there can be any room for doubt.

Upon the first they also agree with the learned Judge that sections 11 and 12 of Act XIV. of 1859 do apply to the 246th section of the Act VIII. of 1859.

The two Statutes were passed in the same year, the assent of the Governor-General being given to Act VIII. on the 22nd of March, to Act XIV. on the 4th of May, 1859. The object of the first was to enact a general code of procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general Law of Limitation in supersession both of the regulations which had governed those Courts, and of the English Statutes which had regulated the practice of the Courts established by Royal Charter. Looking to the 5th sub-section of the 1st section, and the 3rd and 11th sections of Act XIV. of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from the 246th section of Act VIII. should in the case of a minor be modified by the operation of the 11th section of Act XIV.; and that this construction has obtained in the Courts of *India* appears from the case cited from the 3rd *Weekly Reporter* (1).

(1) C. R., p. 8.

In coming to this conclusion, their Lordships have not failed to consider the recent decision of this Board in the case of *Mohummud Bahadoor Khan* v. *The Collector of Bareilly* (1). That case, however, they think, is distinguishable from the present. It arose upon a very special statute, and upon that ground the judgment rests. Their Lordships there said: "It was argued that the clauses in the general statute, Act XIV., 1859, relating to disabilities, might be imported into this Act, but this cannot properly be done. Act XIV. is a Code of Limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it." And they proceeded to observe that the application of the statute (if it did apply) would not assist the Appellants, who would not even in that case have brought their suit in proper time.

This being so, the only other point to be considered on this question of limitation is whether the learned Judge was right in holding that an infant cannot after the expiration of the year bring a suit by his guardian whilst the disability of infancy continues. Their Lordships cannot agree in this construction, which it would appear from the cases cited by Mr. *Bell*, *Ramchunder Roy* v. *Umbica Dossee* (2); *Ram Ghose* v. *Greedhur Ghose* (3); and *Suffuroonissa Bibee* v. *Noorul Hossein* (4), has not been accepted or followed by the Courts in *India*. It is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late; and it cannot be the policy of the law to postpone the trial of claims. Again, to render such a construction imperative, the phraseology of the 11th section must be altered by making the words "after the disability shall have ceased" precede, instead of following, as they do, the words "within the same time." Their Lordships are therefore of opinion that the Plaintiff's suit is not open to the objection that, in

(1) Law Rep. 1 Ind. Ap., p. 167; *Ante* p. 368.
(2) 7 Suth. W. R. 161.
(3) 14 Suth. W. R. 429.
(4) 17 Suth. W. R. 419.

so far as it concerns the properties in question in Nos. 238, 240, and 245, it has not been brought within the proper time.

The next point to be considered is whether the High Court was right in allowing all the ten appeals, and in dismissing the Plaintiff's suit as to those portions of the joint family estate which were the subject of them, on the ground that the suit was wrongly framed.

It is to be observed that the objection taken by the Division Bench to the frame of the suit assumes the correctness of the answer given by the Full Bench to the second of questions referred to it, and is in the nature of a corollary from the proposition therein affirmed. The learned Judges of the Division Bench argue that if it be true that a member of a joint and undivided Hindu family cannot alienate his undivided share in the joint family property without the consent of his co-sharers, it follows that he cannot alone sue for his separate share. And they rely upon a decision in the 12th *Weekly Reporter* (1), in which it was ruled that two only of the members of a joint and undivided family could not sue to set aside a charge created by one member of the family, and to recover their particular shares in the property charged, but that the suit must be brought by or on behalf of all the members of the joint family. Their Lordships do not mean in any way to impugn the authority of that case, or to dispute the general principle affirmed by it. They do not, however, think that the principle is applicable to the peculiar circumstances of, or ought to govern, the present case.

In this case *Sudaburt*, the only other member of this joint family, has, under the practice which was then allowed to prevail in the Courts of *India*, succeeded in recovering, and has been put into possession, of his share of the joint family property. He cannot be said to have any beneficial interest in respect of which he could now sue as Plaintiff; and supposing him to have an interest, the present Plaintiff has made him a party to this suit in the only way in which a person who is unwilling or unable to be joined as Plaintiff can be brought before the Court, *i.e.*, by joining him as a Defendant. In that character *Sudaburt* has disclaimed all interest in the subject-matter of the litigation, alleging that he has already been put into possession of all to which he is entitled. Again, in most, if not all, of the appeals the title of the substantial Defendants is founded on execution sales confined to that moiety of *Bhugwan's* share which, on a partition, would now fall to the Plaintiff. The objection to the frame of the suit was not taken by the substantial Defendants; it seems to have originated with the Judges of the Appellate Court. It is one of form rather than substance; for it cannot be said that if it does not prevail, the Defendants (*Sudaburt* being a party to this litigation and admitting that he is in possession of his share) can be harassed by any second suit. On the other hand, if the objection prevails, the Defendants will remain in possession of property to which, after full trial, they have been found to have no title; and the Plaintiff will be left to the chances of another suit, in which he may be met by the objections well or ill founded on the lapse of time, or the effect of the decrees under appeal as *res judicata*. Their Lordships are of opinion that they ought not to allow the objection to prevail against the substantial justice of the case.

What has been said is sufficient to determine this appeal in favour of the Appellant, so far as it relates to the decrees of the High Court in the nine appeals numbered respectively 170, 224, 235, 239, 243, 244, 238, 240, and 245.

There is, however, as has been already stated, a further question as to the appeal numbered 234, and at the hearing it occurred to their Lordships, who have unfortunately to determine this appeal *ex parte*, that if the Respondents had appeared, they might, without a cross appeal, have contested the correctness of the answers given by the Full Bench to the questions referred to them, answers which are not in the form of a decree, or even of an interlocutory order. To the answer to the first question their Lordships think no

(1) *Rajaram Tewaree* v. *Luchmun Pershad*, p. 483.

objections could have been urged successfully. The second question, however, involves a point of Hindu law, upon which the authorities are not altogether consistent; nor are their Lordships satisfied that the principle laid down by the Full Bench would, if correct, govern this particular case, of which they will now proceed to examine the circumstances somewhat more in detail.

The property to which it relates is thus described in the schedule to the plaint. The village is specified as *Tulmanpore Bhada* in two *kalums* (items). The share of the joint family is stated to be one of 10*a*. 8*p*. Of this 5*a*. 4*p*. are deducted as the share of *Sudaburt Pershad*, which reduces the share claimed by the Plaintiff to 5*a*. 4*p*. The column of remarks contains the following statement: "This *mouzah* was held in *zurpeshgee* lease under a *zurpeshgee* deed executed by *Saligram Sahoy* and *Ramruchea Sahoy*. It was sold at an auction on the 18th of November, 1862, and purchased by the Defendant *Bikramajeet Lall* for Rs.3. The *zurpeshgee* and lease are fit to be cancelled."

Bikramajeet Lall and another Defendant were the Appellants in No. 238, which seems to have covered the whole of the 5*a*. 4*p*. share of *Tulmanpore Bhada* with other portions of the property in dispute. From what has been stated above it follows that their title, resting as it does upon a purchase at a sale in execution of a decree against the widows, is defective; that the right of the Plaintiff to impeach it is proved, and accordingly their appeal ought to have been dismissed. This, however, does not determine the rights of the Plaintiff as against the *zurpeshgeedars*. He may be entitled either to recover so much of the property as is covered by the *zurpeshgee* by setting aside the *zurpeshgee* lease, or merely to stand in the shoes of the nominal mortgagor. But the nature and extent of his right can only be determined in appeal No. 234.

The Appellants on that appeal were the original *zurpeshgeedars Saligram Sahoy* and *Ramruchea Sahoy*. The *zurpeshgee* deed appears to have covered originally only 5*a*. 4*p*. of the entire 16*a*. of *mouzah Tulmanpore Bhada*. If, then, it be true that *Sudaburt Pershad* has succeeded in recovering one moiety of this, the subject of the dispute on this appeal is the remaining moiety or a 2*a*. 8*p*. share. And this appears to have been the view of the High Court, for their decree on this appeal is limited to a 2*a*. 8*p*. share. If, on the other hand, *Sudaburt* has not succeeded in his suit in setting aside the *zurpeshgee* as against him, or in otherwise wresting possession of his share from the *zurpeshgeedars*, it follows that the question of the validity of this *zurpeshgee* remains to be determined between the latter on the one side, and him and the present Plaintiff on the other.

The plaint in this suit alleged no special grounds for setting aside the *zurpeshgee* of the 9th of December, 1859, and indeed contained no special mention of it. The written statement of the Defendants *Saligram* and *Ramruchea* set up that deed, and insisted on their rights under it. But none of the issues are specially pointed to the validity of the deed. Nor do the judgment or the decree of the Principal *Sudder Ameen* deal with that question. All that they decide with respect to the share claimed in *Tulmanpore Bhada* is that "Plaintiff be put in possession thereof in the manner in which possession has been given by the decree of the 5th of April, 1862" (to *Sudaburt*).

This reference to the suit of *Sudaburt* makes it material to consider whether there really was any adjudication upon this question in that suit. The suit, it will be remembered, involved the right of succession to the whole of the property of which *Bhugwan Lall* died possessed as between his widows and the surviving members of the joint family. The plaint contains no specific statement touching the *zurpeshgee* deed of the 9th of December, 1859, unless it be in the schedule, where in the column of remarks it is said "the deed, to the extent of Plaintiff's share, ought to be amended." The judgment of the *Zillah* Judge put the share in *Tulmanpore Bhada* into the first parcel which it found to be joint family property. So far it affirmed the title of *Sudaburt* and *Hurreenath*, and negatived the title of the widows, to whatever interest

in it belonged to *Bhugwan Lall* at the time of his death. But in answer to the 10th issue it expressly found that the deeds executed by *Mukhum*, *Bhugwan*, or the other partners were valid. The decree was a general decree for possession over the properties in the first list. The High Court, on appeal, simply affirmed this judgment and decree of the *Zillah* Court. Can it be said that this judgment and decree import any adjudication touching the invalidity of the deed of the 9th of December, 1859, as against the surviving members of the joint family, even if the Plaintiff in this suit could claim the benefit of such an adjudication. The judgment, so far as it goes, is on the face of it the other way. The terms of the decree may import only that the Plaintiff *Sudaburt* was, so far as his share was concerned, to be put into possession of the rights of *Bhugwan*. If in the execution of that decree, he has contrived, it may be wrongfully, to dispossess to the extent of his share, the *zurpeshgeedars*, that circumstance cannot give title to the Plaintiff.

Again, what has been found by the High Court with respect to this appeal? The answer of the Full Bench expressly stated that the facts were not sufficiently stated to enable them to say whether the nephew of *Bhugwan Lall* could recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it. That statement, taken in connection with the general principle affirmed by them, imports that there was no *constat* that the execution by *Bhugwan* of the deed was without the consent of his co-sharers, or not for the benefit of the family. Mr. Justice *Markby* does not consider this latter question, but simply says, "As no objection was made to the reference to the Full Bench, I think we ought to accept its decision for he purposes of this case, and to hold that the Appellants have failed to establish their title."

In these circumstances there appears to have been no real trial of the question between the Plaintiff and the Appellants in No. 234; and therefore, assuming the principle enunciated by the Full Bench in its answer to the second question to be strictly correct, their Lordships do not feel themselves at liberty to reverse the decree in favour of the Appellants, and to make a decree in favour of the Plaintiff. This being so, they abstain from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued before them. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal.

Their Lordships have felt some doubt as to the form of the order which ought to be made on Appeal No. 234. The Plaintiff has failed to establish his title to recover the land against the *zurpeshgeedars*. He might, however, have established such a title even in this suit, had a proper issue been framed and determined. On the other hand, he has established his title to the property, subject to the *zurpeshgee*. His rights may be prejudiced by the decree as it stands. The suit is an example of the inconvenience of embracing in one suit titles to various parcels of land, which, although having a common foundation, are different in many particulars, and are to be asserted against Defendants having no common interest. Their Lordships have come to the conclusion that the dismissal of the present suit against the Appellants in No. 234 ought to stand, but that the decree of the High Court on that appeal ought to be varied by adding a declaration, that it is to be without prejudice to the right of the Plaintiff to recover the lands in question on satisfaction of the *zurpeshgee*. This appeal, so far as it relates to No. 237 (the case given up by Mr. *Cowie*) must be dismissed, and the decree made by the High Court in that case affirmed. In the other nine cases, the decrees of the High Court must be reversed, and an Order made, dismissing in each case the appeal to the High Court, with the costs of the appeal in that Court, and affirming the decree of the Principal *Sudder Ameen* as to the parcels of property which are the subjects of those appeals. The above will be the substance of the Order which their Lordships will humbly recommend Her Majesty to make.

Their Lordships think that there should be no order as to the costs of this appeal.

17th December, 1875.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

JUNESWAR DASS (for Self and as Guardian of CHUNDER COOMAR), (Defendant)† ... } *Appellant,*

versus

MAHABEER SINGH, RAM ADHEEN SINGH and others, (Plaintiffs) ... } *Respondents.*

Limitation Act XIV. of 1859, s. 1, cls. 10, 12, 16—Interest in immoveable Property.

B, having borrowed money from *A*, executed in his favor a bond (which was afterwards duly registered), in which he engaged to re-pay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that, in the event of the said lands being sold in execution of decree before the day fixed for repayment, *A* should be at liberty at once to sue for the recovery of the debt. Before the term for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by *B*, subsequently and subject to the bond made to *A*. In a suit by *A* against *B* and the purchasers of the lands at the execution-sale, *A* charged *B* personally, and also sought to realize the amount due on his bond by the sale of the mortgaged lands. *Held*, that the claim was in substance a suit for the recovery of immoveable property, or, of an interest on immoveable property, within the meaning of cl. 12, s. 1, Act XIV. of 1859, and, consequently, was governed by the twelve year's rule of limitation therein provided, and not by the rules provided by cls. 10 and 16 of the same section.

Semble. Although *A* was at liberty to sue from the date of the sale of the lands, limitation did not run against his claim from that date, but only from the date fixed in the bond for repayment.

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* From the Judgment of Phear and Ainslie JJ., dated 11th March, 1872.

† 3 Cowell's I. A., p. 1.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This was an action on a security common in *Bengal*, called a mortgage bond, which appears to combine in one instrument two things, a personal obligation by the maker of the bond to pay the money, and a mortgage of property by way of pledge and security. The bond in question is dated the 21st of June, 1856, and was given by *Baboo Ritbhunjun Singh*, who is the Defendant No. 1 in the suit, to *Mussumat Agur Koonwar*. The consideration for the bond consists of the amounts which are stated to have been due under five previous bonds given to the *Mussumat* by *Baboo Dyal Singh* the father of *Ritbhunjun Singh*. The bond recites the former bonds, and proceeds thus:—"Hence, I, the declarant, do of my own accord and consent make myself responsible for the sums of money covered by each of the five above-named bonds, principal with interest, as well as other loans, &c., in all for Company's rupees 16,511, and bind myself for the payment of the said sum of money to the abovesaid lady." This part of the bond contains a personal obligation on the part of the maker of the bond, the Defendant No. 1, to pay the money. Then are inserted the terms of the loan: "With the consent of both parties it has been agreed upon that the interest should be paid as per detail given below, that is, the principal with interest I will pay at the rate of eight *annas* per cent. from the date of the execution of this bond to the end of *Jeyt* 1269 F. S., and from 1270 F. S. to *Jeyt* 1274 F. S. at the rate of Rs. 1 per cent. per mensem. Accordingly, I hereby declare and give in writing that I will positively, without any objection whatever, liquidate the said sum of money, principal with interest, in the month of *Jeyt* 1274 F. S., to the aforesaid lady." As far, therefore, as we have hitherto gone in the bond, the ultimate period for payment would not accrue until *Jeyt* 1274. Now comes the part of the instrument which

creates an hypothecation of land: "For the satisfaction of the lady, and as security for the above sums of money, I pledge and mortgage *mouzahs Dhunpookhra* and *Bahoonra* original, with dependencies appertaining to *taluok Athur, Pergunnah Bhojepore*, held and possessed by me. I and my heirs shall not, as long as the whole amount aforesaid remains unpaid, transfer them in any way." Then there is a clause to this effect: "Should the *mouzahs* mortgaged be sold in execution of decree or for arrears of revenue, the said lady shall in that case be at liberty, without waiting for the expiration of the term of payment, to institute a regular suit, and to sell the moveable and immoveable properties of me the declarant and my heirs, and thereby realise the amount in question." This bond was registered on the 23rd of June, 1856.

The action is brought by *Bhedi Singh* and twelve other persons, who are the heirs of the *Mussumat*, the fourteenth Plaintiff being a person called *Turmundul Dass*, who had purchased a fourth share in the bond. The Defendants in the suit are, first, *Ritbhunjun Singh*, described in the heading of the suit as "the principal contractor of the loan," and, secondly, certain persons who are described in the same heading as "auction purchasers of the pledged property," and it may here be stated that they became such purchasers under a decree obtained upon another mortgage bond made by *Ritbhunjun Singh* subsequently to the bond in question, and of course subject to it. The date of the auction sale which is sought to be impeached is the 18th of May, 1865.

After the discussion which has taken place at the Bar, there remain only two questions to be decided. The first is purely a question of fact which was raised in the following issue, the third issue,—"Whether or not the mortgagor has received the consideration money?" It has been contended by Mr. *Arathoon* that the consideration stated in the bond is not truly stated. The principal amounts of the five bonds enumerated in the bond in question are not disputed, but it is said that an amount of interest equal to the aggregate amount of the principal sums,—the principal being Rs. 8000, and the interest Rs. 8000 also,—found its way into the bond by some fraud or error, and that in point of fact that interest was not due, but had been previously paid. Both Courts below went very fully into the evidence given on that issue, and came to the concurrent finding that the Defendant has failed to establish it. Having executed this bond the *onus* is upon him to shew that the consideration had not passed. Both Courts have come to the conclusion that he has failed to support that burden, and that he has shewn no sufficient ground for the conclusion that that interest was not due. It is said that calculating only simple interest on the bond, the Rs. 8000 could not be made up; but the High Court make a suggestion, which their Lordships regard as a reasonable supposition, that the parties before entering into the new bond may have come to an arrangement that rests should be made in the account, and compound interest paid. In the absence of satisfactory proof of fraud or mistake, every presumption in favour of the statements contained in the bond ought to be made, considering that it was deliberately entered into, and that for many years it has been acted upon, and payments made under it. Their Lordships, therefore, see no reason to be dissatisfied with the conclusion to which the Courts below have come upon the issue of fact, and the appeal so far as that issue is concerned fails.

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things: the obligation to pay the money, which binds the maker of it only, and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first Defendant, the maker of the bond, *Ritbhunjun Singh*, personally, and it also claims to recover the amount of the principal and interest by the sale of the *mouzahs* (naming them), which were the hypothecated property included in the mortgage. It is contended for the Appellant that the limitation contained in clause 16, section 1, of the Act XIV. of 1859, is the proper limitation to apply to

the case. That is a sweeping clause, which provides thus: "to all suits for which no other limitation is hereby expressly provided, a period of six years from the time the cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within clause 16, because, although clause 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that section, and, not being otherwise provided for, falls within the limitation of six years in clause 16. Their Lordships, however, are clearly of opinion that neither of these clauses is applicable to this suit, which is brought, in substance, for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within clause 12 of the first section. The object of the suit is to obtain a sale of the land as against the Defendants grouped as Defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage bond. It is therefore, as against them, a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the *Statute of Limitations* if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. *Cave* that there has been a long and almost uniform current of decisions in the two provinces of *Bengal* and *Madras*, giving this construction to the Act. Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. *Arathoon* that this suit would have been barred if the limitation of six years under clause 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under clause 12, section 1, of the *Limitation Act*.

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

11th, 12th, 13th, 14th, 15th, and 25th January, and 24th March, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

On Appeal from the High Court at Madras.

SRI VIRA VIRADHI VIRA PRATAPA SRI RAGHUNADHA ANUNGA BHIMA DEO KESARI MAHARAZ, the Zemindar of Chinnakimidy, (Defendant)* ... } *Appellant,*

versus

SRI BROZO KISHORO PATTA DEO, by his Adoptive Mother and Guardian, SRI KUNDONO DEVI PATTA MAHADEVI, Widow of SRI ADIKONDA DEO, (Plaintiff) ... ... } *Respondent.*

Hindu Widow—Undivided family—Authority to Adopt.

According to the law prevalent in the *Dravida* country, a Hindu widow, without having her husband's express permission, may, if duly authorised by his kindred, adopt a son to him.

The Collector of Madura v. *Moothoo Ramalinga Sathuputhy*, (1) referred to and approved.

Semble, in the case of an undivided family the requisite authority to adopt must be sought within that family, and cannot be given by a single separated and remote kinsman.

Speculations founded on the assumption that the law of adoption now prevalent in *Madras* is a substitute for the old and obsolete practice of raising up seed to a husband by actual procreation are inadmissible as a ground of judicial decision.

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* 3 Cowell's I. A., p. 154.

(1) 12 Moore's I. A., 397; 2 P. C. J. p. 361.

24th March, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

Rajah Adikonda Deo, the then holder of an impartible *zemindary* in the district of *Ganjam*, which in these proceedings is called sometimes *Chinnakimidy*, and sometimes *Pratapagheri*, died on the 23rd of November, 1868. He left no legitimate male issue, but a widow, then *enceinte*, whom it will be convenient to designate by her title of *Mahadevi*. He had, however, several natural sons, one of whom, *Ramakrishna Deo*, contrived, on the death of his father, to be invested by some of the retainers with the "*Sadhi*," and asserted a claim to the *zemindary* on the ground that he was in fact legitimate, and had been designated by *Adikonda* as his successor in an *urzi* signed by him on the 10th of November, and forwarded to the Collector. This claim has since been found to be groundless, and may be treated as no longer existent.

The Appellant *Raghunadha*, who was a half-brother of the deceased *Zemindar*, must now be taken to have been an undivided brother, and the person who, according to the ordinary law of succession, was entitled to the *zemindary* on the death of *Adikonda* without a legitimate son, either procreated or adopted.

It is necessary, in order to explain some parts of the subsequent history of the case, to observe that the question of succession, when it first arose, was further complicated by the fact that the *zemindary*, though permanently settled, was one of those as to which it was then conceived that, owing to the omission to issue a permanent *sunnud*, the Government of *Fort St. George* had retained the right of nominating, on the death of each successive holder, his successor. The confirmation by this Board of the decision of the High Court of *Madras* in the *Marungapury Case* (1) has since established that there was no legal foundation for this pretention on the part of Government; and it must now be taken to be settled law that the title to the *zemindary* is to be determined by the ordinary law of succession in like cases.

On the day after that of the death of *Adikonda*, *i. e.*, on the 24th of November, 1868, the *Mahadevi* addressed an *urzi* to the Collector, in which she stated the death of her husband; that the family was composed of women and children; that she had then none legally entitled to the *talook*, but was three months gone with child; and prayed to be entrusted with the care of this *talook*. In this document she made no mention of an authority to adopt.

It is shewn, however, beyond all question, by the Collector's letter of the 2nd of December, 1868, which is recited in the proceedings of the Board of Revenue, that before that date he had received a second *urzi* or letter from the *Mahadevi*, in which she had alleged that it was her husband's express wish that, in the event of her having not a son, but a daughter, she should adopt a son. And if the exhibit R be that second *urzi*, or a true copy of it, there can be no doubt that as early as the 26th of November, 1868, the *Mahadevi* had asserted publicly that her husband had, on the 20th of that month, executed in her favour a written authority to adopt a son in the event which afterwards happened. The confusion which seems to have taken place in the Civil Court with respect to the proof of exhibit R has given rise to a controversy on its authenticity which will be afterwards considered. But, whatever may have been the precise contents of the second *urzi*, it is unquestionable that, as early as the 11th of December, the *Mahadevi* presented a formal petition to the Government of *Fort St. George*, in which she stated that *Adikonda*, before his death, executed and gave to her a *putrica* (or will) containing words to this effect: "You have now conceived; if you bring forth a male child, he will be a *rajah* to the *talook*; in case of a female child, you are authorized to select a good child for the seat;" and that in several subsequent petitions and applications she

(1) Law Rep. 1 Ind. Ap; 282; *Ante* p. 318.

persistently put forward and relied upon a written authority to adopt executed by her husband. One of these, bearing date the 18th of March, 1869, stated the date of the instrument to be the 20th of November, 1868; and in most of them she claimed to be heiress to the *zemindary* in default of a legitimate son, natural or adopted, of her husband. *Raghunadha* seems on his side to have been also asserting his claim before the Government and the Revenue authorities.

The action taken by the Government of *Fort St. George* was as follows:—

The Board of Revenue, on the report of the Collector, had, on the 7th of January, 1869, expressed its opinion that *Raghunadha* had the best claim to the *zemindary*, provided the *Mahadevi* did not give birth to a son; but that if she should have a son that son ought to succeed. Thereupon Government, on the 1st of March, ruled that a posthumous son would be entitled to the inheritance, and directed the Collector to take such measures as he might think fit to ascertain whether the widow was really pregnant, and to verify the sex of the child when born. To the widow's repeated applications it made answer that the claim to the *zemindary* was under consideration. On the 11th of July, 1869, the *Mahadevi* was delivered of a daughter, and on the 17th of September in that year Government, in the exercise of its supposed power, and on the recommendation of the Collector, supported by the Board of Revenue, resolved to recognise *Raghunadha*, who had been reported by the Collector to be the undivided brother of the deceased *Zemindar*, as the successor to the *Chinnakimidy* estate; thereby overruling the *Mahadevi's* claim to be heiress to her husband, and ignoring her asserted right of adoption.

Pending these proceedings there had been litigation between the *Mahadevi* and *Raghunadha* touching the right to a certificate, under Act XXVII. of 1860, for the collection of the debts due to the deceased *Zemindar*. This was determined in favour of the *Mahadevi* by the Civil Judge on the 31st of March, 1869. But on the 11th of February, 1870, his decision was reversed by the High Court, and the certificate granted to *Raghunadha*, apparently on the general ground that the claim of an undivided brother was preferable to that of a widow, and that there was no satisfactory proof of division.

For some short time after the determination of the Government in his favour, *Raghunadha* and the widow seem to have lived together in amity. She retained, apparently with his consent, the custody of the keys of the *goutaghoros* or treasuries, in which the jewels, cash, and other valuables that had been left by the late *Zemindar* were kept; but allowed *Raghunadha* to receive thereout both jewels and cash for the purposes of his installation, which took place on the 1st of February, 1870. He again was in correspondence with the Collector in November touching the villages to be assigned to her for her maintenance, and speaks of their friendly relations, although in one of his letters he complains that *Haribondha Surmanto* and two or three more wicked persons were "making intrigues and giving evil advice." But this state of amity, if it ever sincerely existed, was of brief duration. In the course of 1870 the parties again plunged into active litigation. In his suit numbered 9 of that year, *Raghunadha* sought to recover from the *Mahadevi* the jewels and cash in the *goutaghoros*, greatly exaggerating their amount and value, as property to which he was entitled as *Zemindar*. In her suit, No. 12 of 1870, she sought to recover from him the particular jewels and cash which had passed from her to him on the occasion of his installation, alleging that he had received them by way of loan on a promise to restore the former and repay the latter. Her suit was ultimately dismissed on the ground that she had failed to establish any such contract. In the other suit the material issues were whether *Raghunadha* was the undivided brother of *Adikonda*, or separate in estate from him; whether the *Mahadevi*, as widow of *Adikonda*, was entitled by right of succession to the money and jewels left by him; and if not, whether *Adikonda* had made to her at the time of his death a gift of them that was valid against *Raghunadha*.

In this suit the Civil Judge found that *Raghunadha*, the Plaintiff, was the undivided brother of *Adikonda*, and that *Adikonda*, at the time of his death, did not make a gift to his wife of any part of the property then in dispute. He found, however, in the first instance, upon the second issue, that the *Mahadevi*, as widow of *Adikonda*, was entitled to all the money and jewels left by him; proceeding, apparently, on the ground that, inasmuch as each succeeding *Zemindar* must be taken to have held the estate by virtue of a new grant from Government, he held it as selfacquired property; and consequently that, on his death, his personal assets would pass to his widow, to the exclusion of his brother. Before, however, a final decree had been drawn up in this suit, the *Marungapury Case* was decided by the High Court of *Madras;* and the Judge thereupon granted a review of his decision. On that review he found that the *Mahadevi*, as widow of the late *Zemindar*, was not entitled to the money or jewels left by him; and, finally, made a decree in favour of *Raghunadha*, but for an amount much less than that claimed by him. There was no appeal against the decrees in these suits. They decided as between the *Mahadevi* and *Raghunadha* that the status of the family was that of indivision; and that *Raghunadha* being, in default of male issue of *Adikonda*, entitled to the estate, was entitled to the jewels and cash as appurtenant thereto. They have, however, little bearing on the questions now to be determined; although some of the depositions taken in them have been relied upon as affecting the credibility of the testimony given by the same witnesses in the present suit.

Pending these two suits of 1870, and on the 20th of November in that year, the *Mahadevi* adopted the present Respondent. He was the son of the *Zemindar* of *Piddakinidy*, who is admitted to be a *sapinda* of *Adikonda Deo*, though separate in estate from him; both families being derived from a common ancestor, *Purushottama Deo*. Nor is the validity of the adoption impeached, except on the ground that the *Mahadevi* had not sufficient authority to make it.

On the 15th of December, 1870, the Respondent, by his adoptive mother and guardian, the *Mahadevi*, commenced his suit for the recovery from *Raghunadha* of the *zemindary* and of all the property appurtenant thereto, with mesne profits.

The Defendant *Raghunadha* originally set up, by way of defence, that his title as *Zemindar* appointed by Government could not be questioned. But it is now admitted that since the decision of the *Marungapury Case* this defence cannot prevail; and that the only questions to be decided are, whether the exhibit Q which is propounded as the written authority to adopt of the 20th of November 1868 was, in fact executed by *Adikonda Deo*, and if not whether the adoption is not nevertheless valid according to the law that prevails in the Presidency of *Madras*, as one made by a widow without express authority from her husband but with sufficient sanction and consent on the part of her husband's relatives.

The Civil Judge decided both these questions against the Respondent He came to the conclusion both from external and internal evidence that the document was a forgery; he was also of opinion that the requisite assent to an adoption, in the absence of an authority from the husband, was not given, and consequently that the adoption was not valid as against the Defendant. The High Court inclined to the opinion that Q was in fact executed by *Adikonda*, but did not go very much into the evidence for or against the document; being of opinion that, even if no express authority was given by *Adikonda*, the adoption by the widow, being made with the consent of one of his *sapindas* (the father of the child adopted), was valid by the law of *Madras*.

Their Lordships propose to consider, first, whether Q was in fact executed by *Adikonda*.

It has been strongly urged upon them that the judgments of the two Indian Courts upon this question, though not concurrent, are not directly conflicting, the High Court having omitted to find that the document is genuine, or fully to consider the evidence concerning it; that in this state of things their Lordships can-

not safely overrule the decision, upon a question depending mainly on the credibility of conflicting witnesses, of a Judge of great local experience, who saw and examined those witnesses, and has expressed his conclusion in a judgment that demonstrates with what remarkable care and industry he tried the cause.

Their Lordships are by no means insensible to the force of the general proposition involved in this argument. That force, however, seems to them to be somewhat diminished by particular circumstances in this case. They consider that the voluminous judgment of the Civil Judge deserves the credit due to a most painstaking endeavour to arrive at the truth in a difficult case. But its excessive elaboration tends to impair its value by defeating the proper object of a judgment, which is to support, by the most cogent reasons that suggest themselves, the final conclusions at which the Judge has conscientiously arrived. This document records the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial; the effect, often temporary, upon him of a particular piece of evidence or argument of counsel; it subjects every witness to criticism more or less unfavourable; and from this mass of often conflicting statements, it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests.

Again, the counsel for the Respondent have strongly insisted on the objection to the authority of this judgment which they founded upon the observations of the learned Judge in paragraph 62, &c. (1). It must be admitted that the passage is ambiguous. If it means only that where a case has been manifestly proved to be false (as, *e. g.*, if Q had be shewn to be written on a stamp paper purchased after *Adikonda's* death), it is unnecessary to weigh general probabilities, the observation is a mere truism, since it is obviously idle to inquire whether it was likely a man should do that which it has been demonstrated he never did. On the other hand, if it imports that the Judge refused to weigh the probabilities of the case, because he believed one set of witnesses rather than the other, it would support the objection taken, viz., that in forming his belief he had excluded from his consideration that which ought to have entered into it. Their Lordships, however, upon a review of the whole judgment, are of opinion that, in whatever sense the learned Judge made the observation in question, he did not, in fact, fail to consider the probabilities of the case. Whether he gave due weight to them will be afterwards considered.

A more substantial objection to the judgment is, that it does not dispose of the question as it was presented by the parties. The learned Judge was not content to find that Q was a forgery. By a careful examination and comparison of it with admitted signatures of *Adikonda* he satisfied himself that the signature purporting to be that of *Adikonda* was itself forged. Yet the Appellant had admitted that that signature, and the *shankhu* and *chakran* (the emblems on it) were of his brother's handwriting; and the case made by him and his witnesses was that the forgery was effected by filling up, after *Adikonda's* death, a blank paper, which had these genuine marks and signature upon it. Their Lordships agree with the Judges of the High Court in thinking that little weight ought to be given to a comparison of *Oorya* handwriting by an European Judge, however skilled and experienced, when opposed to the admissions of those who dispute the document. They feel bound, therefore, to assume, and that has been almost admitted in the argument addressed to them on the part of the Appellant, that the signature of *Adikonda* upon Q is of his handwriting. It is obvious, however, that the erroneous conviction of the Civil Judge to the contrary may greatly have biassed his estimate of the credibility of the Plaintiff's story, and

(1) That passage was as follows:—"A great deal has been said about the balance of probabilities. But this is not a case to be decided upon probabilities. The Defendant is in possession; and is not to be ousted in the absence of good evidence. This is not a case in which the Court must say it believes one side rather than the other. It disbelieves the Plaintiff's evidence; and that is quite enough. That it disbelieves most of the Defendant's evidence is nothing to the point."

may have prevented him from duly weighing the improbabilities of that told by the Defendant, which he did not adopt. The genuineness, therefore, of the signature of *Adikonda* is a circumstance which materially detracts from the general value and authority of the judgment of the Civil Judge; and their Lordships cannot but feel that they have to determine the question before them upon the evidence taken in the cause without the assistance which they generally find in similar cases in the judgment of one or the other of the Indian Courts.

That there is in this case a strong antecedent probability that *Adikonda* did authorize an adoption is incontestable. It does not rest upon the mere presumption that on his deathbed he would desire to perform that general duty of imperfect obligation which prompts a childless *Hindu* to supply the want of natural male issue by adoption. It is shewn that the brothers, though legally undivided, were long on bad terms with each other. The strife began, as appears by the Collector's letter, on the death of their father in 1835, when there was a dispute as to their succession to the *zemindary*, *Raghunadha* claiming it as the eldest son of the then *Mahadevi*, though younger in years than *Adikonda*, who was born of a wife of inferior rank. This controversy was determined by the then Government, in the exercise of its assumed power, in favour of *Adikonda*. The strife, however, was embittered by subsequent quarrels between the brothers, and by the desperate attempt of *Raghunadha* as late as 1852 to oust his brother by proving him to be illegitimate. In these circumstances, whatever may have been the precise relation of the brothers during the later years of their joint lives, there is a high degree of probability that *Adikonda* would desire to retain, by all means in his power, the *zemindary* in his own line; and would be unwilling to expose the wife to whom he was attached to the chance of falling from the rank which even as adoptive mother of a reigning *Rajah* she would possess, to that of a widow entitled only to be maintained, however honourably, by her brother-in-law.

There being then this antecedent probability that he would execute some such document as that which bears his admitted signature, what is the direct evidence to shew that he really did or did not execute it. The witnesses, whose names are upon it, are *Sumanto* the treasurer, *Siva Purohit*, now the *Dewan* of *Raghunadha*, but formerly the servant in the like capacity, first of *Adikonda*, and afterwards of the *Mahadevi*, *Balaji* the scribe, and *Damapattojosi* the *Purohit*. Of these, the two former are the only subscribing witnesses in the strict sense of the term; *Balaji* signing only as the writer of the instrument; and *Damapattojosi*, though named as a witness, not having signed at all. Again, the only one of the four who deposes to the execution of the instrument is *Sumanto*. His story is, that on the 20th of November (*i. e.*, on a day between which and the day of the *Rajah's* death two clear days intervened), at about 3 *prohoros* of the day (*i. e.*, about 3 P. M.), the *Rajah* sent the peon *Narayani* to call in any respectable people (*bollolokho*) that might be in the outer hall (*sodoro*); that the peon returned with *Siva Purohit*, *Damapattojosi*, *Bodhrosanto*, *Bhagirathipani*, and *Balaji*; two other persons, viz., *Boyiduorahu* and *Gouro Bondhari*, being already in the room when the order was given; that *Balaji* was then sent out to bring paper, pen, and ink; that on his return he wrote the authority to adopt under the *Rajah's* dictation, making first a draft and afterwards a fair copy; that the list of witnesses which appear in *Balaji's* handwriting on it was also written at the *Rajah's* dictation, first in the draft and then in the fair copy; that the subscribing witnesses *Siva Purohit* and the witness himself then signed, *Damapattojosi* excusing himself, with the *Rajah's* consent, from signing, on the ground that he was an old man and could not see; that *Balaji* also wrote his name as the writer of the document; that the *Rajah* himself traced the *shankhu* and *chakran* at the top, and wrote his own signature at the bottom of the document; that they all wrote with the same pen dipped in the same ink-bottle; that it took about two *ghadyahs* (one and a half hour) to complete the transaction; and that afterwards,

and when about the same space of the day remained, the witness, by order of the *Rajah*, took the document to the *Mahadevi*, who, while it was being prepared, was in "the chapel," being a room near that of the *Rajah*, and put it on the threshold, the door being *ajar*. The witness also states that nearly two *ghadyahs* before this, and previously to the preparation of the document, he had taken to the *Mahadevi*, by order of the *Rajah*, the keys of the Treasury House, and had said to her, "The keys of the other Treasury House were given you, now keep the keys of this treasury and all the property therein."

This witness is directly contradicted by the three other persons whose names are upon Q, *Siva Purohit*, *Balaji*, and *Damapattojosi*. The account which they give of the fabrication of Q is the following:—About ten, or most twelve, days after the death of *Adikonda*, *Sumanto* brought to *Balaji* a paper having upon it *Adikonda's* signature, and the *shankhu* and *chakran*, but otherwise blank, together with a draft, and told him to fair-copy the draft upon the blank paper. *Balaji*, according to his own account, at first refused, but afterwards obeyed. The result was Q, as it now stands, with the exception of the signatures of the subscribing witnesses. The paper in that state was given by *Balaji* to *Sumanto*, who took it to *Siva Purohit* for his signature. He swears that he refused to sign it, and denies that the signature upon it which purports to be his is of his handwriting. The value of that denial will be presently considered. The paper was subsequently (*i. e.*, about fourteen days after *Adikonda's* death) taken by *Sumanto* to *Damapattojosi*, who also swears he refused to sign it as witness.

The question is, which of these two stories is to be believed. The last, their Lordships think, must be taken with the qualification that, notwithstanding the denial of *Siva Purohit*, the disputed signature is of his handwriting. That it is so was found by the Civil Judge, and his finding does not depend on mere comparison of handwriting. Its correctness seems to their Lordships to be placed beyond doubt by the exhibit L L., in which, writing to *Iswara Puttro* as late as the 10th of July, 1869, he speaks of the document executed by the late *Rajah* to the *Mahadevi*, and urges his correspondent to use his best endeavours to get from Government a recognition of it. It is clear, therefore, that if Q be a forgery *Siva Purohit* was at one time a consenting party to that forgery. The Civil Judge has undoubtedly recorded a most unfavourable opinion of *Sumanto*. He says of him: "*H. S.* lied and prevaricated grievously. I could not believe anything one bit the more readily from the fact that he asserted it." Yet the credibility of this witness, however small, is nevertheless superior to that of *Siva Purohit* and *Balaji*. Notwithstanding his demeanour he may have told what is substantially a true story; whereas the others must either have been guilty of perjury in this suit, or have been conscious actors in an antecedent forgery. *Damapattojosi* is not open to this imputation, and is apparently a more respectable witness. All that the Judge says against him is that "he protested too much." But there is a high degree of improbability in his story.

The *primâ facie* improbability that there should exist any blank paper with the genuine signature of the deceased *Rajah* upon it is no doubt removed by the evidence of *Binayaka*, and the production of the four blank papers similarly signed, which that witness swears he discovered eighteen months before he gave his deposition (*i. e.*, early in 1870) in the late *Rajah's* record box. There is, however, no proof that at the time when Q is said to have been forged any such papers had been found; and the subsequent discovery of them may have suggested the present answer to the Plaintiff's case. If, however, it be assumed that the supposed forgers had but one such paper in their hands ten days after the late *Rajah's* death, it is obvious that such a paper was very precious; and it is inconceivable that they would have inserted *Damapattojosi's* name in the list of witnesses until they were assured of his willingness to sign. If, again, they had then in their hands more than one such paper, they would naturally, on *Damapattojosi's* refusal to

join in the conspiracy, have destroyed it, and fabricated a similar instrument on which his name should not appear. The story then told by him is less probable than that told by the Plaintiff's witnesses in order to account for the non-signature of it by him; for he is shewn to be a person of weak sight, and not to have been in the habit of writing with a pen. All these three witnesses against the document are shewn to be now more or less dependent upon the Defendant; and there is little, if any, other affirmative evidence in support of the Defendant's case.

On the side of the Plaintiff, however, there is a considerable amount of direct testimony in confirmation of that of *Sumanto*.

Of the witnesses in this category, who are vouched by *Sumanto* as present when it was prepared and executed, are *Boyiduorahu*, the native doctor; and *Gouro Bondhari*, the barber, who are said to have been with the *Rajah* when he sent the peon to call in the respectable people; *Narayani Bisoyi*, the peon sent; and *Bordonosanto*, and *Bhaghirathipani*, who were brought in with *Siva Purohit*, *Damapattojosi* and *Balaji*. They generally confirm *Sumanto's* account of the transaction. It is true that all are more or less discredited by the Civil Judge; that the barber is not relied upon even by the Respondent as worthy of credit; and that the evidence of the peon, who says he was not continuously in the room, is of little value. But the others, particularly *Bordonosanto*, who was related by marriage to *Adikonda*, seem to be of respectable position, are persons who were not unlikely to be present; and their statements, notwithstanding some slight discrepancies, in the main confirm *Sumanto's* account of the transaction. In further corroboration of the Plaintiff's case his counsel rely on the evidence of the *Mahadevi* and of *Iswara Puttro*.

The latter is the *vakeel* who in 1868 and 1869 prosecuted the *Mahadevi's* claim before the Government at *Madras*. He seems to have been employed as a *vakeel* by *Adikonda* in his lifetime; and there is nothing to impeach his general respectability. His testimony is to the effect that having been sent for by the *Rajah*, on account of some pending suit, he was at the house after the execution of Q; and that on the next day, that is, on the 21st of November, the *Rajah*, being then in full possession of his faculties, told him that he had the day before executed in the *Mahadevi's* favour a written authority to adopt. This evidence does not justify the observation of the Civil Judge that "it amounts to nothing," since, if believed, it would establish a clear admission by the *Rajah* of his antecedent act. It is, however, open to the exception taken by Mr. *Norton*, viz., that it is but evidence of an oral admission, said to have been made by a deceased person, and, as such, incapable of contradiction, and open to suspicion. His presence, moreover, at the place at the time in question is not sworn to by any other witness, and is not very satisfactorily accounted for.

The evidence of the *Mahadevi* is to the effect that on the morning of the 20th of November she was weeping over the *Rajah*, who was very ill; that he told her in the event of her not having a male child to adopt one, and promised to give a written authority for the purpose; that in the evening of that day, whilst she was sitting within her room with the door a little *ajar*, *Sumanto* brought a paper and left it on the threshold, saying it was the authority to adopt; that afterwards, and when the lamp was lighted, *i. e.*, after sunset, she took the paper to the *Rajah*, nobody else being in the room; that he took it from her and said, "I have given you written authority—you are pregnant. You will bring forth a male child, if not, you will adopt," and then returned it to her, and that she afterwards kept it in her box. She identified Q as that paper. She further deposed that the key of the *goutaghoro* was brought to her by *Sumanto* before he brought the document; and afterwards, in answer to a question not given in the record, said, "The keys and this written authority were given to me in the evening when there were two *ghadyas* to sunset."

Of this witness the Civil Judge has recorded the following opinion:—"On the face of her deposition, I see no reason to

think her untruthful, but rather the contrary; and yet in O. S. No. 9 of 1870 she put forward, and supported with much evidence, three assertions on important facts which have been declared false, or have been disbelieved, viz. (1st) division between *Adikonda* and the Defendant, it being admitted by her in this suit that they were undivided; (2nd) an examination of the treasuries, shewing that they contained but a small sum, with a view to reduce the amount recoverable by the Plaintiff against her, if he should be successful in that suit; (3rd) the gift of the jewels and cash by *Adikonda* to her. And now she has put forward Q, which is certainly a forgery; she has supported it with much evidence; she has sworn that *Adikonda* himself, in speaking to her, acknowledged it as his; and she has contradicted the story told by all her witnesses."

Of the objection to the *Mahadevi's* credit, which the learned Judge founds upon Q, and the evidence given by her in support of its execution, it is enough to observe that he thereby begs the question which he had to try, viz., whether it was a forgery or a genuine instrument. He would hardly have done this if he had not previously, and by comparison of handwriting, satisfied himself that the signature of *Adikonda* was itself forged. That this foregone conclusion, which must now be taken to be erroneous, must materially have affected his general estimate of the credibility of the Plaintiff's witnesses is therefore shewn by the passage just cited from his judgment. Nor do their Lordships attach much more weight to his other objections to this lady's credit. They do not find any material contradiction between her statement in this suit and those of the other witnesses. There is undoubtedly a discrepancy as to the time when the key was delivered (as to which only *Samanto* and the native doctor speak). But that the *Mahadevi*, a native woman examined from behind the *Purdah*, should have made some confusion as to the time that elapsed between the two acts of delivery does not, in their Lordships' view, materially affect her credit. Again, her contention in the former suit that her husband and the Defendant were undivided brothers, may, under the circumstances, have been raised *bonâ fide*. The fact which was found against her cannot have been in her own personal knowledge, and it was one which before that decree was not perfectly clear. That she should have undervalued, if she did undervalue, the amount of property in the *goutaghoros* will surprise nobody conversant with native suits in *India*. On his side, *Raghunadha* grossly exaggerated the amount and value of that property. Again, the alleged gift of the jewels and cash to her was no doubt found by the same learned Judge against her. There may have been no appeal against his decision (the adoption having then taken place), but it is obvious that the fact of that gift is again in issue in this suit, and that it was more or less determined in the other upon the view which this same Civil Judge then formed of the credibility of the Plaintiff's witnesses in this suit. There is, however, one circumstance connected with that suit of 1870 which affects the credibility, not only of the *Mahadevi*, but of other witnesses for the Plaintiff, and ought here to be considered. That circumstance is the date on which the gift was said to have taken place. The *Mahadevi*, in that as in the present suit, deposed that she received the key and the written authority to adopt on the same day. And this is the story now told by those of the witnesses who in their depositions in the former suit were silent on the authority to adopt. But the date assigned to the gift of the jewels throughout the suit of 1870 was "two days" before the *Rajah's* death, which, in common parlance, would import, and seems to have been so understood, the 21st of November. The date assigned to the transaction in this suit is a date between which and that of the *Rajah's* death two clear days intervened, *i. e.*, the 20th of November.

This circumstance would be almost fatal to the Plaintiff's case as to Q if it were possible to suppose that that case had been got up after the evidence in the jewel suit was given. But the depositions in that suit were taken in December, 1870; and when it is shewn beyond all doubt that the *Mahadevi* had at least as early as the 18th

of March, 1869 (in her petition), stated the date of the alleged authority to be the 20th of November; that the witnesses who impeach Q, which bears that date, admit it to have been in existence ten days after the *Rajah's* death, and say that *Sumanto* was the concoctor of the fraud; it is impossible to suppose that *Sumanto* would ever have treated the authority to adopt as executed only on the 21st. Nor, indeed, is it easy to see why the gift of the jewels should have been represented to have taken place on that day. One of the issues contested in the cause was whether *Adikonda* was of sufficient mental capacity to make the gift; and the nearer to the time of his death the date of the gift was laid, the greater the difficulty of shewing his capacity of making it. There may have been some strange confusion in the jewel suit as to the effect of the term "two days before his death," and misapprehension as to the date to which the witnesses then meant to depose. Their Lordships are unable further to explain this discrepancy; but for the reasons above given they do not think that it seriously affects the question now under consideration.

Their Lordships desire next to say a few words about two documents of which much has been said in the argument before them.

The first is marked E E. Their Lordships are not inclined to adopt the statement of the Defendant, that he signed this security bond without a knowledge of its contents. They do not, however, attach much weight to the words, "as soon as I, or my son from my giving him in adoption, get possession of our *zemindary*," as evidence in favour of the genuineness of Q; for the utmost that any inference to be fairly drawn therefrom would establish is, that in January, 1869, the Defendant knew that the *Mahadevi* had asserted an authority to adopt (a circumstance which is otherwise probable); contemplated the possibility of the power being established and his son adopted under it; and was persuaded by his creditor to provide against such a contingency. *Siva Purohit* was at that time acting for the *Mahadevi*; and if Q were forged, the Defendant would not then have had the knowledge which he says he subsequently acquired of the fabrication of the document. The most, then, that can be said of E E is that it contradicts his statement, that he knew nothing of an alleged authority to adopt until a later period.

The other document is R. It is dated the 26th of November, and contains a distinct statement by the *Mahadevi* that her husband, on the 20th of November, executed in her favour a written authority to adopt, to the effect of Q. It bears upon it the words (by whom written is not known), "Received 1st December evening, by hand, foul copy." The contention on the part of the Defendant is that this document affords no legal proof of the contents of the second *urzi*, stated in the Collector's letter of the 2nd of December to have been received by him from the *Mahadevi;* and that the terms in which he refers to that *urzi* are consistents with the supposition that the *Mahadevi* then put forward only an oral authority to adopt—Q not having then been fabricated. What the Collector says on this point is: "In her second (letter) she adds that it was her husband's express wish that, if she brings forth a son, such son should succeed; if a daughter, that she (the widow) should then adopt a son." These terms are not necessarily inconsistent with those of R. All that can be said of them is that they do not state affirmatively that she alleged her husband's wish to have been expressed in writing, or on a particular day.

It is now admitted on both sides that R is not the original *urzi;* that it is not an official copy of it, which, as such, would be receivable as evidence; and that if grounds had been laid for proving the contents of the missing *urzi* by secondary evidence, R has not been shewn to be a true copy of it. Each side has imputed to the other foul play in respect of this document, but neither hypothesis is supported by proof, or probable in itself. The proceedings afford some grounds for thinking that the original *urzi*, as well as R., was produced from the Collectorate, but it seems that owing to a blunder, or, as suggested, a fraud on the part of a *vakeel*, R was shewn to the witnesses who were

at first examined upon it as if it were the original, and that the original, if ever before the Court, has slipped out of the record.

It is to be regretted that when the mistake was discovered, and the contest about this document arose, the Civil Judge did not further investigate, by inquiry at the Collectorate or otherwise, the history of R and ascertain what had become of the original *urzi*. Either party might have called on the Judge to do this, but neither did so. It was suggested by Mr. *Norton* in his reply, that their Lordships might now see fit to direct such an inquiry. They do not, however, think that they would be justified in thus prolonging this litigation, inasmuch as they do not consider that a knowledge of the precise terms of the second *urzi* is essential to the determination of the issue before them. It is no doubt true that if the second *urzi* were in the terms of R, the *Mahadevi* must have asserted the existence of a written authority to adopt bearing the same date and to the same effect as Q, before the date at which Q is said by the Defendant's witnesses to have been fabricated. But this circumstance, though it would throw considerable discredit on the Defendant's case, would not conclusively disprove it; because it is possible that the document so said to exist might not have then actually come into existence. Again, if the second *urzi* were only in the terms of the Collector's letter, it would not, as has before been observed, be inconsistent with the existence of a written authority to adopt. Their Lordships will, therefore, deal with the questions before them on the assumption that the precise terms of the second *urzi* have not been proved, and leave the Plaintiff to bear the burden of having failed to establish that, before the 2nd of December, the *Mahadevi* asserted that she had a written authority of a particular date; and the Defendant to bear that of having failed to shew affirmatively that she then asserted only a parol authority. They now proceed to consider the grave objections to the genuineness of Q which the learned counsel for the Defendant have founded on the form and appearance of the document.

Their Lordships have the original before them, and so far as they can judge some of these objections are, to say the least, plausible. The list of witnesses in the handwriting of the writer of the instrument is unusual. It is also unusual for the witnesses to sign before the executing party, and to write their signatures immediately above his. The form of the instrument might naturally be expected to be that of exhibit X d, the translation submitted to Government by the *Mahadevi's vakeel* with her petition of the 26th of July, 1869; and it has been contended on the part of the Appellant that that exhibit was purposely so modified in order to avoid the suspicions which a more literal translation of Q. would have engendered. Lastly, it was contended that the appearance of the document is inconsistent with the evidence which represents that all the signatures were written at the same time, and with the same pen, and the same ink; the fine signature of *Balaji* being written after those of the subscribing witnesses. Their Lordships were certainly at first much impressed by the last objection. It is, however, to be observed that after insisting on the impossibility of all the signatures being written with the same pen, the *Zillah* Judge, on the 26th of November, 1871, saw fit to record that, having just had to look again at Q, he thought it quite possible, though not very likely, that with the pen that made the last "ro" of *Sumanto's* signature *Adikonda* might write as well as his signature is written; and a good writer like *Balaji* might write as finely as his signature is written. Very different appearances may certainly be produced by the same pen and ink when used by different hands; and this is more likely to happen with the coarse ink that is used by the natives of *India*.

Again, as regards the objection founded on X d, it is to be observed that it seems to be satisfactorily answered by the Judge himself, who finds that X d, is, in fact, the translation of a *Telegu* version of Q, taken down probably by a *Telegu* man from the mouth of *Iswara Puttro*, there probably being few persons at *Madras* who could read or translate an *Oorya* document like Q.

Of the list of witnesses, it is sufficient to say that it is difficult to see why it should have been inserted in Q, if it were not done by the order of the *Rajah*. The suggestion on the other side is that it was inserted in order to fill up the space above the *Rajah's* signature on the blank paper. But surely a forger would have had no difficulty in expanding the document so as to fill up the vacant space. Nor, as their Lordships have already remarked, is it likely that a forger would have inserted the name of *Damapattajosi* in that list until he had ascertained whether that person was willing to sign.

Upon the whole, then, their Lordships, dealing with this document as one which bears the genuine signature of *Adikonda;* and as containing a disposition which he was likely to make; and weighing the evidence and the probabilities in favour of the Plaintiff's case, against the evidence and the probabilities in favour of the Defendant's case, have, not without doubt or difficulty, come to the conclusion that the former so preponderates over the latter that they ought to pronounce in favour of Q, as a valid written authority to adopt executed by *Adikonda* on the 20th of November, 1868.

This finding is, of course, sufficient to dispose of the present appeal; and renders it unnecessary for their Lordships to consider whether, if it had been the other way, they could have affirmed the decree of the High Court upon the grounds stated in the judgment of Mr. Justice *Holloway*. The great importance, however, of the subject induces them to make some observations upon it.

That, according to the law prevalent in the *Dravida* country, which includes the district in which the *Chinnakimidy zemindary* is situate, a Hindu widow, not having her husband's express permission, may, *if duly authorized by his kindred*, adopt a son to him, is a proposition which cannot now be controverted. The law has been so settled by the decision of this Committee in the *Ramnad Case;* and the principles and authorities upon which it rests are elaborately considered and reviewed, both in the judgment of the Committee (1), and in the judgment of Mr. Justice *Holloway* in the same case (2).

The two judgments, however, though agreeing in this general, conclusion, which was all that was necessary for the determination of the cause, were by no means *ad idem* on several points, and notably on the nature of the authority required.

Mr. Justice *Holloway* intimated an opinion that, if the requirement of consent is more than a moral precept, the assent of any one of the husband's *sapindas* would suffice. This Committee was far from adopting that broad proposition. It pointed out that on the question, who are the kinsmen whose assent will supply the want of a positive permission from the husband, the authorities are extremely vague; that there exists a broad distinction between cases in which the deceased husband was a member of a joint and undivided Hindu family, and those in which, he being separated, the widow has taken his estate by right of inheritance; but that, even in the latter case, the assent of some person who stands to her in the relation of protector may be requisite. It is unnecessary to repeat at large this portion of their Lordships' judgment on that occasion, which is to be found at pp. 411 to 443 of Mr. *Moore's* Report.

The question has since come before the *Sudr* Court of *Travancore* in the case reported in the *Madras Jurist* (3) of February, 1873, and before the High Court of *Madras* in the present case. In the *Travancore Case* the Court, though a foreign Court not bound by the decisions of this tribunal, in a judgment of remarkable ability and research, adopted the principles suggested by this Committee as those which should govern the determination of the question in the case of an undivided family, and ruled that the assent of certain separate *dayadies* of the deceased husband was not sufficient to validate an adoption by a widow, to which the husband's undivided brother and the head of the undivided family had not assented. In the present case Mr. Justice *Holloway*, adverting to what was said by this com-

(1) 12 Moore's Ind. Ap. Ca., 209.
(2) 2 Mad. H. C. Rep., 206.
(3) 8 Madras Jur., p 58.

mittee in the *Ramnad Case* concerning an undivided family, observed, "whether this be so or not, it has no application to the present case, in which the property is to be held in severalty, and not in coparcenary." And he finally formularised the following propositions:—

1. The adoption by the widow, with the assent of a *sapinda*, is a substitute for the actual begetting by a *sapinda*.

2. That the argument from analogy is in favour of the assent of one *sapinda* rather than more.

3. That his assent is not to supply a capacity for rights, but a capacity for action.

4. That proximity to the deceased with respect to rights of property is wholly beside the question, and if this were not so the rule would be entirely defeated.

5. That in the present case that capacity has been sufficiently supplied, as, in the law which this assent of *sapindas* has superseded, a child begotten by this assenting *sapinda* would have been undoubtedly legitimate.

Their Lordships cannot adopt these propositions as a correct exposition of the law.

They observe, in the first place, that they are all more or less founded on the assumption that the law of adoption now prevalent in *Madras* is a substitute for the old and obsolete practice of raising up seed to a deceased husband by actual procreation; and that the limitations, if any, upon the power to adopt are to be traced by analogy from that practice. In the *Ramnad Case* (1) their Lordships, after stating their general conclusion, added the following observations: "They think that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindu law, or upon analogies, real or supposed, between adoptions according to the *Dattaka* form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the *Dattaka Mimàmsa* of *Vidy Narainsamy*, the author of the *Madhaveyam;* but, as a ground for judicial decision, these speculations are inadmissible, though as explanatory arguments to account for an actual practice, they may be deserving of attention."

To these remarks of their predecessors their Lordships adhere. They desire further to observe that it is to their minds extremely doubtful whether the supposed analogy is sufficient to support Mr. Justice *Holloway's* propositions in their integrity. The myth of *Satyavaty* referred to by *Narainsamy*, and most of the texts relating to the obsolete practice which are to be found collected in *Colebrooke's* Digest and elsewhere, all imply an authority external to the widow as the justification of her act, an act repugnant to the general rule of asceticism and celibacy imposed upon Hindu widows. Most of the texts speak expressly of "the appointed" kinsman. By whom appointed? If we are to travel back beyond the *Kali* age, and speculate upon what then took place, we have no reasonable grounds for supposing that a Hindu widow, desirous of raising up seed to her deceased husband, was ever at liberty to invite to her bed any *sapinda*, however remote, at her own discretion; and that his consent of itself constituted a sufficient authorization of his act.

Positive authority then does not do more than establish that, according to the law of *Madras*, which in this respect is something intermediate between the stricter law of *Bengal* and the wider law of *Bombay*, a widow, not having her husband's permission, may adopt a son to him, if duly authorized by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognised by the *Travancore Case*, viz., that the requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not

(1) 12 Moore's Ind. Ap. Ca., 441.

only in estate, but in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that for such a purpose as that now under consideration she can at her will travel out of that undivided family and obtain the authorization required from a separated and remote kinsman of her husband.

Mr. Justice *Holloway*, however, not directly determining anything adversely to the principle affirmed in the *Travancore Case*, distinguishes the present on the ground that, although the family must be taken to be undivided, the particular property is to be held in severalty and not in coparcenary. It is not necessary for the determination of this appeal that their Lordships should decide whether this distinction can be supported, and they abstain from doing so. They may, however, observe that a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr. Justice *Holloway* has himself strenuously insisted upon elsewhere (1), viz., that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it.

Their Lordships desire further to observe that, even if the distinction suggested were adopted it would be necessary, in order to maintain the present [illegible] as one duly made without the permission of the husband, to go the full length of holding that the assent of one separated and distant *sapinda* (and that the natural father of the child taken in adoption) is an authority sufficient to validate the act.

Mr. Justice *Holloway*, indeed, in one place treats *Raghunadha* as an assenting party to the exercise of the power to adopt, though not to the particular adoption.

Their Lordships, however, are of opinion that even this general assent is not established by E E, or by the other evidence in the cause. The parol testimony on this point is untrustworthy; and E E, taking it at its highest, is consistent with the supposition that *Raghunadha* then intended only to provide for the contingency of the *Mahadevi's* establishing the authority to adopt, which she said she had derived from her husband, and exercising it in favour of his son. It must, therefore, be taken that the only *sapinda* of *Adikonda* who is shewn to have assented to this adoption is the *Rajah* of *Piddakimidy*, the father of the adopted child, and their Lordships have already intimated their grave doubts whether such assent would in any case have constituted a sufficient authority.

In the present case there is an additional reason against the sufficiency of such an assent. It is admitted on all hands that an authorization by some kinsman of the husband is required. To authorize an act implies the exercise of some discretion whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is that the *Mahadevi*, representing herself as having the written permission of her husband to adopt, asked the *Rajah* of *Piddakimidy* to give her a son in adoption, and succeeded in getting one. There is nothing to shew that the *Rajah* ever supposed that he was giving the authority to adopt which a widow not having her husband's permission would require.

Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present

(1) 2 Madras, H. C. R., 229

appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decisions in the *Ramnad Case* had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of *Madras*. It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of colleteral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in *India* to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it; and the propositions of Mr. Justice *Holloway* appear to their Lordships calculated unduly to enlarge those limits.

Their Lordships have further to observe that the decree, as it stands, makes the Defendant accountable for mesne profits from the time when he was placed in possession by the order of Government. That was about September, 1869. At that time *Raghunadha* was, in default of a son of *Adikonda*, natural or adopted, unquestionably entitled to the *zemindary*. The adoption took place on the 20th of November, 1870, and the plaint states that the cause of action then accrued to the Plaintiff. The plaint itself was filed on the 15th of December, 1870, and there is no proof of a previous demand of possession. Their Lordships are of opinion that the account of mesne profits should run only from the commencement of the suit. They think that the decree, with that modification, ought to be affirmed, and they will humbly advise Her Majesty accordingly. But their judgment must be understood to proceed on the establishment of Q as a genuine permission to adopt, and not upon the ground upon which the High Court principally relied. The costs of the appeal must follow the result.

1st, 2nd, 3rd, and 4th February, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Special Court at British Burma.

MOUNG SHOAY ATT, (Defendant)* ... ... } *Appellant,*

versus

KO BYAW, (Plaintiff) ... *Respondent.*

Duress—Imprisonment—Avoidance of Contract.

An agent employed by the Plaintiff to purchase timber for him in the Siamese territory was imprisoned by an officer of the Siamese Government, on a charge brought against him by the Defendant of stealing timber. In order to obtain his release he contracted to purchase from the Defendant, for the Plaintiff, the timber which he was charged with stealing, at a price much beyond its value. *Held*, that the Plaintiff might repudiate the contract as obtained under duress.

In *England* the mere fact of imprisonment is not deemed sufficient to avoid an agreement made by one who is in lawful custody under the regular process of a Court of competent jurisdiction, where no undue advantage is taken of the situation of the party making the agreement. But in a country in which there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, imprisonment may in itself amount to duress such as will avoid a contract entered into by the prisoner with the view of obtaining release.

4th February, 1876.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is an appeal from a decree of the Special Court of *British Burma*, reversing a decree of the Judge of *Moulmein*, which had dismissed the Plaintiff's suit, and giving instead of that decree a judgment for the Plaintiff for the sum of Rs. 8,480 with interest.

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* 3 Cowell's I. A. p. 61.

The Plaintiff and Defendant are merchants in the timber trade, residing at *Moulmein*, in *British Burma*, and it is their practice to go up into the *Siamese* territory, and under permission from the Government to cut timber there, and bring it down, in a manner which has been described by Mr. *Coryton*, to *Moulmein*. The Plaintiff, at the time when the transactions which gave occasion to these proceedings took place, did not go into the *Siamese* territory himself, but employed an agent called *Douk* to purchase timber for him, and entrusted him with a considerable sum of money, and with elephants used in drawing the timber which has been cut. It seems that *Douk*, on the 20th of September, 1870, entered into an agreement with a man called *Pho* to purchase some timber, 200 logs, if *Pho* could obtain a permit. It will be necessary, hereafter, to consider that agreement more in detail; it is sufficient now to state the fact that such an agreement was made, and the general purport of it. A few months afterwards, on the 3rd of January in the following year, 1871, the Defendant, who was personally on the spot, also entered into an agreement with the same man, *Pho*, to cut timber for him, under a permit which the Defendant had obtained from the *Siamese* authorities. The Defendant entered into agreements with two other foresters of a similar kind. Timber was cut by *Pho* and by the two other foresters, and on the 6th of May, *Douk*, the Plaintiff's agent, went to the two creeks which seem to be called *Whaypoogan* and *Whaykoonpai*, where the timber was stacked, and put his mark upon 152 logs. It appears upon the evidence, that at that time there were no marks upon the timber, except those of the foresters who had cut it. It seems that *Pho* had cut eighty-one of these logs, and the two other men had cut seventy-one logs. The Defendant hearing of this proceeding, complained to a *Siamese* officer, styled *binyakin*, who was said to be a judge of the district, of what *Douk*, had done, and the judge sent a peon with the Defendant to arrest *Douk* and to bring him before him. It seems that after searching for *Douk* for two or three days, he was found, and taken into custody, considerable violence being used. How far some violence was necessary to secure him, or what degree of force might reasonably have been employed for that purpose, does not appear, but certainly it would seem that a great deal of violence was used; that he was beaten, tied with a rope, and in this state carried into the presence of the *binyakin*. When there the *binyakin* put *Douk* into irons, with an iron collar round his neck, and it is said that threats of personal violence were used towards him, unchecked by the *binyakin*. There is probably some exaggeration in the evidence upon that point. But enough remains to shew that he was not only placed in imprisonment, but had those irons put upon him, and an iron collar. Under these circumstances he was charged with having put his mark upon the logs, and he was charged with having so done fraudulently and criminally. That being the state of affairs, and *Douk* being evidently under great apprehension at the time as to what further might happen, it was proposed that he, having put his mark upon the timber, should purchase it; then there was a parley as to the price, and ultimately it was stated that the price he must give for this timber should be Rs. 45 a log, a price certainly much larger than the value of the timber as it then lay. It is said to be the law of *Siam* that a man who has improperly put his mark upon timber which does not belong to him is liable to pay the value of ten logs for every log so marked. That law or custom is by no means clearly proved, but whether it be so or not, it is clear that the agreement for the purchase of the logs by *Douk* was at a price considerably beyond their value.

It has been argued on the part of the Appellant that although *Douk* must be considered as a prisoner at the time before this judge, yet his imprisonment was lawful, and therefore that the contract cannot be avoided on the ground that he was under illegal constraint at the time he made it. The judge of *Moulmein* is right in his view of the law of *England*, that in this country if a man is under lawful imprisonment for a civil debt, an agreement which he makes while subject to that

constraint is not, by reason of his being so subject to it, capable of being avoided, provided that it is not unconscionable. But imprisonment in a country where there is no settled system of law or procedure, and where the judge is invested with arbitrary powers, is duress of a wholly different kind. In the one case the prisoner knows that the length and severity of his imprisonment are defined and limited by the law, and cannot be exceeded; whereas in the other the prisoner neither knows what will be the length of his imprisonment, nor what amount of pain and misery he may be put to; all is indefinite; and therefore the apprehension acting on the mind of a man in such a situation would be infinitely greater than if he were imprisoned in a country like *England*, where the law is settled, and cannot be exceeded by the Judge.

With regard to the actual circumstances of this imprisonment, there was a great deal of violence used at the time of the arrest, and whether some violence was justified or not by *Douk's* resistance, it is unquestionable that he received a severe beating, which would affect the state of his mind. Then he was put into irons. The charge is made against him—not that he had unintentionally put his mark upon the property of another—but that he had done so criminally, with a view to steal it. He knew what has happened and might happen again in this *Siamese* territory,—that a wrongful act of that kind might be very severely punished, and to an extent which in this country might be supposed to be disproportionate to the offence.

No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made, but there are principles of universal application by which all contracts, wherever made, must be judged. The first principle of contracts is, that there should be voluntary consent to it. In this country duress has always been held to avoid a contract, except in certain cases where the imprisonment is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present, and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it, this contract shews that the man was charged with a criminal offence "*Treephaw*—that is *Douk*—requests not to raise contention against me with regard to having stolen, impressed, and struck with hammer mark the 152 logs of teak timber which has been cut, worked, and kept at the place alloted by *Moung Shoay Att* in the forest, for which *Moung Shoay Att* obtained the imperial order and written permit." It was to get rid of that charge of having stolen these logs, when he was in custody under the circumstances which have been referred to, that this agreement was made. Their Lordships therefore think that the Plaintiff may repudiate it, as having been made by his agent when under duress.

It is to be observed that the treaty between the British Government and the *Siamese* Government contains this clause: "With reference to the punishment of offences or the settlement of disputes, it is agreed that all criminal cases in which both parties are British subjects, or in which the Defendant is a British subject, shall be tried and determined by the British Consul." It seems, therefore, that the *binyakin* had no jurisdiction to try the offence, and the proceedings bear the character of an attempt, by bringing *Douk* before this Judge, to extort an agreement from him.

Their Lordships for these reasons think that this agreement does not in any way bind the Plaintiff; and inasmuch as Rs. 3000 of his money was paid, and his elephants were delivered under it, that he is entitled to bring this suit.

A question was raised whether the agreement had not been confirmed and ratified by the subsequent acts of the Plaintiff, or *Douk* as his agent. No doubt, if there had been a clear ratification, it being in the power of the Plaintiff to ratify or reject it, if there were circumstances from which a ratification might properly be presumed, he would be bound by it, but their Lordships do not find any evidence of such a ratification. The delivery of

the elephants was in effect made before the constraint or the apprehension of constraint had disappeared; for simultaneously with entering into this agreement, it appears that *Douk* gave an order to the man who had the custody of the elephants to give them up to the Defendant, and although the actual delivery did not take place immediately, it was made in consequence of that order, and *Douk* says he was in such a state of apprehension that he could do nothing afterwards, and as soon as he recovered from his beating, went down to *Moulmein*. The other point is that the timber was accepted by the Plaintiff. But their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, *Douk* was protesting against this agreement, and so was the Plaintiff, claiming the timber as his own property.

Another ground suggested by the Special Court on which this agreement could not be sustained as against the Plaintiff, seems to their Lordships to be well founded. *Douk* being in custody upon a criminal charge had clearly no authority to part with his employer's property, or to make an agreement to part with it, to relieve himself from such a charge. If there had been any question of a civil nature, it might have been within the scope of his authority as a general agent to compromise such a claim, but when charged with personal misconduct and a crime, which it cannot be assumed that his principal had authorized, no authority from the employer can be implied that his money and his elephants should be handed over to the man making the charge, in order to relieve his agent from it. It is sufficient, however, to decide that the agreement is avoided on the ground of duress, for, as the Lower Appellate Court observes, this last ground for impeaching the agreement was not made in the pleadings.

Their Lordships having come to this conclusion upon the agreement, it follows that the decree in favour of the Plaintiff must stand.

Then the question arises whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the Plaintiff got into his possession. Undoubtedly if the timber belonged to the Plaintiff, and the claim made by the Defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of this agreement.

This raises the question to whom the timber belonged at the time when this agreement was made upon the 10th of May. Although the question is not an easy one to decide upon the materials before their Lordships, they do not see that any further or better evidence could be obtained upon another inquiry. It is evident from the whole course of the proceedings in the case that a material point was made throughout them as to the property in the timber; and upon the best judgment their Lordships can form on the evidence, they have come to the conclusion that this timber really belonged to the Defendant. Fortunately the case does not depend wholly on oral testimony, and the documents which are found in the case are tolerably clear, the only doubt being upon the precise nature of these permits. There is still some doubt about the nature of the permits, but as far as the case can be understood from these agreements, it is tolerably clear that, as between the Plaintiff and the Defendant, the Defendant is entitled to this timber. The evidence with regard to it is found in the agreements made by the Plaintiff's agent with *Pho*, and by the Defendant with *Pho* and two other persons. The agreement made by the Plaintiff's agent *Douk* with *Pho*, is to the effect that *Pho* had stated "that there was timber which had been killed by order of *Shoay Nan Shin* of *Zimmay*"—the chief or some official under him of *Zimmay*,—"in several creeks," mentioning them, two being those which have already been named. The agreement goes on, "And as I have no elephant, pony, and money for expenses for the purpose of cutting and working the said timber, by applying for and obtaining the imperial order for the same, therefore hire, lend, and accommodate me now with Rs. 600,

and one female elephant valued at Rs. 730, and that at the time of arrival of the 15th day of increase of *Wahtsoe* in the year 1233 (corresponding to the English 1st of July, 1871), 200 logs of timber will be put down and delivered to the waters reach of *Mhineloongyee*." That is an agreement for the cutting of the timber "by applying for and obtaining an imperial order." The whole agreement appears to be made conditionally on that order being obtained. After providing that *Pho* shall pay double the value of that which has been deposited with him if he does not deliver timber, the agreement concludes thus: "Hereafter, if the permit for the forest could not be obtained, and thereby unable to work and handle, then Rs. 600 and female elephant, valued Rs. 730, must be returned by *Nway Pho* to *Moung Treephaw*," that is *Douk*. It appears therefore that the permit was considered, as between the two contracting parties, to be essential to the title, and the agreement was made conditionally upon its being obtained. When we come to the agreement which the Defendant made with *Pho*, it will appear that a permit had been obtained by the Defendant before he entered into it. "*Pho* states and requests to be permitted to cut, work, drag, and put down the killed and standing trees of three cubits and two mike, the lowest up to four cubits, five cubits, and six cubits (in girths of 20 cubits, the lowest up to 25 cubits, and 30 cubits in lengths, which are (in) *Whaypoogan Creek*, and *Whaykoonpai Creek* in the said two creeks within the forests, for which *Thetgoung Moung Shoay Att* obtained the imperial order and written permit"—for a hire of Rs. 15 per log. The agreements of the two other foresters are to the same effect. Under them it seems that 152 logs at least had been cut, which *Douk* marked with the Plaintiff's mark. Now as a question of title, it would certainly seem that the Defendant had the permission of the proper officer of the Government to cut timber. There is some doubt as to whether the permit gave an exclusive right to cut timber in the particular forest, or whether it only gave a right concurrently with any other persons who might obtain similar permits; but it seems to be plain from the wording of these agreements that all parties considered that a permit of one kind or the other was necessary to give a title to the timber. The Defendant had got one, the Plaintiff had none, but employed *Pho* in the expectation that *Pho* would get it, making the agreement terminable, and stipulating that the money advanced should be returned if it was not obtained. It has already been stated how these logs were cut, and there is evidence in the case, which the Judge below believed, that they were cut for the Defendant.

Then as regards the conduct of the Plaintiff, there can be no doubt that he brought an action against *Pho* in the *Siamese* Court, and apparently to recover double the amount of the money he had deposited with him, on the ground that he had not delivered any logs. This claim assumes that *Pho* had not performed any part of his contract, and therefore that the 152 logs did not belong to the Plaintiff. The judgment is differently translated, if it be the same judgment, in this record, and one translation is not very intelligible; but supposing, as appears from one translation, that the Judge decided that *Pho* was to be allowed for 152 logs, the Defendant was no party to that suit, and cannot in any way be bound by it. The conduct of the Plaintiff in bringing such a suit remains as an admission at that time on his part that none of the logs had been delivered by *Pho* under his contract.

Then there is a statement in *Douk's* petition of a subsequent date, to the effect that these 152 logs did belong to *Shoay Att*. He says in that part of his petition, "In regard to the 152 logs of teak timber, as they belong to *Moung Shoay Att*, and the price was fixed at Rs. 45, I shall have to pay by one way; that I deposited with *Byahngyah Kin* Rs.3000, which money *Byahngyah Kin* took and gave away to *Moung Shoay Att*; besides that, four elephants valued Rs. 6000, which *Byahngyah Kin* confiscated, took and gave to *Moung Shoay Att*." *Douk* here states that the 152 logs belonged to the Defendant, and that he had been forced to pay

these sums to get them by way of purchase from him. Upon a point of this kind their Lordships think also that reliance ought to be placed on the finding of the Judge at *Moulmein*, who heard the evidence and was well able to appreciate it, that the property was in the Defendants. The Appeal Court of British *Burma* do not express any opinion to the contrary. All they say is that they think *Douk* might have acted *bonâ fide*, and might have had some grounds for supposing that the timber belonged to him, and so relieve him from any criminal intention to appropriate the timber.

On the whole, therefore, their Lordships think it is established that the property in this timber belonged to the Defendant (so far as it could belong, under the circumstances which have been described in a very interesting way by Mr. *Coryton*, to anybody), and that he would have had the benefit of that timber and taken it down to *Moulmein*, but for the act of *Douk*. Whether the timber ever get down to *Moulmein* or not, or whether all of it got down, is uncertain; but however that may be, their Lordships have no doubt that under the agreement which has been held to be void, the Plaintiff had, or might have had, possession of it at the creeks, and therefore there must be a deduction from the damages to the extent of the value of the timber there. It seems to be admitted that *Douk* marked the best logs he could find, and according to his own statement, the value at the time he marked them was from Rs. 18 to Rs. 20 per log.

Their Lordships are therefore of opinion that the total amount decreed and payable to the Plaintiff under the decree appealed from should be reduced by the sum of Rs. 3040, being the value of the 152 logs of timber at Rs. 20 per log. The amount so reduced will be payable to the Plaintiff with interest thereon at five per cent. from the date of the said decree to the date of realization.

Their Lordships will humbly advise Her Majesty that the decree be varied by making the reduction in these terms, and that in other respects it be affirmed. The decree being thus varied, their Lordships think there should be no costs of this appeal.

8th, 9th and 10th February, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

JUMOONA DASSYA CHOWDHRANI, (Plaintiff)† ... } *Appellant,*

versus

BAMASOONDEBAI DASSYA CHOWDHRANI, (Defendant) ... ... } *Respondent.*

Adoption, Suit to set aside—Infant Marriage—Presumption as to Age—Power of Minor to give permission to adopt—Reg. X. of 1793, s. 33, and XXVI. of 1793, s. 2—Minor under Court of Wards—Onus probandi—Estoppel.

The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent co-habitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in *Bengal*, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble. The operation of s. 33, Reg. X. of 1793, which, read together with s. 2, Reg. XXVI. of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

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* From the judgment of Kemp and Pontifex JJ., dated the 14th February, 1873.

† 3 Cowell's I. A., p. 72.

Quare, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the Plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the Plaintiff.

10th February, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

This is an appeal against the decree of the High Court of *Calcutta*, which, reversing a decree of the Subordinate Judge of *Zillah Rajshahye*, dismissed the Plaintiff's suit.

The suit was brought by a Hindu widow, *Jumoona Dassya*, against her daughter-in-law, *Bamasoonderai Dassya*, who was sued in her own right, and also as the guardian of *Giris Chunder Moozoomdar*, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between *Jumoona Dassya* and the infant adopted, was to set aside that adoption, and to have it declared invalid. *Jumoona* was the widow of *Guru Pershad*, who died in the year 1851. He left, besides his widow, two sons, *Govind Chunder* and *Gopal Chunder*, and three daughters. On his death-bed he executed a *wasuitnamah*, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a 9 *annas* share, and the younger only a 7 *annas* share of his estate. *Govind Chunder*, the eldest son, died in the year 1853. He had, according to the custom of Hindus, been married in his father's life-time, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the Defendants that on his death-bed, the day before his death, he executed a document authorizing his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of *Govind Chunder*, his adoptive father; but upon the death of *Jumoona*, will, if then living, become entitled to take the share of the other brother, who died unmarried, whilst still a child, in preference of the sisters of his father. On the other hand, if the adoption is invalid, *Jumoona*, if she survives *Bamasoonderai*, will become entitled on the death of the latter to the share of her eldest son.

This contingent interest is the only *locus standi* which she has in the present suit; although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, first, whether *Govind Chunder* did execute the alleged authority to adopt; and, secondly, if he did so, whether he was by reason of his age capable of executing such a document.

Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of *Govind Chunder* at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly upon the latter of them, and it bears indirectly upon the former, inasmuch as the older *Govind Chunder* was, the more probable is it that he would desire to execute such a document as that in question.

The contention in the present suit is, that although *Bamasoonderai* was, at the time of her husband's death, eleven or twelve years old, he was only between thirteen and fourteen; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of *Bamasoonderai*, is, their Lordships think, impossible. It is true that, immediately after her son's death, *Jumoona*, in a report made to the collector, appears to have stated that her daughter-in-law was not more than eight or nine years old, and that the age of her son was twelve years; admitting, there-

fore, that there was a difference of three or four years between them. In a subsequent proceeding, that is in her written statement filed in the Act IV. case, in 1854, she expressly stated that the age of her son was greater by four years than that of the Plaintiff. Hence, we have a clear admission on her part that there was a difference of some four years between the ages of *Bamasoonderai* and her husband, although she may have sought to make them both younger than they really were by throwing back the age of the former to eight or nine years. The question, however, of *Bamasoonderai's* age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of *Bamasoonderai* was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her husband's death, of the age of eleven or twelve years. The result of that suit, no doubt, has been the *consensus* of the witnesses on both sides in the present suit as to the age of *Bamasoonderai*. But the effect of the admission of *Jumoona* remains, and there is no reason why we should come to any conclusion other than that the difference of age between *Bamasoonderai* and her husband was that which was originally stated. Their Lordships, moreover, think there is great force in the observations of Mr. Justice *Kemp*, a Judge admittedly of large experience as to native usages and customs upon this point. He thinks that Hindu marriages are usually arranged so that there is a difference considerably more than one or two years between the age of the husband and wife; and their Lordships think this is probable and reasonable. The foundation upon which marriages between infants, which so many philosophical Hindus consider one of the most objectionable of their customs, is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura virgo*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore, it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent co-habitation, should have attained the full age of adolescence, and also the age which the law fixes as that of discretion.

Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that *Govind Chunder* was, at the time of his death, of the age of fifteen or sixteen, and, therefore, of an age which, according to the law prevalent in *Bengal*, is to be regarded as the age of discretion.

Their Lordships will now proceed to consider the question as to the *factum* of this instrument. The story told by *Bharut Chunder Roy*, the father of *Bamasoonderai*, and therefore the most important witness on that side, is in effect this, that the day before the execution of the instrument he had a conversation with *Govind*, and represented that he ought to execute a deed of permission to adopt a son; that *Govind* assented to this; that the witness afterwards communicated what had so passed to *Jumoona*, and that she finally said, "Then, my child, write and give permission to adopt a son." A good deal of criticism has been applied to the reasons for giving a power to adopt which *Bharut Chunder* says he assigned on this occasion. Their Lordships think that the more plausible construction to be put on what he swears he then said is that he had had in view the supposed spiritual advantages which his daughter might derive from having an adopted son; advantages which seem to be considered of some value, though not perhaps of the same value that they are to an adoptive father. It is then sworn that on that day the draft of the deed of permission was begun, but that it was not finally finished until the next day. There is some obscurity as to the preparation of this draft, and the actual giving of instructions for it by *Govind Chunder*. And if this were a case in which a will was propounded, giving benefits to various parties and making a disposition of property, as to which it would be necessary to satisfy the Court that the testator fully

know what he was about, the evidence would be extremely defective. But when the question is only as to the mode of carrying out a permission to adopt, to which the party had signified his assent, the defect in the evidence becomes less material. It is, however, an observation that may fairly be made for the Plaintiff that there is not such satisfactory evidence as to this draft as their Lordships might expect to find. The lapse of time since the transaction may in some degree account for this. According to the case for the Defendant this draft was fair copied on the day preceding the death of *Govind Chunder*, upon a stamped paper purchased on that day at *Nattore*, a place which appears to be at the distance of ten or twelve miles from the family house where the deed was executed. This fair copy is said to have been made by a person other than the person who wrote the draft. The latter is said by some of the witnesses to have been one *Bagchi*, and the writer of the fair copy is said by all the witnesses who depose in favour of the instrument to have been *Ramnarain Sircar*.

Bharut Chunder further states that this fair copy was executed by *Govind Chunder*, and that *Jumoona* then went into the inner apartments, and brought out *Bamasoonderai*, to whom the completed instrument was delivered by *Govind Chunder*. The witnesses for the Plaintiff, on the other hand, whilst they contend that no such transaction ever took place, assert that *Govind Chunder* was on that day speechless and incapable of doing what he is said to have done; that *Bamasoonderai* was not in the house, but was then living at her father's house; and that, although sent for, she was unable to come for want of a *palki*.

In this conflict of evidence, their Lordships are not able to form a confident opinion as to the credibility of one set of witnesses as opposed to the other; and they have not in this cause the advantage of having a clear expression of opinion by the Judge of first instance as to the demeanour, and consequent credibility, of those witnesses when produced before him. His judgment, which was in favour of the Plaintiff, proceeds first upon the assumption that it was impossible to purchase the stamped paper at *Nattore*, and to have the deed engrossed and executed upon the same day; next, upon the general improbability of the transaction; and further upon certain appearances upon the document in connection with the signatures of *Ramnarain Sircar*, and other subscribing witnesses. He, no doubt, also intimates his belief in the testimony given for the Plaintiff to the effect that on the day in question *Govind Chunder* was speechless.

The learned Judges of the High Court have dealt with two of the above points. They seem to have satisfied themselves, and their Lordships are not prepared to impugn their conclusion, that the stamped paper on which the document propounded is written, might, though purchased on the morning of the day of execution, have reached the house in time to have the document engrossed and executed, as it is said to have been engrossed and executed. They, having the original before them, were further of opinion that the appearances which have been referred to were not such as to excite any grave suspicion touching the genuineness of the document. They also, with better means of judging than their Lordships can have, came to the conclusion that the witnesses for the Defendant were of a more respectable and independent class than the witnesses produced by the Plaintiff.

There are two disputed facts relating to the transaction which, if established, would go far to prove the Defendant's case. The first is the presence of *Bamasoonderai*. Their Lordships agree with the High Court in thinking that the story told by the Plaintiff's witnesses in order to account for the alleged absence of *Bamasoonderai* is anything but satisfactory. The young man is shewn to have been ill for several days. It is sworn on the other side that *Bamasoonderai* was living in her husband's house, and had been there a month at least, or two months, previous to his death. Her age renders that probable; but even if from any accidental cause she happened, when her husband was taken ill, to have been at her father's house, their Lordships think that the sug-

gested want of conveyance, considering the apparent position of the family, is wholly improbable, and a story which the learned Judges of the High Court were justified in disbelieving. They therefore believe that *Bamasoonderai* was present on that occasion; and that is a fact which necessarily affects most materially the credit due to the Plaintiff's witnesses.

Then, again, there is the alleged concurrence of *Jumoona*. *Jumoona* has not been examined as a witness in this cause. The reason why she was not examined can hardly be the prejudice of natives of position to appear as witnesses, since she produced as her witnesses upon the point of *Govind's* age her own daughters. She was the most important witness in her own case, both upon the point of the age of her son, and upon her alleged consent to the execution of the document. That the document, if executed at all, should have been executed without her consent, is, their Lordships think, in the highest degree improbable. It is well known what the position of a mother in a Hindu family is: what influence, although she may not be concerned at all in the management of the property, she exercises over the family; what respect is paid to her opinion. Nor is the influence of a mother likely to be least when her son, a youth, is dying in the house. Then, again, the relation of this lady to *Govind* was not merely that of a Hindu mother to her son. She was, under the will of her husband, invested with the management of the property during the minority of her son, who was still in law a minor. In fact, to all intents and purposes she must have been at that time the mistress of the house. Her alleged concurrence was thus a point which it was most material for her to contradict by her own testimony given in the cause, and subject to the test of cross-examination.

Their Lordships, in making this observation, are not insensible to the nature of the suit. It is one in which she, upon a remote and contingent interest, an interest which will probably never accrue to her, comes into Court, not only to destroy the title of a person in possession of an estate, but to destroy his civil *status*; and therefore a more than ordinary burden of proof lies upon her.

A good deal has been said as to what took place after *Govind Chunder's* death. It is perfectly clear that the existence of this document was asserted by *Bamasoonderai* and those who acted for her as early as 1854, when she made an application under the Act of 1841. Afterwards she tried to get possession of her husband's share of the property; and an Act IV. proceeding was commenced in the same month of August, 1854. From the schedule of deeds which forms part of the proceedings in that case, it appears that the document was then actually produced and filed in Court. On the other hand, *Jumoona* seems then, and indeed from the time at which she made her report of her son's death to the collector, persistently to have disputed the existence of a valid authority to adopt. If, therefore, she really concurred in the alleged transaction, there must have been a subsequent quarrel very shortly after *Govind's* death. Originally *Bharut Chunder* and she must have been upon good terms, since she is expressly enjoined by her husband's *wasuitnamah* to have regard to his experience, and to consult him upon all matters of importance. It is not improbable that a rupture took place when, at his instigation or under his influence, his daughter first asserted her right to the possession of her husband's share of the property, which she clearly did before August, 1854, and that thereupon the mother determined to set her face against the alleged right to adopt. But if she honestly repudiated the document, there is no evidence of a quarrel, and that is a circumstance in favour of her. Weighing the whole evidence as to the execution of this document, and considering how important the testimony of *Jumoona* was, and that in omitting to give it she has at least failed to produce the best evidence in her power in support of her own case, their Lordships are of opinion that they have not sufficient grounds, whatever doubts they may entertain as to certain parts of the evidence for the Defendant, for interfering with the finding of the High Court. They desire to state that in coming to that conclusion they do

not rely upon the evidence which has been given on the part of the Defendant, to the effect that *Jumoona*, as late as 1865, when the ceremonies of the adoption were performed in the family house, was present, and made gifts to the adopted son. This fact is not spoken to by *Bharut Chunder* himself. It is not spoken to by two independent witnesses who have no concern with the dispute as to the execution of the authority to adopt, and only come to depose to the performance of the ceremonies; it is in itself highly improbable, considering the hostility in which the parties had previously been; it is opposed to the evidence of the family priest, who says that *Jumoona* positively forbade his taking part in those ceremonies; and it is only to be accounted for by the ingenious suggestion of Mr. *Bell*, of a subsequent reconciliation and a second rupture subsequent to that; all which is mere speculation. Their Lordships do not positively affirm that the Defendant's witnesses who depose to this fact have forsworn themselves; they only say that it has not been proved to their satisfaction, and does not at all influence their judgment.

The only remaining point is that taken by Mr. *Doyne*, to the effect that, although *Govind Chunder* may have been of the age of discretion according to the Hindu law, as prevailing in *Bengal*, he was still a minor under Reg. XXVI. of 1793, and that under the 33rd section of the prior Reg. X. of 1793 he could not make the adoption without the consent of his guardian. The last-mentioned enactment prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined by the *Sudder* Court in the case cited—a case which afterwards came here, though not on the same point—that the prohibition applies equally to an authority to adopt and to an actual adoption. But the words of the 33rd section of Reg. X. of 1793 would seem to confine its operation to persons who are under the guardianship of the Court of Wards. And we have the judgment of Mr. Justice *Mitter*, to the effect that where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindu law, he is capable of executing such an instrument as this. If, then, the case actually turned upon this point, their Lordships' opinion would have been that *Govind Chunder* was not incapacitated from executing this instrument by reason of his not having attained the age of eighteen years. If, however, the consent of *Jumoona* was, as their Lordships think they must take it to have been, given to the execution of the instrument, the particular objection thus taken by Mr. *Doyne* would not arise.

Their Lordships have dealt with this case as if the question were one fairly open for trial between the parties. They give no opinion as to what the effect of a decree in such a suit may be, whether one in favour of the adoption is binding against any reversioner except the Plaintiff, or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the Plaintiff. All their Lordships can do on the present occasion is to say that *Jumoona* has not made out her right to have this adoption declared invalid, and they must humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

11th February, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

RANEE SONET KOWAR, (Plaintiff)† ... } *Appellant,*

versus

MIRZA HIMMUT BAHADOOR, MUSSUMAT BISMULLAH BEGUM (alias NUNHOO SAHIBA), and MUSSUMAT SAHIBZADEK BEGUM, (Defendants) ... ... } *Respondents.*

Istimrarees Mokurruree Tenure—Death of Grantee without Heirs—Escheat—Recognition of Tenancy.

Lands belonging to a *zemindary* granted by the *Zemindar* under an absolute hereditary *mokurruree* tenure, do not, on the death of the grantee without heirs, revert to the *Zemindar*; nor does the *Zemindar*, under such circumstances, take by escheat a tenure subordinate to and carved out of his *zemindary*.

Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a *mokurruree* tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it.

The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespassers.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The question raised by this appeal, though short, is somewhat novel, and there appears to be little positive authority upon it.

It appears that *Rajah Modenarain Singh*, being a Hindu *Zemindar*, but having an illegitimate family by a Mahomedan lady domiciled in his house, granted the *mokurrurees* in question in the name of one of the infant daughters of that family, *Shurfoonnissa Begum*. The grant was clearly intended to create an absolute and hereditary *mokurruree* tenure, inasmuch as it contains the essential words, "generation to generation," which in documents of that kind have always been considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary *mokurruree istimrarees* tenure. It is clear on the evidence that *Shurfoonnissa Begum* died before her father, and not very long after the creation of the tenure; and further, that after her death, the father during his life, and afterwards his widows, who, by the Hindu law, are his heirs, continued to receive the rent reserved from those in possession of the lands, the receipts for such rent being, with one exception, taken in the name of *Shurfoonnissa*, the original grantee, and in that exceptional case in the name of *Burratee Begum*, her mother. One of the questions raised by Mr. *Doyne* is, what effect ought to be given to that reception of rent as a recognition of the tenure and an answer to the present claim to resume the lands included in it.

From this receipt of rent after the death of *Shurfoonnissa*, which must have been well known in the family, an inference may undoubtedly be drawn that the *Zemindar* either originally intended to make the grant for the benefit generally of his illegitimate family, or after the death of his daughter was willing that it should have that effect; and it is difficult to suppose that the widows were not for some time willing to act on some such view of the transaction. It was impossible, therefore, to treat the parties in possession as mere trespassers. The recognition of their interest by the receipt of rent from them would constitute some kind of tenancy requiring to be determined by notice

*From the judgment of Jackson and Ainslie JJ., dated the 23rd May, 1871.

† 3 Cowell's I. A., p. 92.

or otherwise. Their Lordships, however, are not prepared to say that this circumstance is of itself sufficient to defeat the claim of the Plaintiff in this suit. They think that the ground upon which the decision of the High Court is to be supported, if supported at all, is that the Plaintiff in the suit is not the person who, assuming the parties in possession to have no legal title, is entitled to recover the land by the destruction of the tenure. That, of course, raises the question which the High Court has dealt with: namely, whether, on the death of *Shurfoonnissa* without heirs, the right to the possession of the land reverted to the original grantor, or whether the tenure on such a failure of heirs should be taken to have escheated to the Crown.

The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by this Court in the case of *The Collector of Masulipatam and Cavaly Vencata Narrainapah*, which is reported in the 8th volume of *Moore's* Reports, Indian Appeals, page 500. In that case the property in question was a *zemindary*. The last male *Zemindar* had died, leaving a widow, who took a widow's estate, and upon her death there were no heirs of her husband to inherit the *zemindary*. The *Zemindar* was, however, a *Brahmin;* and the point raised in the suit was that on that ground the estate was not subject to the law of escheat. This contention was founded on the text of *Menu*, which says, "The property of a *Brahmana* shall never be taken by the King; this is fixed law;" and also on a passage in *Nareda*, where it is said, "If there be no heir of a *Brahmana's* wealth, on his demise it must be given to a *Brahmana*, otherwise the King is tainted with sin." It seems to have been admitted in that case that the British Government had at least the same rights that the ruling power would have had under the Hindu law, the question being whether that limitation which the Hindu law was said to impose on the right of the Hindu *rajah* or king, was to prevail against or fetter the rights of the Crown. Lord Justice *Knight Bruce*, delivering the judgment of this Committee, said:—"It appears to their Lordships that, according to Hindu law, the title of the King by escheat to the property of a *Brahmin* dying without heirs ought, as in any other case, to prevail against any claimant who cannot shew a better title; and that the only question that arises upon the authorities is whether *Brahminical* property so taken is in the hands of the King subject to a trust in favour of *Brahmins*." And in a subsequent passage of the judgment he went on to say:—"Their Lordships, however, are not satisfied that the *Sudder* Court was not in error when it treated the Appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a *Brahmin*, whom she succeeded as heiress-at-law. If upon her death there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindu law; but by reason of the prevalence of a state of law in the *Mofussil* which renders the ascertainment of the heirs to take on the death of an owner of property a question substantially dependent on the *status* of that owner. Thus the property being originally and remaining alienable might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to *Armenian*, to *Jew*, to *Hindu*, to *Mahomedan*, to *Parsee*, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of *British India*, on the death of any owner being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for *Hindus* and *Mahomedans* by positive regulation; in other cases it rests upon the course of judicial decisions." And the final conclusion of the Committee was this:—"Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindu subject, though a *Brahmin* dying without heirs; and they think that the claim of

the Appellant to the *zemindary* in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow *Lutchmedavamah*, in her lifetime. In the latter case the Government will of course be entitled to the property, subject to the charge." In a subsequent case relating to the same estate, and reported in the 11th *Moore's* Ind. App. Ca., p. 619, the question was between the Collector, representing the Government, and a person claiming to have a valid and subsisting charge by an act of the widow, a charge which the widow was competent to create; and it was held that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector, as representing the Crown, to redeem the charge and recover the estate. The property, no doubt, in this case was a *zemindary;* but the decision seems to establish the principle, that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it. There, therefore, seems to be nothing in the nature of the tenure which should prevent the Crown from so taking a *mokurruree*, subject to the payment of the rent reserved upon it.

It has been argued, however, that this *mokurruree*, not being an independent *zemindary*, but being carved out of a *zemindary*, stands upon a peculiar footing, and that, upon the failure of heirs, the *Zemindar* takes by right of reversion, or, if not strictly by right of reversion, that the tenure escheats to him as the superior lord, rather than to the Crown. The *mokurruree* was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. *Doyne* has shewn, under Act X. of 1859, even in a suit for rent. It could not have been forfeited for the nonpayment of rent; for in such a case the *Zemindar* could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of *Shurfoonnissa* (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the *Zemindar;* and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to and carved out of his *zemindary* by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the *Zemindar*. The principles of English feudal law are clearly inapplicable to a Hindu *Zemindar*. On the other hand, it is clear that, if the *Zemindar* has not such a right, the general right of the Crown subsists, and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession have nothing but their possession to depend upon (a question on which their Lordships give no opinion), the superior title, under which alone they can be ousted from possession of the lands, is not in the *Zemindar* or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

18th, 22nd, 23rd, 25th, February; and 30th May, 1876.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh, and from the High Court of Judicature at Allahabad.

HURPERSHAD and others, (Defendants)* ... } *Appellants,*

versus

SHEO DYAL and others, (Plaintiffs) ... } *Respondents.*

RAM SAHOY, (Plaintiff) *Appellant,*

versus

SHEO DYAL and others, (Plaintiffs) ... } *Respondents.*

BALMOKUND, (Defendant) *Appellant,*

versus

SHEO DYAL and others, (Plaintiffs) ... } *Respondents.*

RAM SAHOY, (Plaintiff) *Appellant,*

versus

BALMOKUND and others, (Defendants) ... } *Respondents.*

Practice—Judge's importing his own knowledge of facts without giving evidence, improper—Variance—Calling fresh evidence upon an issue not proved by evidence originally adduced, not allowable — Custom — Construction — Act I. of 1869, secs. 2 and 16—Hindu Law—Transfer—Oudh Proclamation in 1858, para. 3—Mitakshara—Summary settlement with one member of undivided Hindu family — Hindu Wills.

A judge cannot, without giving evidence as a witness import into a case his own knowledge of particular facts, as the means of knowledge will not then be capable of being tested.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially is it so in the *Mofussil* courts in *India*.

A custom is a rule which in a particular family, or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly.

Secs. 16-19 of Act I. of 1869 have no retrospective effect.

No special mode of transfer is required by the Hindu Law, even a verbal transfer is sufficient.

The 8th paragraph of the *Oudh* Proclamation of March, 1858, declared *C.*, (deceased) *Zemindar* of *Mowawan* and five other persons therein mentioned, thenceforward sole hereditary proprietors of the lands which they held when *Oudh* came under the British rule. Of these lands, which form part of the subject of these suits, summary settlements were made with *G.* (one of *C's* sons) by the Government between April 1, 1858 and October 10 of 1859, to whom a *talookdary sunnud* was granted before the passing of Act I. of 1869, he on his part entering into a *kabooliyat* for the same. But in the 2nd schedule annexed to the Act, *C's* name, and not his, was entered.

In a document dated the 7th of February, 1860, relating to a property in the district of *Oonao*, and by other documents similar in effect relating to properties in other districts, the said *G.* made the following statements:—"I have been requested by Government to submit an application on the subject of primogeniture, with a view that the *talook* may not be split into pieces, as I would wish. Now, the custom that has been followed in my family for generations past is this—that the eldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the *talook*. Under the custom of the family the other brothers are at liberty to have their shares separated, should they wish it. The head has no power under the old custom, to alienate the estate without consulting every sharer. I, therefore, wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed."

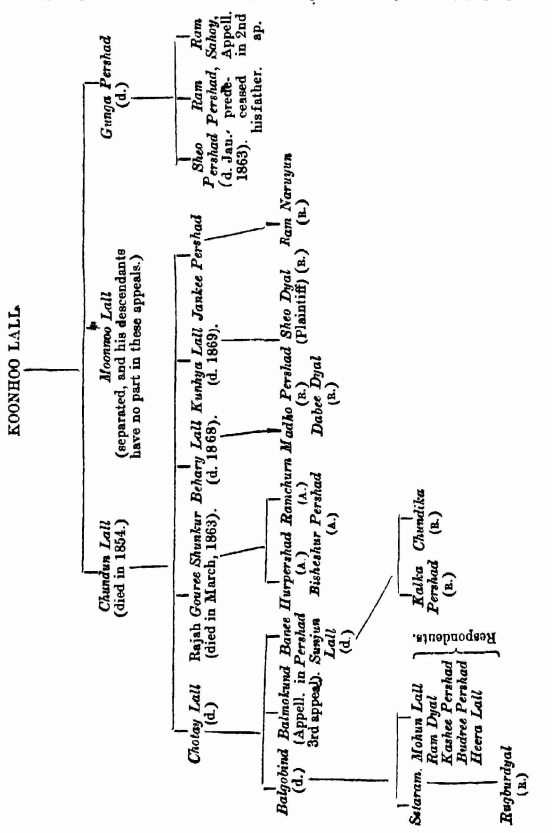
In partition suits among the descendants of *C*, and of his brother, together constituting a Hindu joint family under the *Mitakshara*, all the property, the subject of the suits, having been found to be the joint property of the said family, the contention on behalf of the Appellants in the 1st appeal was that all the estates included in the *sunnud* to their father *G.*, and summary settlements, whether previously joint property of the family or not, became the separate self-acquired property of *G.*; that he was the sole *malguzar* thereof, that he and his sons were the sole beneficial owners of it; and that he had no power to transfer it by will or by alienation *inter vivos*:—

(1) *Held*, that the *sunnud* and summary settlements were a mere grant by the Government to one member of the family of property which belonged to the family jointly, and were not intended to enure to the sole benefit of the grantee, and did not affect the rights of the family. As regards such property granted to *G.*, (if any) which was not previously part of the family estates, it was granted for services presumably rendered with the use of the joint family funds, and could not, therefore, be separate self-acquired property of *G.* within the meaning of Hindu Law.

* Cowell's I. A., p. 259.

(ii) *Held*, also, that, assuming any portion of such property to have been self-acquired by *G.*, he must, in consequence of Act I. of 1869, be deemed to have acquired therein a permanent heritableand transferable right, and had power by will or alienation *inter vivos* to transfer the same.

(iii) *Held*, also, that the document of the 7th of February, 1860, and other similar documents, so far as they related to the property in *Oudh*, amounted to a will within the definition of Act I of 1869, sect. 2. Taken in conjunction with other documents, and having regard to the acts of different members of the family under it, the same amounted to evidence of an alienation *inter vivos* which in *G.'s* lifetime transferred the property to the family to be held as joint family property.



30th May, 1876.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The first three of the above-mentioned appeals are from a decree of the Judicial Commissioner of *Oudh*, in a suit commenced in the Court of the Deputy-Commissioner of *Lucknow*, in which the Respondent, *Sheo Dyal*, was the Plaintiff; and the fourth is from a decision of the High Court of Judicature for the North-western Provinces, in a suit commenced in the Court of the Subordinate Judge of *Cawnpore*, in which the Appellant, *Ram Sahoy*, was Plaintiff.

The former suit will hereafter be referred to as the *Oudh* suit, and the latter will be referred to as the *Cawnpore* suit.

The parties, both Plaintiffs and Defendants, were members of an undivided Hindu family, of which *Koonhoo Lall* was the common ancestor. He left three sons, *Chundun Lall*, *Moonnoo Lall*, and *Gunga Pershad*. About the year 1832, *Moonnoo* separated from his two brothers, *Chundun* and *Gunga Pershad*, who continued undivided, lived in commensality, carried on business as bankers, and thereby acquired and amassed considerable property.

Chundun had five sons: 1. *Chotay*, who died in the lifetime of his father; 2. *Gouree Shunkur*; 3. *Behary Lall*; 4. *Kunhya Lall*, the father of *Sheo Dyal*, the Plaintiff in the *Oudh* suit; and 5. *Jankee Pershad*. *Chundun* died in 1854; *Gunga Pershad* died in *Chundun's* lifetime, having had three sons, *Sheo Pershad* and *Ram Sahoy*, who survived him, and *Ram Pershad*, who died without issue in his father's lifetime. *Sheo Pershad* died without issue in 1863, leaving his brother *Ram Sahoy*, the Plaintiff in the *Cawnpore* suit, his heir him surviving.

Chotay Lall, the eldest son of *Chundun*, had three sons; 1 *Balgobind*, who died some years ago; 2. *Balmokund*; and 3. *Banee Pershad*, of whom the last two were Defendants in both suits.

Gouree Shunkur, the second son of *Chundun*, also had three sons; *Hurpershad*, *Ramchurn*, and *Bisheshur Pershad*, Defendants in both suits, and Appellants in the first appeal.

There were other descendants of *Chundun* through his sons *Chotay Lall*, *Behary Lall*, and *Jankee Pershad* respectively, to whom it is not necessary to refer more particularly. They are shewn so far as is necessary in the genealogical table above set out.

It appears from the above statement that the family consisted of two branches; the descendants of *Chundun*, and the descendants of *Gunga Pershad*.

Sheo Dyal, the Plaintiff in the *Oudh* suit, which was commenced on the 14th of December, 1869, claimed as the representative of *Kunhya Lall*, one of the five sons of *Chundun*, one-fifth of the whole property in suit by excluding altogether *Ram Sahoy*, the sole descendant of *Gunga Pershad*; whilst *Ram Sahoy*, who intervened in the *Oudh* suit, and was the Plaintiff in the *Cawnpore* suit, which was commenced on the 21st of December, 1869, claimed, as the sole descendant of *Gunga Pershad*, one-half of all the property.

It was contended that *Ram Sahoy* had separated before the commencement of the suit, and had received twenty-seven villages and other property as his share. It was, however, considered by the lower Courts that that fact had not been proved. Their Lordships are of opinion that there is no sufficient evidence of the fact, and that the decision was correct. That point may be treated as having been disposed of. It was also considered by the lower Courts, and admitted by the learned counsel for the Appellants in the first appeal, that although *Chundun* was the active member of the family, and the property was acquired principally through his ability, energy, and exertions, no part of it could be considered as his "self-acquired property," that is to say, as having been acquired, within the meaning of the *Mitakshara*, through his own exertions alone and without the use of any part of the family funds.

Their Lordships are of opinion that the above view is correct, and their judgment

will proceed upon the basis that the family was an undivided Hindu family, and that no portion of the property was the self-acquired property of *Chundun*, or of any other member of the family within the meaning of the *Mitakshara*.

The most important questions raised in the *Oudh* suit are what was the effect of Lord *Canning's* well-known proclamation of March, 1858, of the *sunnud* to *Gouree Shunkur*, of the summary settlements, of Act I. of 1869, and of the documents called *Gouree Shunkur's* will, upon that portion of the property which was included in the above-mentioned *sunnuds* and summary settlements.

It was contended on behalf of the sons of *Rajah Gouree Shunkur*, the Appellants in the first appeal, that all the estates included in the *sunnud* and summary settlements, whether previously joint property of the family or not, became the separate self-acquired property of *Rajah Gouree Shunkur*, that he was the sole *malguzar* thereof, and that he and his sons were the sole beneficial owners of it; that he had no power to transfer it by will or by alienation *inter vivos*; and as to the twenty-seven villages, it was stated that although in April, 1858, the summary settlement with regard to them was made with *Kunhya Lall*, there was afterwards a mutation of them into the name of *Rajah Gouree Shunkur*.

It was also stated on their behalf that many, but without specifying which, of the villages included in the *sunnud* and summary settlements were never part of the joint family property.

By the 8th paragraph of the Proclamation it was declared, amongst other things, that *Chundun Lall, Zemindar* of *Mourawan*, and five other persons therein mentioned, were thenceforward the sole hereditary proprietors of the lands which they held when *Oudh* came under British rule; and it was further declared by the 9th paragraph that, with those exceptions, the proprietary right in the soil of the province was confiscated to the British Government.

It was held by the Judicial Commissioner, in his judgment before remand, that the words *Chundun Lall* in that paragraph (probably the words used were *Chondi Lall*, as stated by the Judicial Commissioner) were used as the generic name of the undivided Hindu family and that the title of the constituent members of that family, as it existed in 1858, to whatever landed estates were held by them or their agents, directly or indirectly, on the 13th of February, 1856 (the date of the annexation of *Oudh*), was maintained to them, and was not conferred upon *Rajah Gouree Shunkur*, notwithstanding any wording of the *sunnud* or the fact of his executing a *Kabooliyat* for the estates between the 1st of April, 1858, and the 10th of October, 1859; but that the remaining portions of the estate rested on a different basis. As to those portions, he was of opinion that they "must be held to have been *primâ facie* the sole property of *Rajah Gouree Shunkur*, and that as a consequence of this (confirmed by sect. 4, Act I. of 1869), he had power to alienate it by act *inter vivos*, or to bequeath the whole or any part of it."

The former portion, he held, would follow the custom of the family, whilst the other portions would be regulated by the bequest of *Rajah Gouree Shunkur*, if he had made one, or, failing that, by Act I. of 1869. "The succession," he adds, "to the personal property is independent of all special considerations, and must be regulated by Hindu law and by family custom." Again he says, "So far as concerns the ancestral estate of personal moveable property the will has no effect, for over that *Rajah Gouree Shunkur* had no testamentary power."

The same views are expressed in the judgment under appeal.

Their Lordships concur with the Judicial Commissioner that the 8th paragraph of the Proclamation applied to that portion of the estates of *Mourawan* which belonged to the family at the time when *Oudh* came under British rule, notwithstanding *Chundun's* name was inserted in that paragraph. *Chundun* died in 1854, long before the mutiny. He personally could not have been referred to in the 7th paragraph of the Proclamation as one of those whom the Governor-General declared it to be his intention to reward for

their steadfast allegiance at a time when the authority of Government was partially overborne, and who had proved it by the support and assistance which they had given to British officers. But *Couree Shunkur* was one of those who had given support and assistance to Government, and not only *Couree Shunkur*, but also *Sheo Pershad*, and other members of the joint family.

The *Gomashtas* of the several banking firms of the family were also loyal, and rendered good service to Government.

It can scarcely be supposed that the Governor-General intended to injure any member of this loyal family, and by confiscation and regrant to transfer the beneficial interest in the joint estates of the whole family from the several members of it to a single member of the family for his own sole benefit.

As regards, therefore, the estates which were exempted from confiscation, the *sunnud* and summary settlements were a mere grant by Government to one member of the family of property which belonged to the family jointly. They could not of themselves affect the rights of the family.

As regards that part of the property granted to *Couree Shunkur* which, if any, was not previously part of the family estates, it cannot be held to have been the separate self-acquired property of *Couree Shunkur* within the meaning of the Hindu law. It was granted as a reward for loyalty and for the support and assistance rendered to British officers; such services as those referred to in *Couree Shunkur's* petition could not have been rendered without the use of funds which must be presumed to have been those of the joint family.

This point, however, is not very material, for even if some part of the property was self-acquired by *Rajah Couree Shunkur*, he, according to their Lordships' views, hereafter stated, transferred it to the family.

With regard to Act I. of 1869 the Judicial Commissioner held that it did not confiscate or confer title in landed estate. He says: "The preamble expressly recites that the title in *talooks* has already been conferred: the Act declares what in the sight of Government are '*talooks*,' regulates the order of succession to such; and defines, and, perhaps, creates certain special interests." Their Lordships, however, cannot concur with the Judicial Commissioner in his view that the Act did not confer title.

By sect. 2 the word "*talookdar*" is defined; it is declared to mean "any person whose name is entered in the first of the lists mentioned in sect. 8." *Rajah Couree Shunkur's* name was entered in that list, and sect. 10 made the list conclusive evidence that he was a *talookdar* within the meaning of the Act.

By sect. 3 it was enacted that every *talookdar* with whom a summary settlement of the Government revenue was made between the 1st day of April, 1858, and the 10th day of October, 1859, or to whom before the passing of the Act and subsequently to the 1st day of April, 1858, a *talookdary sunnud* had been granted, should be deemed to have thereby acquired a permanent, heritable, and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabooliyat* executed by such *talookdar* when the settlement was made, subject to all the conditions affecting the *talookdar* contained in the orders passed by the Governor-General of *India* on the 10th and 19th days of October, 1859, and republished in the first schedule thereto annexed, and subject also to all the conditions contained in the *sunnud* under which the estate was held.

Section 4 is as follows:—

"Every person whose lands the proclamation issued in *Oudh* in the month of March, 1858, by order of the Governor-General of *India*, specially exempted from confiscation, and whose names are contained in the second schedule hereto annexed, shall be deemed to possess in the lands for which such person executed a *kabooliyat* between the 1st day of April, 1858, and the 1st day of April, 1860, *the same right and title which he would have possessed thereto if he had acquired the same in the manner mentioned in sect. 3; and he shall be deemed to hold the same subject to all the conditions affecting talookdars which are referred to in the*

said section, and to be a talookdar for all the purposes of this Act."

Gouree Shunkur's name was not contained in the 2nd schedule annexed to the Act, but *Chundun's* was.

Summary settlements were made with *Gouree Shunkur* between the dates specified in sect. 3; and a *talookdary sunnud* was granted to him before the passing of the Act, and subsequently to the 1st of April, 1858, viz., on the 11th of December, 1859, by which the Government bound itself to maintain him and his heirs as sole proprietors of the estate.

Chundun did not enter into a *kabooliyat* for the lands to which the suit relates, but *Gouree Shunkur* did. It therefore appears to their Lordships that *Gouree Shunkur* came within sect. 3 of the Act. If he did not, he came within sect. 4. It makes no difference, however, in the result which is the section within which the case falls, for both sections confer the same right and title.

Their Lordships are consequently of opinion that *Gouree Shunkur* must, in consequence of the Act, be deemed to have *acquired a permanent heritable and transferable right* in the estates to which the suit relates, being those which comprised the villages named in the lists attached to the agreements, or *kabooliyats*, executed by him when the settlements of the different portions of the estates were made; and this, as regards both the villages which were, and those, if any, which were not, previously part of the family property.

They are, however, also of opinion that *Gouree Shunkur* had power by will or by alienation in his lifetime to transfer the estates which, by virtue of the Act, were not merely heritable, but transferable.

By sect. 11, it was enacted that, subject to the provisions of the Act, and to all the conditions under which the estate was conferred by the British Government, every *talookdar* and grantee, and every heir and legatee of a *talookdar* and grantee, of sound mind and not a minor, should be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease, or gift, and to bequeath by his will to any person the whole or any portion of such estate, right, interest, &c.

The remainder of that section, and sects. 12 and 13, contain provisions relative to such transfers which do not apply to the present case.

Sect. 14 enacted that if any *talookdar* or grantee shall *heretofore have transferred or bequeathed*, or if any *talookdar* or grantee, or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate, to another *talookdar* or grantee, or to a person who would have succeeded according to the provisions of this Act to the estate, or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions, and to the same rules of succession as the transferor or testator.

Then comes sect. 15, *which is very important*, and which enacts that—

"If any *talookdar* or grantee *shall heretofore have transferred or bequeathed*, to any person not being a *talookdar* or grantee, the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of, and the succession to, the property so transferred or bequeathed *shall be regulated by the rules which would have governed the transfer of, and succession to, such property, if the transferor or legatee had bought the same from a person not being a talookdar or grantee.*"

The next question is how and to what extent *Rajah Gouree Shunkur* exercised the power of alienation conferred by the Act.

All the Courts in the *Oudh* suit, as well as the subordinate Judge of *Cawnpore*, have given effect to the documents

called the will of *Rajah Gouree Shunkur*; but they put different constructions upon them.

The following is a translation of one of the documents dated the 7th of February, 1860:—

"I, *Rajah Gouree Shunkur*, *Talookdar* and *Zemindar* of *Hurha*, *Turgaon*, &c., in the district of *Oonao*, who have received from the British Government the proprietary right of *Hurha*, *Targaon*, &c., in the district of *Oonao*, in perpetuity, have been requested by Government to submit an application on the subject of primogeniture, with a view that the *talook* may not be split into pieces, as I would wish. Now, the custom that has been followed in my family for generations past is this—that the oldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the *talook*. Under the custom of the family the other brothers are at liberty to have their share separated, should they wish it. The head has no power, under the old custom, to alienate the estate without consulting every sharer. I, therefore, wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed."

The other documents applicable to property in other districts are similar in effect, though not in the identical words.

Other material documents are those called the tabular statement and *Chundun's* chit.

The following are translations of the tabular statement and of the letter in which it was submitted:—

"To the *Teksildar*,

"Sir,

"I received your former letter, together with the form of a statement of succession, desiring me to fill in the columns, and also your latter communication, calling for the statement. As directed by you, the statement is herewith submitted, duly filled in.

"Pray make no objection to the entry, sons of *Lalla Chotay Lall*, and son of *Lalla Jankee Pershad*, deceased.

"The object desired is attainable by such an entry.

"Yours faithfully,

"(Signed) *Rajah Gouree Shunkur*,

"Banker of *Mourawan*."

"May 13, 1860.

STATEMENT INCLOSED.

Name of Talook.	Number of Persons in the Family fit to succeed.	Jumma of the Estate.	Name of Persons in favour of Succession of one Member of the Family.	Name of Persons against the Succession of one Member of the Family.
Jubroulee, &c.	Sons of *Lalla Chundun Lall*, deceased:— 1. Son of *Lalla Chotay Lall*, deceased; 2. *Rajah Gouree Shunkur*; 3. *Lalla Behary Lall*; 4. *Lalla Kunhya Lall*; 5. Son of *Lalla Jankee Pershad*. Sons of *Lalla Gunga Pershad*, deceased:— 1. *Lalla Shiva Pershad*; 2. *Lalla Ram Sahoy*.	...	...	*Rajah Gouree Shunkur*.

"*Remarks.*—The following rule has prevailed with regard to succession in the family of *Rajah Gouree Shunkur* :—The eldest son in the family is regarded as the head, with the consent of all the sharers, and the others remain subject to him; but all the sharers retain their shares, and in case of disagreement between them, each sharer is at liberty to have his share separated."

The translation of *Chundun's* chit is as follows :—

"Let documents be drawn out, under the instructions herein conveyed, and then you will be at liberty to live together or separate from each other. Each sharer will take his share, half in money, and half in gold, silver and debts due from parties. Any member of the family may take me to live with him, or all the members may manage it, so that they may divide among themselves the expenses which may be incurred on account of the necessaries of my life.

	Rs.
"My brother *Gunga Pershad* ...	20,000
"*Chotay Lall* will get double share	30,000
"*Gouree Shunkur*	15,000
"*Behary Lall*	15,000
"*Kunhya Lall*	15,000
"*Jankee Pershad*	15,000

"All the females and children should certainly go to the *Ganges*, and bathe there. They may go either to *Nujuf Gurh* or *Cawnpore*, or *Bruhmawart*.

"Any members wishing to live together may do so, while others may live separate, and pursue their occupation. Each member will supply his own family with food, clothing, and jewels. Marriages, &c., should be celebrated after consultation with all the members.

"*Koonwar Soodee*, 10th 1892 *Sumbut*, or 1243 *Fuslee*."

In the *Cawnpore* suit the High Court held that none of the documents amounted to a will.

They said, "We have no hesitation in assenting to the contention that neither the reply as to the custom of primogeniture, nor the tabular statement which followed it, can be regarded as testamentary. They contain no devise or bequest, nor any language from which a devise or bequest can be inferred." And again: "It cannot be supposed that in replying to the inquiries made by the Deputy-Commissioner the *talookdars* of *Oudh* set themselves to make their wills. It appears to us that the *Rajah Gouree Shunkur* intended no more than to inform the authorities of the custom of inheritance prevailing in the family of which he was a member, and to indicate the persons interested as sharers of the family property. *Moreover, whatever may have been the power of disposal which the Rajah possessed over the property in Oudh, which point it is not necessary for us to determine*, he neither had, nor does it appear that he assumed to have, any power to dispose of the property in suit," that is, the property in the North-Western Provinces. These remarks were very appropriate in the case before the High Court in the *Cawnpore* case. It is clear that the documents had no reference to property in the North-Western Provinces, and that they did not contain a bequest or testamentary disposition of any part of such property. But with regard to that part of the property in *Oudh*, to which they related, the case is very different. That which was not a will in the ordinary sense of the word, might, in their Lordships' opinion, have amounted to a will within the definition of Act I. of 1869. By sect. 2 of that Act it is declared that the word "will" means "the legal declaration of the intention of the testator with respect to his property *affected by this Act*, which he desires to be carried into effect after his death." It appears to their Lordships that the document of the 14th of February, 1860, and the other documents, which were very similar, did declare the intention and wishes of *Gouree Shunkur*, which he wished to be carried into effect after his death with respect to all the estates which the Government had assumed to confer upon him by the *sunnud*, &c., including that part which was ancestral, as well as that which was granted to him for the first time. *Gouree Shunkur*, as an honest and just man, and as a conscientious Hindu, did not wish that after his death the property which belonged to the family jointly should pass to his eldest son as his

heir, and continue to descend according to the rules of primogeniture. He wished things to go on as before, and that that which had been joint family property should continue joint family property.

It appears, from the judgment of the Judicial Commissioner, that documents, such as those which have been called the will of *Rajah Gouree Shunkur*, have been treated and spoken of by the *talookdars* of *Oudh* as their wills.

He says:—

"In ordinary cases this could hardly be construed as a 'will,' for there is no direct allusion to the death of the executor, nor can it be said that there is a distinct direction as to the devolution of his property after his death.

"But in *Oudh* it is a matter of notoriety that the letter to which these documents are answers were expressly intended to elicit and register the wishes of each *talookdar* as to the descent of his landed estate after his death, and the replies are to this day spoken of by *talookdars* as their will *when no other has been made.*

"Its form is immaterial, *as it was made prior to the passing of Act I. of* 1869, and the power of Hindus to make even nuncupatory wills has been decided in repeated judgments submitted by the Lords of the Privy Council.

"I find that this document correctly describes the intention of the *rajah* in respect to the devolution of his *talook* after his death, and that it is correctly described as a 'will.'"

Their Lordships concur in this view. They go further, however, and are of opinion that the declaration in those documents of the wish of *Gouree Shunkur*, acted upon as it was by him and by the other members of the family in his lifetime, and coupled with the tabular statement, was evidence sufficient to prove an alienation *inter vivos*, which in *Gouree Shunkur's* lifetime transferred the property to the family, to be held by them as joint family property. No evidence was given to shew that the rents and profits of the estate did not continue, even during the life of *Gouree Shunkur*, to be brought, like the other assets of the family, to the family treasury, for the use of the undivided family. In the *Cawnpore* case, *Mohun Lall*, one of the sons of *Chotay*, said, "Every one used to take out of the profits as much as he required." In the tabular statement sent in May, 1860, *Rajah Gouree Shunkur* entered his own name not alone, but with the other members of the family, as the persons fit to succeed; he could not have intended to devise to himself by a will or codicial—he clearly meant, by entering his own name as one of the sharers, to express his wish and intention that the estates should be held jointly during his own life as well as after his death.

Their Lordships are of opinion that the transfer of the property to the joint family was complete in the lifetime of *Gouree Shunkur*, and that it was acted upon in his lifetime as well as after his death. *Behary Lall* and *Kunhya Lall*, and the other members of the family succeeded to the estates, not by inheritance, for they were not *Gouree Shunkur's* heirs, but by survivorship, and *Behary Lall* and *Kunhya Lall*, respectively, became managers, according to the custom of the family, and as they would have done if no change had been effected by Lord *Canning's* Proclamation, &c. The beneficial interest continued in all the surviving members of the joint family.

In his petition, dated the 28th of June, 1867, *Rajah Behary Lall* stated that all the present members of the family acquiesced and consented that the tabular statement (in one part of the petition called a "testament," and in another "an instrument"), which was filed during *Rajah Gouree Shunkur's* incumbency, was binding and effectual.

No special mode of transfer is required by the Hindu law, even a verbal transfer is sufficient.

It may be urged that the sect. 16 of the Act enacts that no transfer of any estate, or of any portion thereof, or of any interest therein, made by a *talookdar* or grantee, or by his heir or legatee, *under the provisions of this Act*, shall be valid unless made by an instrument in writing signed by the transferor and attested by two or more witnesses. But that section was not intended to be retrospective or to affect

transfers made previously to the passing of the Act. Sects. 14 and 15 speak of transfers "heretofore made," and it never could have been the intention of the Legislature to render void sales or transfers made before the passing of the Act by one *talookdar* to another *talookdar* under sect. 14, or by a *talookdar* to any other person under sect. 15, if not made by a writing signed by the transferor in the presence of two or more witnesses. If *Gouree Shunkur* had in his lifetime sold the estate and conveyed it by deed to another *talookdar*, Act I. of 1869, passed after *Gouree's* death, would not have rendered the sale void. Sects. 17 and 18 are clearly not retrospective, and sect. 19 applies only to future cases, and it provides expressly that nothing shall affect wills executed before the passing of the Act. Sect. 16 applies to transfers, and sect. 19 to wills; but both sections use the words, "*made under the provisions of the Act;*" they cannot be held to apply to a transfer made by deed, will, or otherwise nine years before the Act was passed.

For the reasons above stated, their Lordships are of opinion that the claim of the sons of *Rajah Gouree Shunkur* to exclude the other branches of the joint family from any share in the *talookdary* estate cannot be supported, and that the conclusion of the Judicial Commissioner in his first judgment to the effect that the same law of succession must be applied to the entire landed estate, and to the moveable property, is correct. It is hardly necessary to remark that *Ram Sahoy*, if he seeks to take the benefit of the ruling, must bring into the common stock the *talookdary* property, which was ostensibly granted to his brother *Sheo Pershad*, or which stands in the name of *Sheo Pershad*, or of himself.

The next question is, what is the rule of succession to be applied.

Upon the first hearing before the Deputy-Commissioner, he rejected the claim of *Ram Sahoy* altogether, and awarded to the Plaintiff one-fifth share of all the property as that to which he was entitled under the will of *Rajah Gouree Shunkur*. Upon appeal the Commissioner modified that decree, and, putting a different construction upon the so-called will, awarded to the Plaintiff a one-seventh share of all the property, moveable and immoveable.

Upon special appeal to the Judicial Commissioner he remanded the case for the trial of certain issues of fact, of which the only important ones to be considered are the 6th and 7th. They are as follows:—

"6. What is the measure of the share of each party. In the personal property? In the estate now found to be ancestral? In the acquired estates?

"7. What is the family custom as to succession?"

Under those issues fresh evidence was given as to *Chundun's* chit, which had been found by the Deputy-Commissioner not to have been proved.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially is it so in the *Mofussil* Courts in *India*. But the parties not only gave fresh evidence upon the issue as to *Chundun's* chit, but they were allowed to set up an entirely new case, and to enter into evidence to prove that *Ram Sahoy* and other members of the family had actually signed copies of the letter, and had agreed to be bound to take upon partition of the immoveable estate, shares corresponding in extent with those specified in *Chundun's* chit, as to the Rs. 110,000 therein mentioned. That was a new case altogether, which had never been suggested or raised by any of the parties in either of the lower Courts in *Oudh*, or even before the Judicial Commissioner on appeal, and in support of that case witnesses who had been examined upon the first trial were examined *de novo*, and materially altered and added to their former evidence.

As the ultimate decision of the Judicial Commissioner after the remand turned upon *Chundun's* chit, their Lordships will proceed to consider the evidence given with reference to that document. Before doing so, however, it will be well to go back and refer with more particularity to the proceedings in the *Oudh* suit.

The Plaintiff claimed one-fifth of the

whole property, moveable and immoveable, basing his claim on the will of *Gouree Shunkur*.

Hurpershad claimed to be entitled, as the eldest son of *Gouree Shunkur*, to succeed to the whole of the *Mowrawan* estate, whilst the other sons of *Gouree Shunkur* contended that the wishes of *Gouree*, as expressed by the document (in one place called by them a will, and in another a deed), were that the property should be divided amongst all of his sons. The only parties in the *Oudh* suit who relied upon the paper called *Chundun's* chit were *Rugburdyal*, *Mohun Lall*, *Ram Dyal*, and *Kashee Pershad*, grandsons of *Chotay Lall*, and great-grandsons of *Chundun*, and *Balmokund* and *Banee Pershad*, sons of *Chotay* and grandsons of *Chundun*. They said that the *talook* could not, under the will of *Behary Lall*, be broken up, and they set up *Chundun's* chit merely as to the moveable property, houses, and gardens. They never stated or alleged that any of the members of the family had signed copies of it or had assented to, or agreed to be bound by it. It was contrary to their case that it was intended to apply to any part of the immoveable estate. Their pleader, *Kali Pershad*, stated, in the fifth ground of their defence, as follows:—"According to a letter of *Lalla Chundun Lall*, *Chotay Lall* was entitled to one-third of the moveable property, houses, and gardens. Plaintiff is therefore entitled to one-sixth." This was by putting *Ram Sahoy* out of the case altogether, and claiming to divide the moveables amongst the five sons of *Chundun* and their descendants, and giving *Chotay* a double share under *Chundun's* chit. In this way they reduced the Plaintiff's share in the moveable property from a fifth to a sixth, and set up a claim for *Chotay's* descendants in the moveables, houses, and gardens, to two-sixths or one-third, being a double share. *Balmokund*, by the same pleader, stated that he, and not the sons of *Gouree Shunkur*, was entitled to succession, meaning, no doubt, that he was entitled to the whole of the immoveable estate as *talookdar*. That claim, however, has since been abandoned.

Ram Sahoy, the descendant of *Gunga Pershad*, contended that the Plaintiff, as representing one of the five sons of *Chundun*, was entitled to a one-tenth share, that is to say, to one-fifth of a half, only; he himself claimed the other half, as representing *Gunga Pershad's* branch of the family. He was not originally made a Defendant in the *Oudh* suit, but he intervened and was allowed by the Deputy-Commissioner to contest the Plaintiff's claim only so far as it related to a share in the twenty-seven villages which stood in his name, leaving him the option of making good by a separate suit any further claim he might have.

The only issue in the *Oudh* suit in the Court of the Deputy-Commissioner which raised any question as to *Chundun's* chit was the 11th, and this had reference to the moveable property only. The issue was as follows:—

"Are the descendants of *Chotay Lall* entitled to one-third of the moveable property, houses, and gardens," and the *onus* of this issue was stated to be on the descendants of *Chotay Lall*.

[The judgment then discussed the evidence and various findings upon that issue, involving the question as to *Chundun's* chit, and proceeded]:—

The Deputy-Commissioner, in his judgment on remand, found that there was no ascertained custom as to partition, and putting *Chundun's* chit out of the question their Lordships are of opinion that that finding was correct.

With respect to *Chundun's* chit, the Deputy-Commissioner, after giving his reasons in detail, and amongst others that the original document had not been produced, said:—"I am still of opinion that the proof of the genuineness of the document is insufficient; and even admitting its genuineness, I cannot set any value upon it." He said:—

"It has been found that *Chundun Lall* and *Gunga Pershad* were a joint undivided family, and hence *Chundun Lall* had no legal power to deal with more than his own share, *i. e.*, one-half of the joint property.

"For those reasons I set aside altogether *the so-called writing of Chundun Lall*. It has been found above that no

ascertained family custom respecting partition has been established, and I find, in consequence, on the issue, that the measure of the share of each party *in the personal property* is Hindu law, under which *Babu Ram Suhai will take one-half* ($\frac{6}{10}$), *and the sons of Chundun Lall, or their representatives*, each one-tenth ($\frac{1}{10}$). In the ancestral estate, and that acquired up to the 14th of February, 1856, I find that the measure of the share of each party is also Hindu law, and that under it *Babu Ram Suhai* will take one-half, and the sons of *Chundun Lall*, or their representatives, each one-tenth. I find that in the acquired estate of *Babu Sheo Pershad, i. e., Bunthur talook, Babu Ram Suhai* is entitled to the sole ownership, the measure of his share being Act I., 1869, and in the acquired estate or 'grant' of *Gouree Shunkur*, as previously explained, I find that the measure of the share of each of the parties is the will of *Rajah Gouree Shunkur*, under which the sons of *Chundun Lall*, or their representatives, and *Babu Ram Suhai*, will each take one-sixth."

The finding of the Deputy-Commissioner, taken on remand, afterwards went before the Judicial Commissioner. He found that *Chundun's* chit was genuine, not that all or any of the parties had signed a copy or copies of it, or had agreed to be bound by it; but he considered that the document set forth the custom under which the ancestral estate had been held, and to which both *Rajah Gouree Shunkur* and *Babu Sheo Pershad* in their wills, and *Rajah Behary Lall*, in his petition, alluded.

The following is an extract from his judgment:—

"The Court of first instance would apply to the ordinary Hindu law, but it appears to me that such a ruling would not only be in direct contravention of the repeated declaration of this family for many years, that the joint estate was subject to family custom; but in direct opposition to the expressed wishes of the two grantees, *Rajah Gouree Shunkur* and *Babu Sheo Pershad*, in respect to the estates over which they respectively had a power of testamentary disposition.

"Had these latter intended that their grants should be divided according to Hindu law, nothing could have been easier or more natural than for them to say so. But what they do say is, 'We have a custom under which we now hold family property, and by that custom we wish the succession to our acquired estate to be regulated.'

"I think it impossible for any member of the family to say that the division should be by law, rather than by family custom.

"The difficulty is to decide what is that custom.

"The two instances of separation in previous generations do not assist us, for they are evidently not regulated by a common law, but were friendly agreements, the amounts given off being determined amicably, and based probably on facts known to the parties concerned, and to no one else.

"It is hardly disputed that the greater portion of the property held prior to the recent grants was acquired by *Chundun Lall* and his eldest son, *Chotay Lall; and I myself can speak, from many years' experience, to the veneration in which the Burra Lalla (Chundun Lall) was held by the joint family, and to the fact that all agreed that though the family lived and hoped to continue as undivided, yet that Chundun Lall had made a division prior to his demise, which was preserved in the family archives, and recognised by them.*

"A paper purporting to be a copy of the record of the division so made in *Chundun Lall's* own handwriting, has been produced in this suit, and it is admitted that it is a copy of the document filed in the Court of *Cawnpore*.

"Some ridicule has been cast upon this paper, and the Court of first instance deemed it unnecessary to inquire into its genuineness or its validity.

"The ridicule was misplaced, for the points which, to the ignorant, appear ridiculous, are precisely those which prove the paper to be a genuine production of the patriarchal head of an undivided Hindu family.

"In this Court there has been no real

attempt to deny its genuineness, nor evidence offered to refute it, and as it has been found by the highest Appellate Court to be genuine in a suit between some of those parties in respect to properties held by them in the North-Western Provinces, and not subject to the special law of *Oudh*, I think it unnecessary to remand this case again for trial of that issue, and, under my special power of review, I find that the document produced as *Chundun Lall's* is genuine.

"Finding that, I have no doubt but that that document sets forth the custom under which the ancestral estate has been held, and to which both *Rajah Gouree Shunkur* and *Babu Sheo Pershad* in their wills, and *Rajah Behary Lall*, in his petition, allude."

He then declared his finding on the several issues directed on the remand, and on the 6th and 7th. He said, on the 6th, "I find that the measure of the division of the personal property, the ancestral and the several acquired estates, including the *Mhuntra talook*, is the custom of the family; and on the 7th, that the family custom is set forth in the writing of *Lalla Chundun Lall*, and that by it there falls of the entire estate divided into 22 portions, to the heirs of *Gunga Pershad*, 4 portions; to the heirs of *Chotay Lall*, 6 portions; to the heirs of *Rajah Gouree Shunkur*, 3 portions; to the heirs of *Rajah Behary Lall*, 3 portions; to the heirs of *Kunhya Lall*, 3 portions; to the heirs of *Jankee Pershad*, 3 portions."

And he concludes thus:—

"I therefore find that the Plaintiff, *Sheo Dyal* as the only son of *Lalla Kunhya Lall*, is entitled to a share equal to three out of twenty-two equal portions of the entire estate, and cancelling the decrees of the Commissioner of *Lucknow*, dated 7th May and 2nd June, 1870 (as before), I amend, as above, the decree of the Deputy-Commissioner of *Lucknow*, dated 28th March, 1870, said share to be enjoyed by said *Sheo Dyal*, subject to and in accordance with the will of *Rajah Gouree Shunkur*, deceased; and, considering the courteous and liberal manner in which the advocates of all parties have in this Court consented to the arrangement which enables the interests of all concerned to be determined in one judgment, I rule that when finally taxed in this Court all the costs in all the Courts in this case shall be costs against the estate."

The finding upon the 7th issue is altogether at variance with the cases set up by the several Defendants in the suit, none of whom—as before observed—with the exception of the descendants of *Chotay Lall*, ever relied upon *Chundun's* chit, and they only as regards the moveable property.

The genuineness of the document is now admitted, but it does not of itself prove a custom.

A custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly. But *Chundun's* chit did not allude to or prove a usage in the family, or profess to lay down a certain definite rule which could be applied to any other state of facts than that which existed at the time it was written. It was not, and could not be, acted upon or applied to all cases of partition amongst brothers or descendants of brothers. It was a mere proposal for the division of Rs. 110,000 amongst certain then existing members of the family. What general rule can be extracted from it? Is it that in all cases where there are two brothers, the eldest having five sons, shall take nothing (for that was the case as to *Chundun*, by his own chit), that his eldest son shall take six twenty-seconds or three elevenths, the rest of his sons three twenty-seconds each, and his brother four twenty-seconds, and what is to be the case where there are more than two brothers or the descendants of more than two? Their Lordships are of opinion that *Chundun's* chit did not declare, was not intended to declare, and was not evidence of, a valid family custom. There was no evidence in the *Oudh* case of an agreement by which the parties bound themselves to act upon it on any future partition of the family property, moveable or immoveable. The Judicial Commissioner did not rest his judgment upon the

fact that an agreement between the parties had been proved, but upon the fact that *Chundun's* chit set forth a custom under which the ancestral estates had been held, and to which he stated *Rajah Gouree Shunkur* by his will, alluded. He referred to his own experience with regard to the veneration in which *Chundun* was held, and to his knowledge that the family had recognised a division which *Chundun*, prior to his demise, had made.

It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment, as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness. But even if the Commissioner's statement of facts from his own knowledge be taken as evidence, *Chundun's* chit did not establish a custom as to the extent of shares upon partition, especially as regards immoveable property. As to such property the terms of it were not applicable. It expressly says, "Each sharer will take his share half in money and half in gold, silver, and debts due," and if the translation in the *Cawnpore* case is to be relied upon, it says, "half the estate consists of cash, and the other half of silver, gold, and debts," which shews that it was intended to apply only to property of that description.

The Judicial Commissioner not only found that *Chundun's* chit set forth the custom as to the shares in which the family property was divisible, but he interpreted the documents called *Gouree Shunkur's* will, and the tabular statement, as referring to a family custom by which the extent of the shares of the different members of the family was regulated. Their Lordships do not put that construction upon those documents. No such custom was set up by any of the parties to the suit in answer to the Plaintiff's claim. The custom referred to in the documents called a will was merely that "the eldest member of the family continues to be the head;" "that everyone possesses a share; that the other brothers are at liberty to have their shares separated if they wish it; that the head has no power to alienate without consulting every shareholder;" and a wish was expressed that the old custom of maintaining the share of each shareholder should be preserved in opposition to the rule of primogeniture. But there is no allusion to any custom under which the different members of the family were entitled upon partition to shares other than those provided by the rules of the *Mitakshara*.

Deenanath, in his evidence, says, "The custom of the family was that the eldest member had the direction." *Gouree Shunkur* did not state in the tabular statement, any more than in the documents called a will, that there was a custom as to the extent of the shares to which the several members were entitled upon partition. In the tabular statement he divides the members of the family fit to succeed under two heads, "the sons of *Chundun*" and "the sons of *Gunga Pershad*." He does not number them from one to seven; but he numbers *Chundun's* sons from one to five under one heading, and *Gunga's* sons one and two under the other; he puts himself down as one of the five, and inserts grandsons in the place of deceased sons, thus: "The sons of *Chotay Lall*, deceased," and "the son of *Lalla Jankee Pershad*, deceased." He does not state that *Chotay's* sons will take two shares, but puts them down as representing their father as one of the sons of *Chundun*; and he also puts down *Jankee Pershad's* only son as representing his father, as another of the sons of *Chundun*.

The entry is as follows:—

Sons of *Lalla Chundun Lall*, deceased:
1. Sons of *Lalla Chotay Lall*, deceased.
2. *Rajah Gouree Shunkur.*
3. *Lalla Behary Lall.*
4. *Lalla Kunhya Lall.*
5. Son of *Lalla Jankee Pershad.*

Sons of *Lalla Gunga Pershad*, deceased:
1. *Lalla Shiva Pershad.*
2. *Lalla Ram Sahoy.*

See also tabular statement, in which the words "descendants of *Chotay Lall*" are used instead of the words "sons of *Chotay Lall*."

Their Lordships consider that the proper interpretation of that document is that *Gouree Shunkur* considered, represented, and declared that it was his wish and intention that the property should be divisible *per stirpes*, and that is clearly the mode in which, in the absence of a family custom, the property being joint, would have been divisible under the *Mitakshara*. See the "*Mitakshara*" on Inheritance, ch. i. sect. 5, para. 12.

It is not likely that *Gouree Shunkur*, who had had the *sunnud* granted to him, and been allowed to engage for the Government revenue, intended to say, and it is clear that he did not say, that it was his wish that his nephews, *Chotay's* sons, as representing their father, were entitled, by custom or otherwise, to a share double the amount of that to which he himself was entitled. He certainly did not refer to *Chundun's* chit, and he could not have referred to the copies which are alleged to have been made and signed after his death.

The Judicial Commissioner's judgment as to what was the nature and extent of the custom is founded entirely on *Chundun's* chit. The custom spoken of by *Rajah Gouree Shunkur* in the documents called his will, is a custom said to have existed in his family for generations past. There certainly was no evidence of any partition in the family in which the property had been divided in the proportions specified in that document. The evidence, such as it was, was all the other way:—[The judgment then discussed that evidence.]

Their Lordships having decided that the property which was granted to *Rajah Gauree Shunkur* by *sunnud*, &c., was transferred by him to the family to be held as joint family property, the whole of the property in dispute in both the suits must be governed by the same rules. Their Lordships are of opinion that neither by custom, usage, contract, nor by any other means, has the property in dispute in the *Oudh* suit at any time become divisible upon partition in any other manner or in any other shares than according to the rules of the *Mitakshara*. They are of opinion that the finding of the Judicial Commissioner on the sixth and seventh issues, that the measure of division of the personal property, the ancestral and the several acquired estates, including the *Bunthra* estate, is the custom of the family, and that that family custom is set forth in the writing of *Chundun Lall*, and his decree founded upon that finding are erroneous, and that the property must be divided according to the rules of the *Mitakshara*. There is not sufficient evidence to warrant a finding that *Ram Sahoy* was to take the *Bunthra* estate and the twenty-seven villages as his share of the property; and their Lordships are of opinion that the twenty-seven villages must be held to form part of the joint family estate, and must accordingly be divided as part of it.

It was agreed at the hearing of the appeals that their Lordships should decide whether the *Bunthra* estate is part of the joint family property, and is divisible in the same manner as the *Mourawan* estate. They are of opinion that it is. *Sheo Pershad*, to whom it was granted, having signed documents similar to those which were signed by *Gouree Shunkur* as to the *Mourawan* estates, *Bunthra* became part of the undivided family estate.

With regard to the property which is the subject of the *Cawnpore* suit, their Lordships are of opinion that *Chundun's* chit does not apply to it; and that it is not satisfactorily proved that the members of the family ever agreed that upon partition it should be divided in the proportions specified in *Chundun's* chit with respect to the Rs. 110,000 therein mentioned.

[The judgment then discussed the evidence in the *Cawnpore* suit and proceeded:—]

Upon the whole their Lordships are of opinion that there was no custom in the family nor any agreement proved which disentitled the several members of the family to receive, on partition of the joint family property, the shares to which they were entitled under the *Mitakshara*. Ac-

cording to that law, the property was divisible *per stirpes*. (See the *Mitakshara* on Inheritance, chap. 1, sect. 5, para. 12.)

The Plaintiff in the *Cawnpore* suit, as the sole descendant of *Gunga Pershad*, was consequently entitled to one-half, and the sons of *Chundun* and their descendants respectively each to the fifth of a half, or, in other words, to one-tenth of the property in that suit, according to the rules of the *Mitakshara*.

Their Lordships are of opinion that the parties are entitled to those shares in all the property moveable and immoveable in both suits, and also in the twenty-seven villages and in the *Bunthra* estate: and they will humbly recommend Her Majesty to reverse the decrees of the Judicial Commissioner and of the High Court respectively, and to decree to *Ram Sahoy*, the Plaintiff in the *Cawnpore* suit, one-half of the property in that suit, and to decree to *Sheo Dyal*, the Plaintiff in the *Oudh* suit, a fifth of one-half, or, in other words, one-tenth of all the property in that suit, including the twenty-seven villages, and also to award and direct that the *Bunthra* estate be divided in the same proportions as the other property, that is to say, *per stirpes*, one-half to *Ram Sahoy*, and one-tenth to the descendants of each of the five sons of *Chundun* respectively, according to the rules of the *Mitakshara*.

Their Lordships will not interfere with the decree of the Judicial Commissioner so far as it relates to the costs in the Courts in *Oudh*. They are of opinion that they should be paid out of the property to which the *Oudh* suit relates. They are also of opinion that, under the circumstances, the costs in both the Courts in the North-Western Provinces ought to be paid out of the property to which the *Cawnpore* suit relates.

They will therefore further humbly advise Her Majesty that the costs in all the Courts below, both in the *Oudh* suit and in the suit in the North-Western Provinces, be ordered to be paid out of the property to which those suits respectively relate.

The costs of all the parties in these appeals will be taxed here, and must be paid out of the properties to which the suits respectively relate.

5th and 6th May, 1876.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BISHESWARI DEBYA, (Plaintiff)* ... } *Appellant,*

versus

GOVIND PERSHAD TEWARI and others, (Defendants) ... ... } *Respondents.*

Plaint and Kabala—Cause of Action—Consent by real owner to the act of a Benameedar.

Plaintiff brought the suit on the allegations that Defendants 1 to 3 owed him some money, that in satisfaction thereof, and on receipt of a further sum of money they sold to him a certain *Putni Mehal* and caused a *Kabala* thereof to be executed by their mother the auction purchaser, *i. e.* Defendant No. 4, and the Defendants, Nos. 1 to 3, being the real owners, became witnesses to the deed.

That in the *Kabala* there was a distinct stipulation to the effect, "If any one making any objection to the sale by me of the said *mehal* give you trouble in any way, then I will put matters straight. If I fail to do so I will return the consideration money. If I do not return it you will realize it by means of a suit."

Plaintiff being dispossessed by a third party, sued the Defendants 1 to 4 for release of the estate or refund of the consideration money.

The first Court held that the plaint and *Kabala* do not disclose a cause of action against anybody. The High Court on appeal held that they do, but against the mother, the *benameedar*, *i. e.* the Defendant No. 4 only.

Held that the plaint and *Kabala* do disclose a cause of action against all the Defendants, inasmuch as it is averred that the sons caused their mother to sell this property, and that they assented to the instrument of sale by becoming attesting witnesses to it, and the stipulation in the deed was intended to provide against a general defect of title.

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* 3 Cowell's I. A., p. 194.

6th May, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH :—

Their Lordships think, differing from the opinion of the High Court, that there ought to be a remand of the whole cause, and against all the Defendants, for trial to the Civil Judge. Both the Courts below have given judgment upon the plaint, and the instrument of sale referred to in the plaint, without any evidence having been gone into. The Civil Judge was of opinion that upon these documents no cause of action was shewn against any of the Defendants. The High Court thought he was wrong in that view so far as regards one of the Defendants, the fourth, but held that there was no cause of action against the first, second, and third Defendants, who are the sons of the fourth.

The facts which appear upon the allegations in the plaint are to this effect, that the three first Defendants, with a brother who has since died, purchased a property called lot *Chagram*, a *putni mehal* in *pergunnah Khond Ghose*, from *Nand Kishore Dass*, the former *Mohunt* of the *Rajgunge Akhra;* that having failed to pay the rent to the *Zemindar*, lot *Chagram* was sold, and was purchased for Rs. 22,000 by the three sons, the three first Defendants, as *sebaits* of *Iswar Gopal Jeo Thakoor;* that subsequently they presented a petition praying that the name of their mother, *Champa Koomari*, the Defendant No. 4, might be inserted as purchaser in the place of their names, and that the Collector, in compliance with their petition, entered her name as the purchaser. But the plaint states that the consideration money was paid out of the funds of the Defendants, the sons. Then the plaint goes on to allege the sale to the Plaintiff, which it states in this way: "Subsequently on their being desirous of selling the aforesaid lot *Chagram*, I consented to purchase it, as they (Defendants Nos. 1 to 3) were at that time indebted to me in a considerable amount, and agreed to allow a deduction in the consideration money in part satisfaction of their debt referred to; accordingly"—then comes what is really the most material allegation in the plaint—"on the 9th of *Assar* 1276 they caused a *kabala* to be executed by the auction purchaser, *i. e.* Defendant No. 4, for a consideration of Rs. 22,200, and the Defendants Nos. 1 to 3, being the real owners, became witnesses to the deed." The plaint then refers to a stipulation, for the breach of which the action is brought, which will be referred to presently. It then goes on to shew how the consideration money was arranged. "A sum of Rs. 12,672 was deducted both on account of principal and interest, in part satisfaction of the debt which the Defendants Nos. 1 to 3 owed to me on the bonds they had executed in my favour; and one of the bonds was returned to them; Rs. 3,950 was deducted in part liquidation of the money they owed me on mortgage of certain personalties which, in proportion to the said payment, they took back, and the balance, *i. e.* Rs. 5,577. 8a., they have received in (currency) notes and in ready money." The three sons received the whole of the consideration, they were released from large debts, and received the balance in money. This is the mode in which the contract is stated. The contract of sale itself is set out, and no doubt appears to be a contract entered into by the mother (*Champa*) with the Plaintiff. But that is perfectly consistent with her being *benameedar*, and perfectly consistent with all the allegations in the plaint, that the sons caused her to enter into it on their behalf, they being the real owners, they being the real vendors, and they being the persons who actually received the purchase-money, which in a given event was to be returned.

The action is brought for a breach of this provision in the instrument of sale: "If any one making any objection to the sale by me of the said *mehal* give you trouble in any way, then I will put matters straight. If I fail to do so I will return the consideration money. If I do not return it you will realize it by means of a suit"—that clause providing that in the event of disturbance, and the matter not

being put straight, the purchase-money should be refunded. The breach alleged in the plaint is that after the Plaintiff had held possession of the *mehal* as the proprietor thereof, "the Collector of *Burdwan*, whom the High Court appointed in the month of *Kartick* 1277, as the receiver of the estates belonging to the *Rajgunge Akhra*, ousted me in his capacity of receiver from the above *mehal*, when I made an application to the High Court, seeking to have the estate released; but the High Court disallowed my prayer, whereupon I wished the Defendants either to release the estate or refund the consideration money as stipulated in the *kabala*. They said that they would have the matter settled, but have neglected to do so."

The Civil Judge upon this plaint, and upon this instrument of sale, held that there was no cause of action against anybody, apparently on the ground that this stipulation in the bill of sale was not intended to provide against a general defect of title, but only against objections arising from the personal status of the *benameedar*, the mother, as a Hindu widow. The High Court thought this view was erroneous, and their Lordships entirely agree with the High Court in the opinion that there is a question to be tried, viz., whether there has been the ouster and disturbance alleged, and whether under the circumstances they constitute a breach of the contract. This is a question depending on the evidence, and the High Court properly remanded the cause to the Civil Judge to try it. But, having made this remand, they decided that the contract was one which bound the mother only, and that the sons not being bound by it, the suit ought to stand dismissed against them.

Their Lordships have some difficulty in perceiving the exact grounds upon which the High Court have come to this conclusion. Mr. Justice *Markby* seems to admit that there may be circumstances under which the real parties may be bound, although the contract is entered into nominally with the *benameedar*. But he says: "It is contended before us that because *Champa Koomari* was only what is called a *benamdar*, therefore all the covenants which she made in this transaction are binding upon the true owners of the property. But no authority for that very general proposition is produced before us, and I certainly do not feel inclined or authorized to lay down any such proposition." Their Lordships agree with Mr. Justice *Markby* that no such general proposition can be laid down. The question in all these cases is with whom the contract was made. Cases may be supposed where the contract may be intended to be made, and may be, in fact, made with the nominal party only; but, on the other hand, there may be cases where the contract is with the real parties, and probably in the greater number it will be found that the contract is so made; and when persons are interested on the one side in the estate, and on the other in the money to be received for the estate, the parties who are so beneficially interested on either side are those between whom it may be expected that the contract would actually be. Mr. Justice *Markby* says at the end of his judgment, "Whether the male Defendants would have been liable had the Plaintiff's case been that their names were not disclosed in the transaction, although they were the real vendors, it is not necessary to determine. I think it must be taken upon this plaint that the Plaintiff, knowing the circumstances, has elected to deal with the female Defendant on the footing that she is the owner." Their Lordships think that the learned Judge has taken a mistaken view of the plaint, because, so far from its appearing upon the plaint (whatever may hereafter appear upon the evidence) that the Plaintiff has elected to deal with the female Defendant, the allegations all point the other way; the allegations are that the sons caused the contract to be made, and the plaint throughout treats the mother as the mere instrument, and the sons as the parties entering into the contract.

The question, therefore, to be tried on this point will be, whether this contract was really entered into by the mother as the agent and on behalf of the three sons and by their authority. If it should appear from all the circumstances that the Plaintiff, knowing the facts, really did

elect to treat the mother as the sole contracting party, then the Plaintiff will fail.

Mr. *Forsyth* in his argument contended that although it might be true that the mother was the agent in making the sale, she must be deemed to be the principal in entering into this particular instrument. Their Lordships think that upon the face of this plaint there is no foundation for such a distinction. This is not a case where an authority is given to an agent to sell, and the agent exceeds his authority by entering into a particular stipulation; because not only is it averred in the plaint (of course that is to be proved) that the sons caused their mother to sell this property, but also that they assented to the instrument of sale by becoming attesting witnesses to it. If that should turn out to be the case when the evidence is given, it would appear that they authorized not only the sale itself, but a sale in the very terms of the *kabala* which the mother executed.

Their Lordships give no opinion whatever on the case upon the merits. They desire to say no more than this, that upon the plaint and the allegations found in it, they think that the Plaintiff has disclosed what may be a cause of action against all the Defendants. Whether or not she proves her case at the trial is a totally different question, upon which no opinion can now be given.

In the result, therefore, their Lordships will humbly advise Her Majesty to direct that the decree of the High Court be varied, by ordering that the cause be remanded as against all the Defendants.

Their Lordships see no reason why the ordinary rule as to costs should not prevail in this case. The Plaintiff will, therefore, have the costs of this appeal, and of the appeal to the High Court; and their Lordships will direct that the costs of this appeal be taxed by the Registrar, and that these costs and the costs of the appeal to the High Court be the Plaintiff's costs in the cause in any event.

9th, 10th, 11th, 16th, 17th, and 18th May, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RANEE KHUJOOROONISSA, Widow of ENAYUT HOSSEIN, (Defendant)* ... ... } *Appellant,*

versus

MUSSUMAT ROUSHUN JEHAN, (Plaintiff) ... } *Respondent.*

Compromise—Appeal—Fraud—Mahomedan Law—Devolution of Property—Deed of Gift—Will—Presumption of Marriage.

In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the Defendant, who thereupon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the Plaintiff's interest, was allowed. The Defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct. *Held*, by the Judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the Plaintiff was to be allowed to be heard against so much of the original judgment as was unfavorable to her, the Defendant must similarly be heard against so much of the same judgment as was unfavorable to him.

The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration,

* 3 Cowell's I. A., p. 291.

or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property and to confer it on the donee. It is incumbent on those who set up transactions of this nature, to shew very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, *held* to be an attempt to give, under color of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife.

18th May, 1876.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This case, which fills a great mass of printed paper, and has occupied much time, finally resolves itself into a few points not attended with any very great difficulty. In order to make those points intelligible, a short history of the whole case appears to be necessary. *Rajah Deedar Hossein* died in 1841, possessed of half of the large *zemindary* of *Soorjapore*. He left five sons and five daughters. According to the contention of the one side he left five widows; according to the contention of the other side he left one wife and four concubines. *Enayut Hossein*, his eldest son, possessed himself of all the property of the deceased *Rajah* by virtue of two documents which he set up, and which will have to be referred to subsequently, one being a deed of gift as it is called, and the other a will, both dated the 18th of November, 1839, about two years before the death of the *Rajah*.

The first document purported to convey to *Enayut* one-third of the *zemindary*. The will may be shortly described as giving to *Enayut Hossein* a third of what remained, burdened with a trust of a somewhat indefinite character for pious uses, but with a bequest of the residue after those pious uses had been satisfied to the beneficial use of *Enayut* himself. *Enayut* was put into possession of the whole of the landed property, and it was directed that the other children were not to be enabled to sell or dispose of their shares in any way. *Enayut* was to pay them certain annuities, which he does not appear to have done, and it was only of the personal property that a division was directed in accordance with the Mahomedan law. By virtue of these documents *Enayut* took possession of the property of his father, and appears to have reduced the other members of the family to a state of poverty. He struggled for some time to obtain mutation of names, in pursuance of those documents. The mutation was opposed by other members of the family, but was finally obtained in 1844 upon *Enayut* giving security. After that time some abortive suits were instituted by different members of the family *in formâ pauperis*; but the first proceeding necessary to notice at all at length, is a suit instituted by *Khoobunissa*, who was the widow of *Nuzeeroodeen*, the third son of *Rajah Deedar Hossein*, in 1852, as guardian and protector of her infant daughter *Roushun Jahan* (the present Plaintiff), to set aside both the deed and the will, and to obtain possession on behalf of her daughter of a fourteen *annas* share (the daughter's share) of the property of *Nuzeeroodeen*. She appears to have also brought a suit for the other two *annas* on her own behalf.

This suit came to be heard before Mr. *Loch*, who was the Judge at *Purneah* in 1855. * His decision was to the effect that both the documents, the deed and the will, were in fact executed by the *Rajah Deedar*; that the deed was valid, but that the will was invalid because it had not obtained the consent of the heirs other than *Enayut*, which according to his view of the will was necessary by the Mahomedan law.

Enayut Hossein appealed against that decision, and *Khoobunissa* would have had an undoubted right to her cross appeal but for what subsequently transpired. Pending this suit, which was decided in 1855, *Enayut Hossein* had instituted a cross suit against *Khoobunissa* for the purpose of carrying into effect an alleged compromise to which he said she was a party, he alleging that she had received some Rs. 31,000, and had executed a document compromising the suit in his favour. This she denied. Issues were raised upon it, and this case came on for trial in August, 1856, rather more than a year after the other decision. But on the 30th of August of that year a compromise, which in some respects may be undoubtedly called a real compromise, was come to. *Khoobunissa* then filed a document, in which she declared that she would not any longer contest the questions between her and *Enayut Hossein;* that she had received certain money from him, and agreed altogether to his terms, and in that document there was a statement that her daughter *Roushun Jehan* assented to this compromise. *Roushun Jehan* was also represented as a party to the transaction, and as asserting herself to be of age. That compromise was given effect to by Mr. *Loch;* it was also given effect to by the *Sudder Dewanny Adawlut* Court, which dismissed the appeal, and gave a decree in the terms of it in December, 1856.

Roushun Jehan, the present Plaintiff, in 1859 married *Syud Ahmed Reza*, a member of the other branch of the family, who possessed the half of the *pergunnah Soorjapore* other than that which was held by *Deedar Hossein;* and in 1860 she filed a suit, in which she asserted that she was no party to and had no knowledge of the compromise between *Enayut* and her mother, and that it was effected by fraud and collusion on the part of both of them. She prayed that that compromise might be set aside, and she prayed in substance for a review of the judgment of Mr. *Loch*, so far as it was against her. She made also three further claims; the first to a share derived by her father from his brother *Edoo Hossein*, who had died before him; the second to a share in right of her grandmother, *Bibee Loodhun*, whom she alleged to have been a wife of *Deedar Hossein*. She thirdly claimed that there should be added to the whole *zemindary* property a portion which *Enayut Hossein* had recovered by a decree of this Board against the *Rezas*, in respect of the right of his grandmother *Rance Sumree*. It may be as well at once to dismiss this part of the case, by stating that it is not now denied on the part of *Enayut* that he recovered this sum, not in his own right, but as a trustee for all the other members of the family.

This suit appears to have been deplorably dealt with in the inferior Courts of *India*. It came first before Mr. *Beaufort*, who framed a certain number of issues, and proceeded as far as deciding the issues in bar. Then it came before Mr. *Birch*, who upset all that Mr. *Beaufort* had done, and dismissed the suit altogether in a summary manner, on the ground that the cause of action was not stated with sufficient precision. The High Court set this mistake right by remanding the cause to be retried; whereupon it came before Mr. *Simson*, who had succeeded Mr. *Birch*. Mr. *Simson*, who seems to have very imperfectly apprehended the nature of the suit, framed an issue, which by no means decided it, and after his trial (if it can be so called) of the case, it came before the High Court again, and was again remanded. This occurred in January or February, 1864, when a very careful and luminous judgment was given by the Chief Justice Sir *Barnes Peacock* and another member of the Court, which it is now necessary more particularly to refer to. The High Court, after stating that the case had not been properly tried or even apprehended, remanded it for the following issues to be tried, in addition to the one laid down by Mr. *Simson*, which was as to the validity of the deed. "1. Was the Plaintiff of age according to the Mahomedan law, independently of Regulation XXVI. of 1793, at the time when the alleged compromise was effected? 2. Did the Plaintiff execute the documents which purport to have been executed by her, or any and which of

them? 3. If so, was she induced to execute the same by means of fraud or misrepresentation? 4. Was the compromise a fair one and beneficial to the Plaintiff? 5. Did the Plaintiff receive any portion of the money alleged to have been paid by the Defendant or any portion of the profits of the *putni talook?* 6. Did the Plaintiff's mother *Khoobunissa* receive the money? 7. Were all or any and which of the receipts, alleged by the Defendant in his written statement to have been executed by the Plaintiff, executed by her? 8. Was the decree in the *Zillah* Court of *Purneah* of the 30th of August, 1856, establishing the receipt for the Rs. 31,400, obtained by fraud or misrepresentation? 9. Was the decree of the *Sudder* Court of the 10th of December, 1856, founded on the alleged compromise, obtained by fraud or misrepresentation? 10. If not, was it binding on the Plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into?" The High Court proceed to say, "These are the issues which we consider necessary for a proper determination of the Plaintiff's right to set aside the decree of the *Sudder* Court. It appears to us that this appeal is in the nature of a bill for a review of judgment, and therefore when the decree is set aside by virtue of a regular suit, the same rights will arise as if the Court upon review of judgment had set aside its own decree." Then they go on to say: "The above issues will apply of course to the Plaintiff's claim only so far as affects that portion of *Deedar Hossein's* property which was the subject of the former suit, but they do not apply to the shares which belonged to her uncle and her grandmother, or to the share of the property recovered by the Defendant by the decree of the Privy Council. These are wholly distinct matters from that at issue before Mr. *Loch*, and therefore as to them we think it proper to lay down the following issues to be tried by the Judge." Then come six more issues: "1. Did the father of the Plaintiff survive her uncle *Edoo Hossein*, and is the Plaintiff entitled to recover any and what portion of the share, if any, of her uncle *Edoo Hossein* in the estate of the Plaintiff's late grandfather *Rajah Deedar Hossein?* 2. Did *Edoo Hossein* receive the allowance given by his father's will, or assent to the will? 3. Did the Plaintiff's grandmother *Mussumat Bibee Loodhun*, alias *Saemah*, succeed to any and what portion of the estate of *Rajah Deedar Hossein?* 4. Did *Bibee Loodhun* take the allowance as alleged in the Defendant's written statement? 5. Is the Plaintiff entitled to recover any and what portion of *Bibee Loodhun's* share, if any, of *Rajah Deedar Hossein's* estate? 6. Is the Plaintiff entitled to recover any and what portion of the one *anna* eight *gundas* share of the *zemindary* of *Sooryapore*, recovered by the Defendant under decree of the Privy Council dated the 11th of July, 1859?"

All the first ten issues which related to the validity of the compromise in the suit which was heard before Mr. *Loch*, and came before the *Sudder Dewanny Adawlut*, were decided by the Judge, Mr. *Muspratt*, before whom this case came on its remand, in favour of the Plaintiff. With respect to the latter issues, the Judge found against the Plaintiff upon the question of *Edoo Hossein* surviving his brother *Nuzeeroodeen*, her father, and he found against her on the question of her right to succeed to any portion of the property of her grandmother *Bibee Loodhun*. The case came on appeal before the High Court, who gave a very elaborate judgment in January, 1866. The High Court agreed with the learned Judge of the *Zillah* Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion that the compromise being set aside, owing to fraud and collusion on the part of *Enayut Hossein*, *Enayut Hossein's* right of appeal against Mr. *Loch's* judgment was not revived, whereas the right of appeal on the part of the Plaintiff *Roushun Jehan* was revived. From

that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the Plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. *Loch* as is against her, *Enayut Hossein* ought to be heard to appeal against so much of the decision as is against him. The High Court further affirm the decision of Mr. *Loch* on the subject of the will, which was in favour of the Plaintiff, but they reverse his decision so far as it concerns the deed, which was against her. Further, they reverse the decision of Mr. *Muspratt* upon the two questions of the right of the Plaintiff to succeed to *Edoo Hossein*, and her right to succeed to her grandmother. The case, therefore, reduces itself to four questions, —first, the validity of the deed; secondly, the validity of the will; thirdly, the survivorship between *Edoo* and *Nuzeeroodeen*; and, fourthly, the Plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by *Rajah Deedar Hossein* of this deed giving one-third to his son *Enayut* on the 10th of November, 1839. The deed was either—to use English expressions—a did of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seisin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. *Perry*, which is treated as trustworthy on both sides, that in point of fact *Rajah Deedar Hossein* remained in receipt of the rents and profits of the property until his death. Therefore if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, viz. whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. It was, however, conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bonâ fide* paid.

Upon the subject of consideration there is the evidence of Mr. *Perry*, who was present at the time of the execution of the document, who says that the *Rajah* admitted that at some previous time he had received the consideration. There is the evidence of *Enayut Hossein* himself, who speaks to having paid the consideration, although he does not condescend to any particulars; and there is the evidence of one or two other witnesses, who speak of the consideration being given at the time of the execution, which appears scarcely reconcilable with the evidence of Mr. *Perry*. But the whole

transaction must be looked to. Mr. *Perry* speaks, as far as his knowledge is concerned, of the deed remaining in the possession of *Rajah Deedar Hossein*, although no doubt there is some evidence to the opposite effect. But it is certain that no proceeding was taken for obtaining mutation of names for more than twelve months after the execution of the deed. A petition was presented on the 16th of March, 1841, purporting to be on the part of the *Rajah*, and requesting a mutation of names, and there was another by *Enayut* on the 3rd of May of that year. But, on the 19th of June of that year, the *Rajah Deedar* presented a petition altogether repudiating the transaction, declaring that he had received no consideration money whatever, that it was not intended that any transfer should take place until after his death, and praying that the mutation of names should not be effected. On being questioned what his real wishes were, he still persisted in declaring his wish that *Enayut* should not be substituted for him in the books of the Collectorate. It is true that on the 19th of November, 1841, a petition was laid before the Collector, purporting to come from *Deedar Hossein*, in which he set up the transaction, declaring that he had received the consideration money, and desiring that the name of his son should be entered, but that was several days after he was dead. He died on the 15th. The petition was dated on the 14th, received on the 19th, and the Collector very properly declined to act upon it. No evidence was given as to the state of the *Rajah* when he executed this petition, so shortly before his death (if indeed he did execute it), although *Rajah Enayut Hossein* and *Heera Lall*, the *mokhtar* who was concerned in it, either of whom could probably have given information on the subject, were not examined as witnesses in the cause.

Taking into consideration all these circumstances, their Lordships have come to the conclusion that the transaction set up on behalf of the Defendants was not a real one, that no real consideration passed, that there was no intention on the part of the *Rajah* to part with the property at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships therefore agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. *Loch* that the heirs had not consented to this will; and with that finding their Lordships are satisfied. But it was argued by Mr. *Cowie*, first, that the will did not require confirmation; secondly, that at all events so much of it as gave one-third to *Enayut Hossein* for pious uses was not in contravention of Mahomedan law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare *Enayut Hossein* the executor and representative of *Deedar*, and to direct him to look after the *zemindary*, and so forth. Then follows this passage: "I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for the testator's welfare hereafter, by charity and pilgrimage, and keep up the family usage, namely, the expenses of the mosque and *tazeeadaree* of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor." Then it goes on to say, from the other two-thirds "he shall keep everyone by his good conduct and affection contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me to obey the said executor and consider him my representative." Then further: "None of the heirs have power to sell or divide the landed property mentioned in the will." This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan law. With respect to the limited contention, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to *Enayut Hossein* after he has devoted

what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under colour of a religious bequest, an interest in one-third to *Enayut Hossein*, in contravention of Mahomedan law.

The survivorship between *Edoo* and *Nuzeeroodeen* is a question made by no means clear on either side. Mr. *Muspratt* appears to have decided it almost, if not entirely, upon the ground that *Enayut Hossein* put in certain proceedings *in formâ pauperis*, the petition to sue and other documents, purporting to have been executed by *Edoo* in 1845. If he did then execute them, undoubtedly he had survived his brother, who died in January or February, 1844. There appears to have been oral evidence on both sides; on the one side, that *Edoo* lived until 1845, on the other, that he died some time in 1843, a few months before his brother. The judgment of the High Court appears to be in effect that after a very careful consideration of these documents, after directing various searches for the originals, of which attested copies were produced, which searches proved fruitless, they have come to the conclusion that these documents are not genuine. Their Lordships do not feel that sufficient is laid before them to satisfy them that the High Court were wrong in that decision. These documents being rejected as fabricated, the Court say in substance that they credit the testimony of the Plaintiff rather than that of the Defendant, who had shewn himself capable of fabricating documents, and that they do not in this question believe witnesses who on other parts of the case had not been believed.

Under these circumstances, whatever might have been their Lordships' view if the case had come before them as a tribunal of first instance, they do not think that sufficient ground has been shewn for reversing the decision of the High Court.

There remains the question of the right of the Plaintiff to succeed to *Bibee Loodhun*, and that depends upon whether *Bibee Loodhun* was merely a concubine or a wife. It is an undisputed fact that *Nuzeeroodeen*, the son of *Bibee Loodhun*, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognized by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1), in which Dr. *Lushington*, who delivered the judgment of this Board, makes this observation (2): "The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that *Bibee Loodhun* was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the *Rajah*.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th of March, 1873. In the case of *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan*, a case from *Oudh*, and a *Sheeah* case, their Lordships say: "This treatment of the daughter by the Appellants"—that is to say, the treatment of the daughter as a member of the family,—"affords a strong presumption in favour of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if *Bibee Loodhun* had survived her son *Nuzeeroodeen*. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child: "After these acknowledgments, *Mulka Jehan* and the

(1) 3 Moore's Ind. Ap. Ca., 295; 1 P. C. J., p. 282.
(2) Page 318.

Appellant, who met with her ought in their Lordships' view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence, they think the presumption must prevail."

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of *Nuzeeroodeen*, raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the *Rajah*, in which undoubtedly there is this expression: "For the maintenance of four female servants monthly, 75; annually 900," and *Bibee Loodhun* does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression: "The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from state fixed annually at," so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by *Enayut Hossein* himself of *Bibee Loodhun* being a wife, inasmuch as when *Khyroonissa* the principal wife brings a suit against him, *Enayut Hossein* objects, on the ground that *Bibee Loodhun*, one of the other wives, is not joined.

Under these circumstances, it appears to their Lordships that there is evidence not only from the acknowledgment of *Nuzeeroodeen's* legitimacy by the family, but from the admission of *Enayut Hossein*, that *Bibee Loodhun* was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the *Sheeah* sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of her marriage being what is called a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the Defendant speak of *Bibee Loodhun* not as a temporary wife but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole, their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not as a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the Plaintiff would be entitled to, assuming that *Bibee Loodhun* was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is, a fortieth share; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail, and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of *Mussumat Bibee Loodhun*, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

18th and 19th May, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GIRDHARI SINGH, (Plaintiff)* ... ... } *Appellant,*

versus

HURDEO NARAIN SINGH and others, (Defendants) } *Respondents.*

Sale set aside on review without notice to purchaser, mention of a lower amount of Government Revenue, a material irregularity—Waiver of the irregularity by Debtor—sec. 15 Letters Patent Act.

In execution of a decree against Respondents, a certain estate held at Government revenue Rs. 8,146 was attached, and a sale proclamation was issued mentioning the decretal amount to be a little more than what it actually was, and the Government revenue to be Rs. 3,140. The sale was postponed at the request of the Judgment-Debtor, a copy of the sale notification to that effect being posted in the Court. The property was then sold and purchased by the Appellant. The Judgment-Debtors applied for setting aside the sale on the ground of irregularity and inadequacy of consideration, but it was rejected. On review, the Court without service of notice on the auction purchaser, and on the ground that there was some mistake in the account, that the property was sold at an inadequate price, and that the said price and its interest was deposited by the Judgment-Debtor ordered the sale to be set aside. The auction-purchaser applied for confirmation of the sale, which application was rejected.

The High Court under section 15 of the Letters Patent Act held that there was no material irregularity, the mistake as to the amount of the Government revenue being in favour of the Judgment-Debtor, and confirmed the sale.

Held that there was a material irregularity, the mistake as to the amount of the Government revenue was against the interest of the Judgment-Debtor, as the value of estates are determined according to the amount of the Government revenue, but it was further held that inasmuch as it was on the application of the Judgment Debtor himself that the sale was postponed, he agreeing that the attachment and the notification of sale should be maintained, the application amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. The High Court order was interpreted to mean that the sale be confirmed by the officer who ought to have confirmed it. The order of the High Court was accordingly affirmed.

19th May, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

In the present case, *Girdhari Singh*, the Appellant, was the judgment-debtor, and the Respondent, *Hurdeo Narain Sahoo*, was the purchaser at a sale in execution. The sale in question took place on the 9th of September, 1872, and the estate was sold to the Respondent for the sum of Rs. 55,000, he being the highest bidder at the auction. On the 1st of October, 1872, the judgment-debtor, under the provisions of Act VIII. of 1859, s. 256, made objections to the sale. The 256th section says: "No sale of immoveable property shall become absolute until the sale has been confirmed by the Court. At any time within thirty days from the date of the sale application may be made to the Court to set aside the sale, on the ground of any material irregularity in publishing or conducting the sale; but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." The judgment-debtor, therefore, under this section was bound to shew that some material irregularity in publishing or conducting the sale had taken place, and that he had sustained substantial injury by reason thereof.

One of the objections which the judgment-debtor made to the sale was, that the attachment *purwannah* shewed "the amount of the decree to be Rs. 51,677, and the Government revenue of the *mouzah* sold to be Rs. 8146; contrary to this the amount of the decree has been specified as Rs. 54,000, and the Government revenue as Rs. 3,000 in the sale notification. This is wrong and contrary to the

* 3 Cowell's I. A., p. 230.

real facts." Now, instead of the proclamation stating the Government revenue to be Rs. 8,146, it stated it to be Rs. 3,146, the irregularity occasioned being, in all probability, the substitution of the figure 3 for the figure 8. The case came on to be heard upon the petition of the Appellant before the subordinate Judge, who says, "Whereas there is no reason to decide the sale to be irregular, it is ordered that this petition be rejected." Having rejected the petition and treated the objections as insufficient, he ought to have done something further; he ought to have proceeded under sect. 257 to pass an order confirming the sale. That section says: "If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale; and in like manner if such application is made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal." If the subordinate Judge had followed the directions of the Act, and having disallowed the objections had made an order for confirmation, that confirmation would have been appealable to the High Court. But the Judge not having made an order of confirmation, the judgment-debtor applied to the subordinate Judge to review his decision under sect. 376 of the Code of Civil Procedure. That section speaks merely of decrees, and not of orders. But even admitting that a review of judgment in this case could have taken place, the auction-purchaser was never summoned. He had no opportunity of shewing cause against a review of judgment. Sect. 378 of the Act says: "Provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited." The order passed upon the review was this: "This petition has been filed anew under the provisions of sect. 376, Act VIII. of 1859. It appears that the judgment-debtor has put in the entire amount of the decree Rs. 54,232. 2 *a.* 1½ *p.*, hence there is no necessity for the holder to get the sale confirmed;" the word "holder" meaning the decree-holder; but he says nothing as to the right of the auction-purchaser to come in and have it confirmed; he says, "Hence there is no necessity for the decree-holder to get the sale confirmed. It appears that the sale has not been as yet confirmed, and the judgment-debtor has also paid the interest of the consideration money for the auction-purchase. From these facts it appears that the judgment-debtor has really sustained a great loss by this sale, and has paid the decretal amount, together with the interest of the purchase-money. The property sold is the ancestral estate of the judgment-debtor, and seems to have been sold at an inadequate price; and on reference to the record there also appears to be some mistake in the account. It is therefore ordered that the sale be set aside, that the decretal amount paid by the judgment-debtor be paid to the decree-holder, that the purchase-money paid by the auction-purchaser be returned to him, and that the interest on the purchase-money paid by the judgment-debtor be also paid to him." Upon that order being made, the auction-purchaser came in; and on the 11th of November, 1872, he petitioned, and said: "1. When the objections of the judgment-debtor to the sale were disallowed, my right for the confirmation of the sale became absolute and perfect. Against that order only an appeal could be preferred to the High Court. 2. The order rejecting the objections in respect of the sale cannot, under the provisions of sect. 376, Act VIII. of 1859, be held to be in the nature of a decree, hence the review of such an order is out of the jurisdiction of the Court. 3. If for the sake of argument it be granted that such an order is fit to be reviewed, it was nevertheless necessary to have carried out the entire provision of the law in respect of review, and it was necessary to issue a notice under sect. 378, Act VIII. of 1859, to me the Petitioner, and it was proper to hear my pleader's arguments regarding the disallowing of the review. 4. The grounds under which the Court has set aside the sale are

not sufficient according to law. For this reason I beg to file this petition, and pray that the order of the 9th of November *idem* being set aside, the sale be confirmed and a certificate of sale be granted to me." Upon that the Judge refused to confirm the sale or to grant the certificate. He says: "In the notification the sum of Rs. 8,146. 11*a*., has been specified in the place of the sum of Rs. 8,146. 11*a*." Therefore he alludes to the mistake in the proclamation which he had already overruled. He says, "There is no doubt that this estate has been sold at a very low price for *Baboo Koonj Lal*, the *gomashta* of *Baboo Hurdeo Narain*, the auction-purchaser, himself admitted to me that the estate sold by auction is leased on a *jumma* of Rs. 18,000 or Rs. 19,000."

The sale having been effected at a low price would in itself be no ground for refusing to confirm the sale. But it appears that under sect. 249 of Act VIII. of 1859 it was necessary to state correctly in the notification of the sale what was the amount of the Government revenue assessed upon the estate. The subordinate Judge having refused, under his order of the 11th of November, 1872, to confirm the sale or to grant a certificate of confirmation, an application was made to the High Court, not by way of appeal, but under the provisions of the 24 & 25 Vic. c. 104, s. 15, which enacted that "Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction." The subordinate Judge then having refused to confirm the sale, he having disallowed the objections, it was competent to the High Court, by a proceeding in the nature of a mandamus, to order the Lower Court to do that which it ought to have done, namely, having rejected the objections to the sale, to confirm it; and the High Court proceeded upon that section and made the order. But the High Court did not merely treat the judgment of the subordinate Judge upon the application for review as a nullity; they entered into the question as to whether the objections to the sale were valid or not valid. In fact they treated the case in their decision as if the Lower Court had actually confirmed the sale, and there had been an appeal to them—against that confirmation. Their Lordships think that they may look at the case now in the way in which the Judges looked at it then, to see whether there were really any objections to the sale which would have been a ground for setting aside the confirmation of the sale if the subordinate Judge when he rejected the objections had passed an order confirming it.

Now the only material objection to the notification of the sale was that to which allusion has already been made, namely, that the *sudder jumma* was stated to be Rs. 3000 odd instead of Rs. 8000 odd. Section 249 directs that the notification of the sale shall state the amount for the recovery of which the sale is ordered specifying the time and place of sale, the property to be sold, and the revenue assessed upon the estate. Not specifying the amount of the revenue correctly was an irregularity for which the sale might have been set aside, provided the judgment-debtor had satisfied the Court that he had sustained a substantial injury in consequence of it. The subordinate Judge says that in the notification the sum of Rs. 8146. 11*a*. was specified in place of Rs. 8146. 11*a*., and that there is no doubt that the estate has been sold at a very low price. The High Court deals with that objection. They say, "What are the alleged irregularities?" One of the objections is the mistake with regard to the Government revenue which was payable upon the estate. Then they say: "The error as to the *sudder jumma* was, if an error at all, and of this there is no evidence, an error in favour of the judgment-debtor, for if the *sudder jumma* was quoted at a lower figure in the proclamation than the recorded *sudder jumma*, it was not a material error likely to depreciate the bids, but rather to stimulate the bidders at the sale, for intending purchasers could refer to the *towji*; moreover, this objection was overruled by the subordinate Judge." Their Lordships do not agree in this reason which was given by the High Court. If an estate is said to be held at a certain Government *jumma*, the auction-purchaser may not know what the

real value of the estate is, or what are the rents which are receivable from it. He may, perhaps, have had no opportunity before coming into the auction room and bidding, to refer to the *towji*; if the Government revenue were stated to be much less than it really was, he would suppose that the estate was a much less valuable one. In the ordinary mode of assessing the value of estates for the purpose of paying stamp duty or court fees upon the institution of a suit, it was formerly taken that three times the amount of the Government revenue of a permanently settled estate was a fair estimate of the value of the estate; but that was found to be much too low; and in the *Court Fees Act*, VII. of 1870, it was enacted that in assessing the value of estates for the purpose of suits, the value of the estate should be taken as ten times the amount of the Government revenue; and in those cases in which there was no Government revenue, that fifteen years' purchase of the actual rents should be treated as the estimated value of the estate. Therefore it appears to their Lordships that the High Court was not correct in holding that the error was in favour of the judgment-debtor; they think that the error might have been against the interest of the judgment-debtor, and that if the sale had been confirmed, and he had proved that he had sustained actual damage by the irregularity, it would in an ordinary case have been a sufficient ground for setting aside the confirmation upon an appeal against it.

But their Lordships must look to another portion of this case. It appears that the sale was fixed for the 5th of August; that the judgment-debtor applied to the Court to postpone the sale, and stated that he wished to raise the money, and added, "Under such circumstances it is prayed that a postponement of one month be grnted, *the attachment and the notification of sale being maintained.*" Now the notification must have been stuck up at the Court House, and he must have had an opportunity of seeing what the real notification was; and if there was a clerical error in inserting Rs. 3146. 11 *a.* as the Government revenue instead of Rs. 8146. 11*a.*, he ought at that time to have made objection to the notification, and not to have consented to allow the notification to remain and be maintained as the notification under which the sale was to take place. Upon that petition an order was passed which was as follows: "It is ordered that the postponement be granted; that in case of non-payment of the decretal amount the property of the judgment-debtor be sold, *without the issue of a second notification of sale*, on the 2nd September, 1872; and that a copy of the notification be suspended in a conspicuous place of the Court House." So that on the application of the judgment-debtor himself the sale was postponed, he agreeing that the attachment and the notification of sale should be maintained.

Their Lordships think that the judgment-debtor could not properly take objection to that notification by stating that there was an error in it. The petition amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. Under these circumstances, their Lordships think that the High Court was right in ordering the confirmation of the sale.

But it is said that the High Court had no power themselves to confirm the sale. Although the learned Judges in their judgment say, "We reverse the order of the subordinate Judge dated the 9th November, 1872, and confirm the sale," the order merely directs that the order of the Lower Court be reversed, and the sale confirmed. Their Lordships interpret the order of the High Court as meaning that the sale be confirmed by the officer who ought to confirm it, namely, by the subordinate Judge, who ought to have confirmed the sale when he disallowed the objections. That is the mode in which the subordinate Judge himself interpreted the order of the High Court; for upon the order being sent to him he passed an order confirming the sale.

Their Lordships see no reason to interfere with the order of the High Court, and they think that this appeal ought to be dismissed. The case must take the usual course, and the appeal will be dismissed with costs.

24th May, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

REASUT HOSSEIN, (Plaintiff)* ... ... } *Appellant,*

versus

HADJEE ABDOOLLAH and another, (Defendants) } *Respondents.*

Registration Act (VIII. of 1871), s. 76—District Court—Order refusing Registration Proceeding to compel Registration—Review—Act XXIII. of 1861, s. 38—Act VIII. of 1859, s. 376.

The Registration Act of 1871 gives power to the Government to appoint Districts and Sub-Districts for the purpose of registration; but the "District Courts" mentioned in the Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary *tillah* Courts.

Semble.—The final words of the 76th section of the Registration Act, which declare that "no appeal lies from any order made under this section" apply to an order rejecting, as well as to an order admitting, an application for registration.

Quære.—Whether after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registration by means of, a regular suit? *Futteh Chund Sahoo* v. *Leelumber Singh Dass*,(1) referred to and distinguished.

An order rejecting an application for registration, under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a decree within the meaning of Act VIII. of 1859, as to fall within the operation of the sections of that Act which provide for the admission of a review.

S. 38, Act XXIII. of 1861, which enacts that "the procedure, prescribed by Act VIII. of 1859, shall be followed as far as it can be in all miscellaneous cases, and proceedings which, after the passing of the Act, shall be instituted in any Court", renders the whole procedure of Act VIII. of 1859 including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an appeal against an order of the High Court of *Calcutta*, dated the 2nd of April, 1873, by which that Court in the exercise of its extraordinary and statutory jurisdiction of superintendence over the inferior Courts set aside an order of the Judge of *Gya*, dated the 4th of January, 1873.

The contest between the parties related to the registration under the provisions of the *Registration Act*, 1871, of a deed purporting to have been executed by a Mahomedan lady of the name of *Bibee Noorun* in favour of her grandchildren, on the 10th of November, 1871. She died on the 18th of December, 1871, and on the 5th of January, 1872, the Appellant, as the father and guardian of the donees, presented the deed for registration in the registrar's office at *Gya*. The Respondents, who were the heirs-at-law of the alleged donor, were cited in the usual way, and came in and denied the execution of the deed. It is admitted to be one which can have no force or validity, or be capable of being produced in any Court of justice in evidence, unless it be registered; and the heirs of the party who is alleged to have executed it having denied the execution of it by her, the registering officer was under the Act bound to refuse to register it. The Act gives an appeal from the sub-registrar to the principal registrar; but as he was equally bound to refuse registration of an instrument of which the execution was thus disputed, such an appeal would have been obviously infructuous; and the Appellant accordingly took the

* 3 Cowell's I. A., p. 221.

(1) 14 Moore's I. A., 129; S. C. 9 B. L. R., 433; 2 P. C. J., p. 709.

course of applying, under the 73rd and following sections, to the *zillah* Judge at *Gya* for an order upon the Registrar to register the deed.

The Judge proceeded under the Act, and several witnesses were produced and examined in support of the deed. No witnesses were tendered on the other side. The Judge disbelieved the witnesses called, and for the reasons given in his judgment rejected the application made to him, and consequently the deed was not registered.

Within ninety days after the date of this order, Mr. *Tayler*, the Judge who rejected the application, was succeeded as Judge at *Gya* by Mr. *Craster*; and an application was made to the latter to review his predecessor's order. That application in terms purported to be made under sects. 376 and 378 of Act VIII. of 1859, and the counter petition filed by the Respondents seems to admit that the application was so made, and that a review of such an order might be had under those sections upon proper grounds, although it contends that what the petition sought in the particular case was in the nature rather of an appeal than of a review within the meaning of the Act.

Upon hearing the parties Mr. *Craster* made an order admitting the review. His judgment was in these words: "I consider this case may be admitted for argument. According to the general practice a Court is at liberty to hold a review of the order passed by it. The argument which is now made does not shew me any reason to believe that this Court has no power to have a review of its order in this case, although there is not any particular rule laid down for such a proceeding in the law according to which the above order was passed." The law to which he refers is obviously the *Registration Act*. After the order admitting the review was passed, but before the case was reheard in pursuance of it, the Respondents applied to the High Court, invoking its extraordinary jurisdiction; and that Court granted a rule to shew cause why the order of the 4th of January admitting the application for the review and directing it to be placed on the review file for argument, should not be set aside on the ground that it was made without jurisdiction; staying, pending the rule, all further proceedings under the order. The case was then argued in the High Court, the judgment under appeal was pronounced, and the rule for setting aside the order of the Judge as made *ultra vires* and without jurisdiction was made absolute.

A point was taken, though not very strongly pressed, at the Bar, to the effect that this order of the High Court was itself *ultra vires*, inasmuch as the order which it set aside must be taken to have been made, not by one of the ordinary *zillah* Courts, over which the High Court has an unquestioned power of superintendence, but by a District Court created by the Registration Act, over which it has no such power. Their Lordships can see no ground for this contention. It appears to them, looking at the Act of 1871, that although power is there given to the Government to appoint districts and sub-districts for the purpose of registration, the District Courts mentioned in the Act (except where the High Court is said to be, when exercising its local jurisdiction, a District Court within the meaning of the Act) must be taken to be the Courts exercising the ordinary civil jurisdiction within that district; and, therefore, in the case of a regulation province, to import the ordinary *zillah* Courts.

Another question raised was whether under the 76th section (of which the final words are, "no appeal lies from any order made under this section,") an order against which no appeal can be preferred must not be taken to mean only one by which the Judge directs the registrar to register a deed, and whether there may not be an appeal from an order like that passed by Mr. *Tayler* rejecting the application for registration. Their Lordships would have great difficulty in saying that an order of rejection does not fall within the term "an order made under this section;" because if the Judge does not make his order of rejection under the 76th section, it is difficult to see what other section gives him jurisdiction to make it. They do not, however, think it necessary to decide the question, because it is obvious that, whether an appeal lies from the order or not,

the right, if it exists, of reviewing an order may co-exist with the liberty to appeal; and, consequently, that the question whether the power of the Judge of first instance to review his order exists cannot be affected by the consideration whether an appeal lies from that order.

Another question raised, which it is equally or perhaps still more unnecessary to decide, is that suggested by Mr. *Arathoon*, viz., that, although a final order rejecting the application for registration may be made in this summary way, it would still be open to the parties benefited by the deed to propound it in a regular suit, and to obtain its registration by means of such suit. Their Lordships conceive that it will be time enough to decide this question when it arises. They only desire to observe that the case of *Futteh Chund Sahoo* v. *Leelumber Singh Dass and Others* (1), is no authority upon it. In that case the suit was for the specific performance of an unregistered agreement for sale, and sought to have, not the agreement, but the conveyance to be executed in pursuance of it, registered; and all that was decided was that the agreement not having been registered could not be given in evidence in the suit.

The principal question which their Lordships have to decide upon this appeal is whether the power to admit a review which is given by the Act of 1859 (sects. 376 to 378, and the following sections), does exist in such a proceeding as that under consideration, as it would unquestionably exist in a regular suit. If the general power is found to exist, a subordinate question may arise whether if the exercise of the power is not in strict accordance with the provisions of those sections, the order admitting the review can be quashed as one made wholly without jurisdiction.

Their Lordships are disposed to think that an order rejecting an application for registration under the Act of 1871 must be taken to be so far in the nature of a decree within the meaning of Act VIII. of 1859 as to fall within the operation of the sections in question. The proceeding may be what is technically called in *India* a miscellaneous proceeding, or it may be a summary suit; but the order made upon it is, so far as concerns the matter in dispute, final between the parties. Whether it is subject to appeal or not, it is, so far as the Court pronouncing it is concerned, a final order of adjudication between the parties.

But it seems to their Lordships that the determination of this question does not depend upon the mere construction of Act VIII. of 1859, because by the 38th section of the amending Act of 1861 it is expressly enacted, "that the procedure described by Act VIII. of 1859 shall be followed as far as capable in all miscellaneous cases and proceedings which after the passing of the Act shall be instituted in any Court." This provision, their Lordships conceive, expressly makes applicable to a proceeding to compel registration under the *Registration Act* the whole procedure of Act VIII. of 1859, including the power of admitting a review. And this was in fact almost admitted at the Bar by Mr. *Bell*, when he was contending that the right of appeal to the High Court would, under the 23rd section of the Act of 1861, have existed in this case.

It is argued, however, that if the 376th and following sections of Act VIII. of 1859 do apply to an order rejecting an application for registration, they do not justify the particular exercise of jurisdiction in this case. The 376th section says, "Any person considering himself aggrieved by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a superior Court, or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the *Sudder* Court, or by a decree of the *Sudder* Court from which either no appeal may have been preferred to Her Majesty in Council, or, an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council, and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or for any other good and sufficient reason, may be desirous

(1) 14 Moore's Ind. AP. Ca., 129; 2 P. C. J., 709.

of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." The application is to be made within ninety days of the date of the decree, unless the party can shew just and reasonable cause for having delayed his application. Then the 378th section enacts: "If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final." And then follows a provision that the opposite party is to have notice. And the Respondents contend that the order admitting a review in this case, though not the proper subject of appeal, was liable to be quashed, on the ground that the Judge had no jurisdiction to entertain the application, inasmuch as there was before him no distinct allegation of an error of law, nor any suggestion of the discovery of new evidence.

Their Lordships, looking to the original application to review, are by no means satisfied that it does not contain enough to give the Judge cognizance of the matter upon the strictest construction of Act VIII. of 1859. They allude particularly to the ninth ground of the petition, which refers to certain deeds and to certain evidence which seems to have been tendered in the course of the inquiry before Mr. *S. H. C. Tayler*, and rejected by him as unnecessary. That evidence, if not very material to the general question, was by no means immaterial with reference to one ground which the learned Judge gave for rejecting the application, because he dealt with the fact of one deed being for consideration, whereas that which was propounded was not for consideration. Therefore, if he allowed that matter to influence his judgment, it seems to be reasonable that the parties should have the opportunity of explaining those circumstances, and of having that evidence which he refused to admit brought before the Court upon a review; the evidence in fact would be in the nature of evidence which they had been from some cause prevented from adducing on the original hearing.

Their Lordships, however, do not rest their decision upon that narrow ground, because looking to the extreme generality of the terms used in these sections, particularly to these terms "other good and sufficient reason" and "necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice," they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to shew that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing. They do not consider that the case in the *Indian Jurist (Nuseeroodeen Khan* v. *Indernarayan Chaudury)* (1), and the other cases cited only limit the discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case the Appellate Court reverses the order because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case it quashes the order because there was no discretion at all to be exercised.

Their Lordships, for these reasons, are of opinion that the order of the High Court which is under appeal cannot be supported; and they most humbly advise Her Majesty to allow this appeal, to reverse the order of the High Court, and in lieu thereof to order that the rule to shew cause why the order of Mr. *Craster* should not be set aside be discharged, with the usual costs in the High Court.

The Appellant who has been obliged to come here must of course have his costs of this appeal.

(1) 1 Ind. Jur. 147.

20th and 21st June, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, the Right Hon. Sir Robert Porrett Collier, and the Right Hon. Sir Henry S. Keating.

On Appeal from the High Court at Bombay.

COWASJEE NANABHOY, (Plaintiff)* ... } *Appellant,*

versus

LALLBHOY VULLUBHOY and others, (Defendants) } *Respondents.*

Contract of Partnership—Right of Co-partners to dissolve partnership.

A contract between a partner and his co-partners for remuneration to the former for the management of the partnership business by a Commission on the sale, during his life-time, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on, except at a loss: nor does it imply an obligation to pay the managing partner compensation in case the partnership is dissolved for that reason.

Rhodes v. *Forwood* (L. R. 1 Ap. Ca., 256) refers to, and approved.

21st June, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

The circumstances under which this appeal arises are as follows.

On the 10th of June, 1857, *Cowasjee Nanabhoy* entered into an agreement with a number of persons, who were to form a partnership with him for the purpose of establishing a factory for the manufacture of cotton twist. As the terms of this agreement are very peculiar, it is as well to read *in extenso* the material parts of it. The beginning of the agreement is to this effect: "To *Parsee Cowasjee Nanabhoy Dawar*, written by us the undersigned, (who) do give in writing to you as follows:—You are establishing a factory for the manufacture of 'water' cotton twist. For the same there have been made 100 allotments, *i. e.*, 100 shares each; one share has been fixed at about Rs. 3,000, viz., three thousand. Relative to the same, we have given in writing to you this instrument, agreeably to the particulars written below. The first clause is this:—For the above-mentioned factory (ground is to be procured), and a building is to be erected, and machinery is to be sent for from *Europe*, and the same is to be set up here. In regard thereto, whatever business may have to be transacted, *i. e.*, the employment of persons, and whatever outlays may have to be made for the said factory, the whole management thereof, all we the undersigned shareholders having agreed, have intrusted to you that management, do you duly carry on during your life-time, and the entire authority for signing and carrying on the entire management of the said factory belongs to you, and after the decease of you, *Cowasjee*, the whole of the shareholders are to approve of such agent or trustee as the shareholders, having held general meeting, may appoint." The second clause runs thus: "Out of the above 100 allotments, *i. e.*, shares, as many shares as we have taken we have made known below in writing in the place of the signature of each of us, and at the time of signing this agreement, having paid you a deposit at the rate of Rs. 500, viz., 500 for each one share, a receipt bearing your signature was obtained." The third is in these terms: "For the above purpose, whatever may have been expended for a building and machinery, and whatever other outlays may have been made and may hereafter be made, all those we the shareholders are duly to pay in equal portions agreeably to our shares, the calls which you make in respect of the same as there may be need, we are duly to pay within fifteen days time. If within the said time of fifteen days we should not pay the amount of each call of those calls which you may make, then the share or shares subscribed by us shall become forfeited, *i. e.*, there

* 3 Cowells I. A., p. 200.

shall not remain on the part of those who may not pay the calls any right to the deposit to the amount of Rs. 500, viz., 500 paid per share, and the call or calls which may have been (already) paid, and the money paid for the same shall be credited to the profit account of this company; and hereafter should any shareholder of the shareholders who have signed below sell or make over his share or shares to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement." The fourth runs thus: "All we shareholders having agreed to make this agreement or settlement (viz.), that in return for the trouble you have been at in getting up this factory we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows: Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory all that do you sell; and for whatever you may sell on account of the factory do you duly receive from this company the commission at the rate of Rs. 5, viz., 5 per cent. during your lifetime, but upon purchases you are not to receive anything from the company; yet on goods which you may purchase from merchants and sell, you yourself having received a percentage, also agreeably to custom, do you duly give credit for the same to this company," and so on. The fifth relates to sending for machinery on behalf of the company, and setting up the machinery, and so forth. The sixth relates to the calling of meetings, and the remaining provisions do not for the present purpose appear to be material.

Cowasjee took a number of shares in the company, some of which he held up to the time of the winding-up. He was undoubtedly a partner with these persons. He called up the full amount which was contemplated by this agreement, namely, Rs. 3000 on each share, all the shares having been taken. Some time afterwards he called up another Rs. 1000 on each share, and he also borrowed a sum of Rs. 150,000; he borrowed it indeed upon his own credit, but he charged it to the company, and he made another call of Rs. 500 per share. Upon this the shareholders became dissatisfied; meetings were called, and they came to the conclusion that the company could not be carried on profitably with the capital which had been subscribed, or which they were bound to pay, and under these circumstances they filed a bill, praying, among other things, for a dissolution and winding up of the company. The order for the dissolution was made by the High Court of *Bombay*, and the reasons for making it are stated in the judgment of the High Court, of which it is not necessary to read more than the following passage: "Supposing the partnership to be for a definite period, or one which is not dissoluble at the will of the majority of the members, we are of opinion that a state of things has arisen which requires the Court to decree a dissolution. It is impossible for the business of the company to be carried on without making further calls on the shareholders, the debt is accumulating, and it appears that even with the capital subscribed the business could not be carried on." An appeal was preferred against this judgment to the Queen in Council. The judgment was affirmed by the Queen upon the advice of this Board, but entirely without prejudice to the question whether or not *Cowasjee* was entitled to compensation. Subsequently the High Court of *Bombay* decided that he was not entitled to any compensation, and from this last decision the present appeal is preferred.

This question arises upon the construction of the contract. It is to be observed, as was properly called to their Lordships' attention by the counsel for the Appellants, that this is not a contract between master and servant, nor between principal and agent—at all events, not a contract pure and simple between principal and agent—but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of *Cowasjee* is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not

necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets, the less it sells the less he gets, and if it sells nothing he gets nothing. This distinction, which indeed is implied by the very terms used, is one which has been recognised in several cases which have come before the Courts.

The question is, whether from the whole of this agreement it is to be inferred, by necessary or reasonable implication, that all the co-partners of *Cowasjee* bound themselves to carry on the business at all hazards, or at whatever loss, at least during his life, or in other words whether they agreed to renounce their right of dissolving the company if they found that it could not be carried on except at a loss, or whether as an alternative to either of these two cases they agreed to pay him compensation. The part of the agreement which has been most pressed upon their Lordships is that contained in the 4th clause, wherein this is said (and indeed the same expression is used in the first clause), "You are to receive commission for what you sell on our account during your lifetime." Certainly it appears to their Lordships that the effect of this provision would be to give *Cowasjee* a right to commission during his lifetime, provided that the company was carried on and any commission was earned. It may also be contended, though it is not necessary to decide whether correctly or not, that these terms import an agreement that the partnership should be carried on at least as long as *Cowasjee* lived; but that would not be enough for the Appellants, for they would have further to shew that the partners relinquished the inherent right they would possess, notwithstanding that the partnership were established for the life of *Cowasjee*, or even for a definite term, of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success. This right is stated in Mr. Justice *Lindley's* book on Partnership, at page 243 of the last edition, in which he says: "In a more recent and more important case, however, the Court recognised the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on, except at a loss, unless they do, the partnership will be dissolved by a Court of Equity. Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired." So even putting it in the light most favourable for *Cowasjee*, that the partnership was originally intended to exist at least during the time of his life, it remains to be shewn that there is any provision in this agreement from which it can be fairly inferred that his co-partners relinquished the right which they would have of applying to the Court for winding up the business if it could not be carried on at a profit, or, in the event of their exercising this right, undertook to pay him compensation. In this case the company has been wound up on almost precisely the grounds which are indicated in Mr. Justice *Lindley's* book, and the order for winding up has been affirmed by this tribunal.

Their Lordships, after giving their best attention to the whole of this agreement, have come to the conclusion that by no fair and reasonable intendment can it be inferred that the partners relinquished their right of dissolving or applying to have the company dissolved under the circumstances mentioned, or that they agreed, if they did exercise this right, to pay *Cowasjee* compensation. For this reason they are of opinion that the case of *Cowasjee* fails.

Many cases have been called to their

Lordships' attention, decided upon the terms of particular contracts, and more or less bearing upon the present, but inasmuch as the decision of this case rests upon the words of this contract, which is of a very peculiar character, their Lordships do not think it necessary or advantageous to pass those cases in review. They think it enough to say that the conclusion they have come to, that no such term as has been contended for is to be imported into this contract, appears to them in conformity with the current of decisions which have been quoted, and more especially with the last case of *Rhodes* v. *Forwood*, decided by the House of Lords.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court of *Bombay* be affirmed, and that this appeal be dismissed with costs.

21st and 22nd June, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

MIRZA MAHOMED AGA ALI KHAN BAHADOOR, (Plaintiff)* ... } *Appellant*,

versus

The WIDOW of BALMOKUND and others, (Defendants) ... } *Respondents*.

Money decree—Rights of decree-holder—Procedure in Execution—Act VIII. of 1859, ss. 201, 205, 206, 216, 236—Action before Attachment.

Under the Civil Procedure Code 1859 as well as the English law, a judgment for moneys due on a debt does not vest in a judgment-creditor any portion of the property of his judgment-debtor.

Held, consequently, that the Plaintiff having merely obtained a money decree against *J* could not maintain a regular suit against the Defendants (whom he alleged to be in possession of *J's* share in paternal property) for recovery of the unsatisfied portion of his money decree. Plaintiff had only the right to have the judgment executed according to the particular provisions of the Civil Procedure Code and not by action.

Where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed, and no other.

22nd June, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is an action brought to recover Rs. 12,420, being the value of a one-seventh share of *Jaidyal*, a judgment-debtor, in the property left by *Ishri Dass*, his father. The allegation in the plaint is that this amount is due from the Defendants, who hold the property. The claim is based on a decree which the Plaintiff obtained in the Civil Court at *Lucknow* on the 20th of November, 1863, for Rs. 14,460, against the aforesaid *Jaidyal*, who died, leaving the decree against him unsatisfied; and the plaint alleges that that decree gives the Plaintiff a right to institute the present suit. The plaint states that: "The property of the judgment-debtor being one-seventh share in the legacy of his father, *Ishri Dass*, is in possession of the Defendants, his brothers. *Bisheshoor Pershad*, one of the brothers of the judgment-debtor, the Defendant No. 5, realised the debts due to the saltpetre firm of his father to the amount of Rs. 14,280, 6*a*., and the Plaintiff obtained a decree from the Civil Court of *Lucknow* on the 7th of September, 1866, for Rs. 2040. 0*a*. 10*p*., equivalent to one-seventh share of the judgment-debtor in the collections made by Defendant No. 5, and recovered the amount of this decree. This decree was confirmed by the Judicial Commissioner on the 16th of March, 1867." The original judgment therefore was reduced from Rs. 14,400 to the amount sought to be recovered The plaint proceeds: "The Plaintiff now sues the Defendants, who hold the property of the judgment-debtor in their possession, for that portion of the decree against *Jaidyal*

* 3 Cowell's I. A., p 241.

which has not been satisfied, and prays that, after a due inquiry, adjustment of accounts, and the determination of the value of the legacy of *Ishri Dass* out of the share which may be found due to the deceased judgment-debtor, the amount claimed may be decreed to Plaintiff with costs of the Court, and interest up to the date of realization." The Defendants put in written statements; one of them stated that the Plaintiff was not the legal representative of *Jaidyal*, and therefore could not sue, and the other said that there was no privity. The real question in this case is, whether the decree gave the Plaintiff a right to institute the present suit; in other words, whether a judgment-creditor has by virtue of the judgment, without execution, a right to the property of the judgment-debtor, whether it consists in lands, in moveable property, or in debts. The Plaintiff contends that by virtue of this judgment he became entitled to the property of his judgment-debtor, and was entitled to recover it from the persons in whose hands it was.

The Civil Judge who tried the cause in the first instance dismissed the suit. Upon appeal to the Commissioner, he held that the suit was maintainable, and awarded to the Plaintiff the amount claimed, on the ground that certain books had not been produced, and that he was entitled in consequence, under sect. 170 of Act VIII. of 1859, to give a decree to the Plaintiff for the full amount claimed.

The case afterwards went before the Judicial Commissioner, who reversed the decision of the Commissioner. He held that the decree of the Civil Judge in the first instance was the correct one; and that the judgment which the Plaintiff had recovered against *Jaidyal* did not vest in him the property of *Jaidyal*, or the value of it. Their Lordships are of opinion that the view taken by the Judicial Commissioner was correct, and that a judgment does not vest in a judgment-creditor any portion of the property of his judgment-debtor. It gives him a right to have the judgment executed, but until execution the property of the judgment-debtor does not vest in the judgment-creditor simply by virtue of the judgment. That is so according to the law of this country, and it is also the case under the Code of Civil Procedure, Act VIII. of 1859, which is the law in force in *India*. By sect. 206 it is enacted that no moneys which are payable under a decree are to pass into the hands of the judgement-creditor except through the intervention of the Court. It is expressly provided that "all moneys payable under a decree shall be paid into the Court whose duty it is to execute the decree, unless such Court or the Court which passed the decree shall otherwise direct." A judgment-debtor is not justified in paying the money to the judgment-creditor unless the Court makes an order to that effect; but he is bound to pay it into Court, so that there shall be no dispute afterwards as to whether the money has or has not been paid over to the judgment-creditor. Further, it is enacted that "no adjustment of a decree in part or in whole shall be recognised by the Court unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made or to whom it has been transferred." And it has been held upon that section that if a judgment-debtor chooses to pay the money otherwise than through the Court, he must take the risk of being compelled to pay it over again.

Now, if this suit could be maintained, how is the money to get into Court? If the judgment of the Commissioner be upheld, the Plaintiff would be entitled to levy the amount against the Defendants in the suit, and the money would never pass through the Court at all. Therefore, even looking at that section of the Act alone, it would be clear that this suit cannot be maintained. But the Act provides, sect. 201, that "if the decree be for money it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary." Therefore, the decree is to be satisfied, not by bringing an action against the debtors of the judgment-debtor, or those who hold his property, but it is to be enforced by the attachment and sale of the property of the judgment-debtor.

Then the Act points out the mode in which the property is to be attached, and the different classes of property which are liable to be attached. By sect. 205, "the following property is liable to attachment and sale in execution of a decree, namely, lands, houses, goods, money, bank notes, cheques, bills of exchange, promissory notes, Government securities, bonds or other securities for money, debts, shares," and so on. It is not clear what the one-seventh of the legacy alleged to be in possession of the Defendants was: whether it consisted of lands or of money. If it was land or money it was liable to be attached under sect. 205, and if it was a debt due from the Defendants to *Jaidyal* it was also liable to be attached. The Act having stated what property is liable to attachment, goes on specifically to point out the mode in which the property is to be attached. If it is land, it is to be attached in a particular manner; if it is goods, it is to be attached in another manner; if it is a debt, it is to be attached in the manner provided by sect. 236. By sect. 236, "Where the property shall consist of debts not being negotiable instruments, the attachment shall be made by a written order, prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever, until the further order of the Court." Having described the property liable to be attached, and the mode of attachment, the Act proceeds to point out how sales are to be conducted.

It has been pointed out by Mr. *Leith* in the argument that if an action such as this could be supported, all the provisions of the Code would be frustrated.

By sect. 216 of the Act it is provided that "if an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for, requiring him to shew cause, within a limited period to be fixed by the Court, why the decree should not be executed against him."

Now the decree against *Ishri Dass* was obtained as far back as the 20th of November, 1863. If the Plaintiff had applied for execution on the same date as that on which he commenced the suit, a much longer period than a year would have elapsed between the date of the decree and the date of the application for execution. Then it would have been necessary for the Court to issue a notice to the party against whom execution was applied for, requiring him to shew cause, within a limited period to be fixed upon, why the decree should not be executed against him. It would have been necessary in this case, *Jaidyal* being dead, to have called upon some one who was his representative, to shew cause why the judgment should not be executed, because after a year it would be presumed that the judgment might have been satisfied. But then there is the provision in sect. 216 that "no such notice shall be necessary in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous application for execution." It appears that an application was made for a certificate from the Court at *Lucknow*, in which the decree had been passed, to the Court at *Sultanpore*, for the purpose of having it executed. Many objections were made by the person against whom the execution was to issue, and Mr. *Young*, the Deputy-Commissioner, on the 29th of July, 1868, made this order: "Judgment-creditor now says *Jaidyal's* claim consists of debts and land; on his making proper application these can be attached; but in the event of *Balmakund* declining to pay, I am clearly of opinion that the only way to compel him is by regular suit, and I shall then be ready to appoint a receiver. Judgment-creditor's application is refused, and case to be struck off file of pending cases." That order was passed on the 29th of July, 1868, and it appears to be the last order that was passed upon an application for execution. This action was not commenced until the 25th of April, 1871, which was more than two

years after that order had been passed. The Plaintiff could not have obtained execution of this judgment if he had applied for execution without proceeding under sect. 216, and having *Jaidyal's* representative summoned to shew cause why execution should not issue. Then can he commence this action, two years and more after that last order was passed, without calling upon any one representing *Jaidyal* to shew cause why he should not levy this money? The presumption is, that after this period the debt has been satisfied. The Plaintiff could not have executed the decree until he had given notice to some one representing *Jaidyal* to shew cause why the execution should not issue; but if this action can be maintained, then, as Mr. *Leith* has very properly observed, the Plaintiff would be enabled to enforce his decree behind the back of and without notice to the representatives of *Jaidyal*.

Their Lordships are clearly of opinion that in this case the decree did not vest in the Plaintiff any right to the property for which he is suing, and consequently that he cannot maintain the suit. The Judicial Commissioner has very clearly laid that down in his judgment. He says: "This suit, as laid, is not a suit to establish the Plaintiff's judgment-debtor's title to certain definite property previously attached, but is preferred on the assumption that the Plaintiff, by virtue of his decree, occupies the position of his judgment-debtor, and is therefore entitled to establish his claim to a certain share of the estate left by his judgment-debtor's father." In another part of his judgment he says, and their Lordships quite agree with him in that remark, that "if every decree-holder could proceed by regular suit to enforce his decree, all the provisions in the Civil Procedure Code in regard to executions of decree would be of no avail. But it is evident to the Court that where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed, and no other." In this case the procedure prescribed is to proceed to execute the judgment by attachment and sale, if necessary, and not to proceed by action. If an action like this could be maintained—if the Plaintiff could recover these Rs. 12,420 from the persons in possession of the judgment-debtor's property—what answer would they have if another execution creditor were to ask to attach the same property and to sell it? Could they have the property attached in their hands and taken from them when they had paid Rs. 12,420? And how could the difference be ascertained if the Rs. 12,420 should not be the full value of the property liable to attachment? How could any other creditor get the difference between the Rs. 12,420 and the actual value of the property? He must be driven to a suit or he must take the property. If he attach the property, then it would be taken from the Defendants, after having been compelled to pay the Rs. 12,420; if he could not attach the property, then he must be driven to a suit, and must be deprived of his right to execution of the decree.

It appears to their Lordships that the proper mode of enforcing a decree is that pointed out by the Code of Civil Procedure, namely, by execution and attachment and sale, or by execution and attachment, and the appointment of a receiver under sect. 243 to collect the property.

Their Lordships are of opinion that the Judicial Commissioner came to a right conclusion, and they therefore will humbly recommend Her Majesty to affirm his decision, and to dismiss this appeal, with costs.

27th, 28th and 29th June, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NIDHOOMONI DEBYA, (Plaintiff)* ... } *Appellant,*

versus

SARODA PERSHAD MOOKERJEE and others, (Defendants) ... } *Respondents.*

Hindu Will—Gift to adopted son—Performance of ceremonies—Persona designata—Gift.

G, a childless Hindu, by his will directed as follows:—"And as I am desirous of adopting a son, I declare that I have adopted *K*, third son of my eldest brother. My wives shall perform the ceremonies according to the *Shastras*, and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property moveable and immoveable, in my own name or *benami*, left by me, also that adopted son. When he comes to maturity the executors shall make over everything to him to his satisfaction." . . . "God forbid, but should this adopted son die, and my younger brother *Nilruttun* have more than one son, then my wives shall adopt a son of his. If at that time *Nilruttun* has not a son eligible to adoption, they shall adopt another son of *Saroda*, and the wives and executors shall perform all the afore-mentioned acts."

In a suit *Ny* N, one of *G's* widows, as an heiress of her husband, to set aside the will and recover half of the property—

Held, that on the evidence the will was proved and that its effect was a gift of the property to the adopted son as a designated person, independently of the expected performance of certain ceremonies by the testator's widows.

Quære—whether the performance of the ceremonies was necessary for the completion of the adoption; and if so, the power having been given to two widows, could one alone perform them effectually.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This appeal arises under these circumstances:—

One *Doorga Pershad Mookerjee*, a member of a Brahminical family, had three sons, *Baman Dass*, *Gouri Pershad*, and *Amoda Pershad*. *Gouri* had also three sons, *Saroda*, *Grijanund*, and *Nilruttun*. *Grijanund* died at the age of twenty-one, leaving two widows, and one of those widows, *Nidhoomoni Debya*, brings this suit as heir of her husband, for the purpose of recovering a half of his property. She also seeks to set aside a will of her husband and a will of her husband's father. The will of her husband which she seeks to set aside was dated on the 21st of January, 1865, a day, or a short time, before his death. The effect of it is to declare that he had adopted a son of his elder brother *Saroda*, and to devise and bequeath all his real and personal property to that adopted son, with the exception of a provision for the widows. The will of *Gouri Pershad* was to the effect, that his three sons should take his property as joint tenants, and that upon one of them dying the residue should go to the survivors. In the event of the will of *Grijanund* being set aside, the Defendants might possibly have availed themselves of the will of *Gouri* his father for the purpose of shewing that the widow could not recover in right of her husband, but if the will of *Grijanund* is affirmed no question as to the will of *Gouri* arises.

The subordinate Judge found against both the wills. That decision was reversed on appeal to the High Court, consisting of the Chief Justice and two puisne Judges. The High Court affirmed the will of *Grijanund*, and they rightly stated that that will being affirmed, no question arises with respect to the will of *Gouri*.

Their Lordships do not think it necessary to go into a lengthened examination of the evidence for and against this will. They think it enough to say that they concur with the opinion of the High Court that the will is sufficiently proved. It is, as the High Court observe, a will which it is highly probable that a man under the circumstances of *Grijanund* would make. There is a great body of evidence in support of it which appears to their Lordships to preponderate over the evidence against it; among the evidence in sup-

* 3 Cowell's I. A., p. 253.

port of it is that, among others, of the family medical man, and of a relation who appeared to have the confidence of both the factions into which the family appears unfortunately to have been divided, and to have been required to arbitrate between them. The will was published and made known almost immediately after the death of the testator; and the adoption of the child which he declares in the will he has made was also made public and insisted upon. It is also to be observed that other members of the family, even those who now oppose the will, recognised the adopted child *Koibullo* in various judicial proceedings. They brought actions in which they associated his name with theirs, and one of them, *Amoda*, who now opposes the will, endeavoured to defeat an action on the ground that this very *Koibullo* ought, as the adopted son of *Grijanund*, to have been joined with him as a Defendant.

What has been said would have been sufficient to dispose of the case but for a contention which has been set up here, apparently for the first time, there being no trace of it in the proceedings below. The passages of the will on which it is based are in these terms: "And as I am desirous of adopting a son, I declare that I have adopted *Koibullo Pershad*, third son of my eldest brother *Saroda Pershad*. My wives shall perform the ceremonies according to the *Shastras*, and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property moveable and immoveable, in my own name or *benami*, left by me, also that adopted son. When he comes to maturity the executors shall make over everything to him to his satisfaction. The executors are empowered to perform the daily and occasional family ceremonies and pay the expenses of suits, &c., after due consideration. The minor, when he attains maturity, shall be incompetent to object to anything done by them in this respect. God forbid, but should this adopted son die, and my younger brother *Nilruttun* have more than one son, then my wives shall adopt a son of his. If at that time, *Nilruttun* has not a son eligible to adoption, they shall adopt another son of *Saroda*, and the wives and executors shall perform all the afore-mentioned acts." It has been argued that inasmuch as the testator directed that his wives should perform certain ceremonies according to the *Shastras*, which ceremonies (though the nature of them has been by no means defined) were necessary to the completion of the adoption, and inasmuch as these ceremonies were performed by one wife only, the adoption was not complete, and *Koibullo* never in any sense became the son of *Grijanund*.

The argument raised two questions. First, whether or not these ceremonies (whatever they may have been) were necessary for the completion of the adoption, or whether all that was necessary to it had been done by the testator, who in his lifetime received the child, the child having been given by his natural father. Secondly, whether, supposing these ceremonies to be necessary, and a power to have been given to two widows to perform them, one widow only could perform them effectually. But it appears to their Lordships that neither of these questions arises in this case, and probably it is because they did not arise that they were not discussed. The effect of the will according to their view is this: "I declare that I give my property to *Koibullo* whom I have adopted." There is a gift of his property by the testator to a designated person. This direction follows, "my wives shall perform the ceremonies according to the *Shastras*, and bring him up." Undoubtedly the testator desired and expected that the wives should perform certain ceremonies. He requested them to do so. But it appears to their Lordships that it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by *Koibullo* to be entirely dependent on whether the wives choose or did not chose to perform the ceremonies. If they did not, it may be that the adoption is not in all respects complete, although their Lordships by no means decide this, or give any opinion on the subject. Be that as it may, the gift of the property nevertheless takes effect. The provision "God

forbid, but should this adopted son die, and my younger brother *Nilruttun* have more than one son, then my wives shall adopt a son of his," further indicates that the testator did not contemplate his widows having the power of cancelling the adoption of *Koibullo*, and ousting him from the benefit he was to take under the will, by declining to perform the ceremonies. Whether they performed the ceremonies or not, it is certain that as long as *Koibullo* lived no other adoption could take place.

For these reasons it appears to their Lordships that the judgment of the High Court is right; that the widow has no claim under this will except to whatever is given to her for her maintenance; and they will humbly advise Her Majesty that the decree of the High Court should be affirmed, and this appeal dismissed with costs.

30th June, and 1st and 4th July, and 25th November, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAM COOMAR COONDOO & another, (Plaintiffs)* } *Appellants,*

versus

CHUNDER CANTO MOOKERJEE, (Defendant)... } *Respondent.*

Champerty and Maintenance—Agreements contrary to public Policy—Action for improperly puting the law in motion—Malice—Want of reasonable and probable cause—Application under s. 73, Act VIII. of 1859—Costs.

The English laws of maintenance and champerty are not of force as specific laws in *India* either in the *mofussil* or in the Presidency towns. The ground on which contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is that they are contrary to public policy.

An agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not necessarily opposed to public policy, since cases may easily be supposed in which it would be in furtherance of right and justice, that a suitor who had a just title to property, and no means to support it, should be assisted in this way. But agreements purporting to be made to meet such cases, when found to be extortionate and unconscionable, so as to be inequitable, or to be entered into for improper objects, as for the purpose of gambling in litigation, or of injuring others by encouraging unrighteous suits, are contrary to public policy, and ought not to have effect given to them.

Since by the law of *India* a champertous agreement does not constitute a punishable offence, an action in that country, founded on alleged champerty, to recover losses and costs incurred in litigation, cannot be sustained on the ground that a remedy by action accrues where an indictable offence has been committed.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it has been done maliciously and without reasonable or probable cause. In the absence of such proof, an action for loses and costs incurred in defending a suit will not lie as against a person who is alleged to have been a mover in that suit, and to have had an interest in it, but who had not been made a party to the record; since such a state of things creates no legal privity from which a promise can be implied on which an action on contract can be founded, nor does it, *ex hypothesi*, constitute a legal wrong.

Where it appears that the Plaintiff in a suit is in fact suing on help of another person who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given.

The rejection by the Court of an application under Act VIII. of 1859, s. 73, to have a stranger, who has an interest in the suit, made a co Plaintiff on the record, cannot give a ground for an action against such stranger for costs incurred in the suit, which would not otherwise lie.

The cases in which persons other than parties to the suit have been held liable to costs in England, relate to applications either in the cause itself, or to the disciplinary and summary jurisdiction of the Courts. They give no support to the contention that an independent action will, under such circumstances, lie.

25th November, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was instituted by the Appellants, who were the successful Defendants in two former suits brought by one *McQueen* and his wife against them, to recover from the Defendant, *Chunder Canto Mookerjee*, who was neither an ori-

* 4 Cowell's I. A., p. 23.

ginal nor added party in those suits, the amount of the costs incurred by them in that litigation, and which *McQueen* and his wife, by reason of their poverty, were unable to pay.

The principal suit of the *McQueens* (the other being for mesne profits only) was brought in the *Hooghly* Court to recover from the present Plaintiffs some lands in *Howrah*, which their father had purchased of one *Bibee Bunnoo*.

Mrs. *McQueen* was the illegitimate daughter of one *McDonald* and *Bibee Bunnoo*, and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now Plaintiffs in that suit was that *Bibee Bunnoo* was either the real owner, or had been allowed by *McDonald* to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty-four years after the purchase, and had greatly improved it.

The principal *Sudder Ameen* held the suit to be barred by limitation, and dismissed it. The High Court (finding that *Bibee Bunnoo* had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then Plaintiffs, the *McQueens*.

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then Defendants (the now Plaintiffs) should have their costs in *India*, and of their appeal to Her Majesty.

These costs amounted to a large sum, and the *McQueens* were unable to pay them.

The connection of the Defendant *Mookerjee* with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the *McQueens* and *Mookerjee*, which recited an apparently good title of the former to the property. By this agreement *Mookerjee* was appointed the attorney and *mooktear* of the *McQueens* to conduct the litigation against the present Plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs. 150 per mensem to the *McQueens* for their support during the pendency of the proceedings. On the other side they agreed in effect that *Mookerjee* should have the management of the suit, they however assisting him, unless it happened that *McQueen* could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of *Mookerjee*."

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, *Mookerjee* should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the *McQueens*.

This power of attorney was made irrevocable, unless upon the terms that the *McQueens* should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs.2000 as liquidated damages.

McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by *Mookerjee*.

It appears that after the present Plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the *McQueens* obtained possession of the property. The Court having ordered the possession to be restored, unless the *McQueens* gave security to the amount of Rs. 12,000 to repay what would be due in case the decree should be reversed, the present Defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, *Mookerjee* purchased of the *McQueens* all their interest in the principal suit, and the suit for mesne profits, for Rs. 22,000, out of which he was to deduct Rs. 12,000 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that in the former

suit the now Plaintiffs—upon the agreement between *Mookerjee* and the *McQueens* coming to their knowledge—applied to the Judge to have *Mookerjee* made a party to the suit under the 73rd clause of Act VIII. of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the *McQueens*, the present Plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the Plaintiffs being in lawful possession as owners of the property in question, the Defendant, knowing this was so, maliciously conspired with the *McQueens* to bring a suit in their names to take the possession from them, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the *McQueens*, and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the Plaintiffs," in the names of persons who had no right, and were without means to pay the costs. It then avers that the former suit was brought "maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts shewing the Defendant's connection with them, alleges that "the litigation was instigated and carried on by the Defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the Defendant, maliciously and without probable cause, had been proved, this action would undoubtedly have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice *Williams* in *Cotterill* v. *Jones* (1):—

"It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Courts in *India* on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the Defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the Plaintiffs. The terms of the agreement, and his large expenditure, shew that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the *McQueens*, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then Plaintiffs. Indeed, it was properly admitted at their Lordships' Bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the Bar, which, stating them generally, are:—

1. That the agreement and acts of the Defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the Plaintiffs have suffered special damage from them.

2. That the Defendant was the real actor in the former suits, and had an interest in them, and was, therefore, responsible for the costs of them.

(1) 11 C. B. 735.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in *England*, have been introduced into and form part of the law of *India*, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the Bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper Plaintiff, in his petition of appeal to the *Sudder* Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. (*Ram Gholam Singh* v. *Keerut Singh* (1)).

In 1836 the *Sudder* Court refused to enforce against a successful litigant an agreement he had made to give two *annas* of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. (*Brijnerain Singh* v. *Tekuerain Singh* (2)).

In 1840 a similar agreement to that in the last case came before the Court; one Judge thought it was not proved; but the other, Mr. *Tucker*, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases." (*Zuhoorooniss Khanum* v. *Russick Lal Mitter* (1)).

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the Plaintiffs." (*Andrews* v. *Maharajah Sreesh Chunder Race* (2)).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full *Sudder* Court consisting of five Judges, in which the Principal *Sudder Ameen* had dismissed a suit because the Plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal *Sudder Ameen* was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir *R. Barlow* says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the Plaintiffs." Mr. *Welby Jackson*, whilst he thought the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such aarangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that as between a Plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognise and

(1) 4 Select Reports, 12.
(2) 6 Select Reports, 181.

(1) 6 Select Reports, 298.
(2) S. D. A. 1849, Beng., 310.

enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." (*Kishen Lal Bhoomick* v. *Pearee Soondree* (1)).

This case appears to have been generally regarded as a leading decision. Mr. Justice *Glover* so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal: *Panchcouree Mahtoon* v. *Kalee Churn* (2). In this same case, however, Mr. Justice *Macpherson* said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in *India* in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and Another* v. *Amirtamoyee Dassy*(3), which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice *Phear*, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in *England* is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in *India*, and therefore, on grounds of public policy, void. Upon an appeal to the full Court, the Chief Justice (Sir *Barnes Peacock*) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice *Macpherson* agreed with Mr. Justice *Phear* in thinking that the agreement was void, as being against public policy.

Mr. Justice *Holloway* in a case which came before the High Court of *Madras* in its original jurisdiction in 1870, expressed a strong opinion that the English statute and common law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice *Holloway* on the application of the English statute and common law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it. (*Mulla Jeffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (1)).

This opinion of Mr. Justice *Holloway* seems to be directly opposed to the view expressed by Chief Justice *Scotland* in delivering the opinion of the High Court of *Madras* in a former case (*Pitchakutti Chetti* v. *Kamala Nayakkan* (2)). The Chief Justice there says:—"Maintenance and champerty are made offences by the common and statute law of *England*, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindu law relating to contracts. (See 1 *Strange's* Hindu Law, p. 275.)"

The passage in *Strange* alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of *Bombay*, *Damodhar Madhavji* v. *Kahandas Narandas* (3), *Westropp*, C.J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the *Mofussil*.

To return to the *Bengal* Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soonduree Chowdhrain* v. *The Court of*

(1) S. D. A. 1862, Beng., 394.
(2) 9 Suth. W. R., 490.
(3) 4 Beng. L. R., 1.

(1) 7 Mad. H. C. R., 128.
(2) 1 Mad. H. C. R., 153.
(3) 8 Bomb. H. C. Rep. O. J. 1.

Warde (1), the Court (Sir *R. Couch* being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer* v. *Kamala Naicker* (2). He also referred with approval to the remarks of Mr. Justice *Holloway* as to the mischievous effects of such agreements in *India*.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice *Macpherson* was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell* v. *Watson* (3), that the present suit might be maintained.

In the judgment of the High Court delivered by Sir *R. Couch*, C.J., reversing Mr. Justice *Macpherson's* decree, the Chief Justice says: "It has been always admitted that the English Common Law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply to the *Mofussil*, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 *Moore*), are considered to be immoral and against public policy and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in *India* so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in *England*."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In the case reported in the 8th *Moore*, the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and this being so, their Lordships observed: "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law and partly by statute, are forbidden." But in the course of the judgment they made the following observations: "The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in *England*; but they have been properly regarded in *India* as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Chedambara Chetty* v. *Renga Krishna Muttu Vira Puchaiya Naickar* (1), in which a suit to enforce an unrighteous and champertous bond was

(1) 20 W. R., 446.
(2) 8 Moore's Ind. Ap. Ca., 170; 1 P. C. J., p. 733.
(3) 8 M. & W. 601.

(1) Law Rep. 1 Ind. Ap., 241.

dismissed, the following observations were made:—

"With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England*. The statute of champerty being part of the statute law of *England*, has of course no effect in the *Mofussil* of *India*; and the Courts of *India* do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts of *England*. On the other hand the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in *India*; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the *Mofussil*, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the *Mofussil* has not been always borne in mind.

It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of *India* by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in *England* in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of *India*, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from *India* of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons* v. *The East India Company* (1). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the Defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the *Mofussil* on this point. Having regard to the frequent dealings between dwellers in the towns and those in the *Mofussil*, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into *India*, it seems clear to them upon

(1) 1 Moore's Ind. Ap. Ca. 176; 1 P. C. J., 1-107.

the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in *India*, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the *McQueens* if their suit had been successful; but assuming this to be so, the Plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the Defendant for the losses and costs of the litigation. By the law of *India*, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the Plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the Defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of the first impression, no precedent for it having been found either in *England* or *India*. It may be assumed that, under the first agreement, the Defendant acquired [a contingent interest in the property the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, *McQueen* was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the Defendant, subject to a power of revocation by the *McQueens* on onerous terms, which was not exercised. But this state of things created no legal privity between the Plaintiffs and the Defendant, from which a promise can be implied on the part of the Defendant to pay the present Plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shewn, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent

suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or by the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the Plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now Plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the *McQueens* and the Defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-Plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in *England*, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *In re Jones* (1). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward* v. *Gifford* (2). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in *Calcutta* was much relied on by the Appellant's counsel: *Bamasoonduree Dossee* v. *Anundolal Bose*, (3.) There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal Plaintiff, Mr. Justice *Phear*, on a motion, made apparently in the suit, ordered the real Plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir *Barnes Peacock*) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice *Phear's* judgment rests, but on the circumstances of the case, which shewed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the Plaintiffs that if the costs in *India* were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the Defendant, pending that appeal, of all the rights of the *McQueens* in the property and the suit. Undoubtedly the *McQueens* after this purchase became nominal Appellants only, and the claim of the Plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrance, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second

(1) Law Rep. 6 Ch 497.
(2) 4 M. & W. 194
(3) Bourke's Rep. O. C. J., 45; and on appeal, p. 96.

ground on which it is sought to support the present action fails. And if the law administered in the *Mofussil* is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind, and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the Plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the Defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

11th, 12th and 13th July, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of the Lucknow Division.

CHOWDHRI MURTAZA HOSSEIN, (Defendant)* } *Appellant,*

versus

MUSSUMAT BIBEE BECHUNNISSA, (Plaintiff) } *Respondent.*

Act VIII. of 1859, sec. 327—Sufficient cause—Setting aside an award—Consultation with expert—Waiver of objection—Submission to chances of arbitration.

According to the true construction of Act VIII of 1859, the earlier sections are not incorporated into the 327th section as they are expressly incorporated into the 326th; and the words "sufficient cause" should be taken to comprehend any substantial objection which appears upon the face of the award, or is founded on the misconduct of the arbitrators, or in any miscarriage in the course of the proceeding or upon any other ground which would be considered fatal to an award on an application to the Courts in *England*.

The mere fact of the arbitrators consulting an expert was not a valid objection to their award. On an objection that the award was invalid because the will referred to the arbitrators referred to another will, which was not produced before them by the Plaintiff.

Held that although the objection might have been sufficient if the Defendant had objected to the arbitrators proceeding to make an award, the Defendant was no longer entitled to object to the validity of the award as notwithstanding the knowledge of the suppression he did submit to take his chances of the arbitration.

13th July, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an application under the 327th section of Act VIII. of 1859 to have an

* 3 Cowell's I. A., p. 200.

award filed in Court, with the usual consequence of having its provisions enforced as a decree of Court.

The arbitration which resulted in this award came about in this way: the Plaintiff, who seeks to have the award filed, was the widow of one *Chowdhry Sarfaraz Ahmud*; the Defendant, who resists the filing of the award, is *Chowdhry Murtaza Hossein*, who was the brother of *Sarfaraz Ahmud*. It appears that *Sarfaraz Ahmud* left not only a widow, but a daughter and daughter's children, of whom one was a son; that a considerable part of his property consisted of *talooks*, and that he was registered as *talookdar* under the schedules of Act I. of 1869, so as to make his *talooks* descendible in the case of intestacy to a single heir according to the rules laid down in the 22nd section of that statute. The effect of these was to make the *talookdary* property of *Sarfaraz Ahmud* descendible to his daughter's son, if he had been recognised and treated by the deceased as his own son, but in default of such recognition, to his brother, in preference to his widow. The Act gives the *talookdars* the power of altering this law of succession by any will made more than three months before the death of the testator, or by one of later date if made with a particular form of attestation. It is, however, an admitted fact in this case, that the will of *Sarfaraz Ahmud* was made within a month of his death, and was not attested in the manner prescribed by the statute. The question raised and considered in these proceedings was in terms whether the will was valid or invalid; but the proper issue was whether such a will was sufficient to pass *talookdary* property, since it might be a good will according to Mahomedan law as to one-third of the testator's other property, although it was not executed according to the provisions of the Act.

In this state of things the brother, whose claim to inherit the *talooks* was liable to be defeated only by proof of the recognition of the grandson as a son, of which there is no question in these proceedings, was induced to enter into a submission to arbitration, the effect of which was to make his rights and the rights of the widow determinable according to the terms of the will of the testator, and, therefore, for the purposes at all events of that arbitration, to recognise the sufficiency of the will. The submission to arbitration was in this form: We agree that "whereas Mr. *W. Glynn*, the Deputy-Commissioner of *Barabunki*, has with our consent appointed *Chowdhree Ghullam Furreed*, *talookdar* of *Barraiee*, *pergunnah Rodowlee*, and *Rughunath Singh*, *talookdar* of *Palee*, arbitrators, to determine according to the terms of the will of the deceased *talookdar* the dispute between *Chowdhry Murtaza Hossein* and *Chowdrain*, widow of *Sarfaraz Ahmud*, deceased, relating both to the property specified in the will, and to that not mentioned therein, we do hereby declare and duly execute this document." The arbitrators made their award on the 16th of March, 1871. The suit to have it filed in Court was commenced on the 21st of August, 1871. Both parties seem to have made references to the Deputy-Commissioner complaining of portions of the award, but the result was that the widow, at least, adopted it, and took these proceedings in order to enforce it.

In the Courts below an objection was originally taken to the form of the suit on the ground that the award was not an award within the meaning of the 327th section, but a judicial award which could only be dealt with under the earlier sections of the Act. That point has been given up, and the propriety of the suit must now be taken to be admitted.

A question, however, has been raised whether the earlier sections of the Act are incorporated into the 327th section, so as to give the Court proceeding under the latter section the power of remitting an award which is insufficient upon the face of it back to the arbitrators for amendment; and also how far the power of such a Court to refuse to file an award is limited by the 324th section, which says that no award shall be set aside except on the ground of misconduct or corruption of the arbitrators or umpire. Their Lordships are of opinion that, upon the construction of the Act, the earlier sections are not incorporated into the 327th

section as they are expressly incorporated into the 320th; and that the words "sufficient cause" should be taken to comprehend any substantial objection which appears upon the face of the award; or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country.

The objections which were formally taken to the admission of this award were embodied in the nine issues settled by the Deputy-Commissioner of *Lucknow*, to whom the cause was transferred from the Deputy-Commissioner of *Barabunki*. Those which are involved in the first, second, third, fifth, eighth, and ninth issues have here been given up by the learned counsel for the Appellant as untenable. That raised by the fourth issue was relied upon; it is in substance, that the arbitrators before making their award had consulted one *Mahommed Ali*, a *vakeel*, or native lawyer. The sixth was in these terms: "Is the award, being based on an invalid will, itself invalid?" It will hereafter be considered what is embraced in that issue. The objection which it patently raises, viz., that founded on the date and execution of the will, is now no longer relied upon. The seventh was that the arbitrators were bribed. The result is that the only objections raised by the issues which are now relied upon are, the consultation of the pleader, the corruption of the arbitrators, and whatever is included in the sixth issue.

It will be convenient at once to dispose of the seventh issue by saying that the Deputy-Commissioner, after hearing the evidence that was adduced before him, came to the conclusion that there was no ground for imputing corruption to the arbitrators; that the story told by the witnesses as to the bribes that were given was false, and that their Lordships see no ground whatever for dissenting from that finding. This was not the finding of two Indian Courts, because the Commissioner to whom there was an appeal thought that he was incompetent to entertain that question. Their Lordships upon the evidence unhesitatingly acquit the arbitrators of corruption in this matter.

The point as to the consultation of the pleader was disposed of in the course of the argument by their Lordships, who intimated a clear opinion that the case implicating the pleader in the alleged corruption having failed, the mere fact that the arbitrators consulted a person supposed to be learned in the law was not a valid objection to their award. An objection was also founded on a passage in the record wherein it appeared that on one occasion one arbitrator sat alone; but upon the whole their Lordships are of opinion that the final award was made by the two arbitrators, and that there is nothing in this objection, which seems never to have been raised in the Courts below.

The case of the Appellant is then reduced to the objection which he contends is involved, though not explicitly stated, in the sixth issue. It is in effect that, by reason of the reference in the ninth paragraph of the will which was before the arbitrators to another document described as "a will bearing the testimony of *Rajah Farzand Ali Khan* and *Rajah Jugmohun Singh* in the possession of my wife," which was not produced before the arbitrators, they cannot be said to have had the whole will of the testator before them; and ought not to have made an award without having that document produced before them; and that by reason of this miscarriage the Court ought to refuse to direct the award to be filed.

The award contains the following statement regarding the missing document: "It is worthy of observation that the *Chowdrain* has rendered her conduct suspicious by concealing the second will. But if it had been produced in compliance with our directions, it would not have prejudiced the *Chowdrain*, because we are not disposed to tolerate injury or harm being done to either party. It is regretted that the *Chowdrain* has, by concealing the second will, created suspicion in our minds as to the said will, and we have no reason whatever to believe that the will under consideration was in no respect similar in terms to that now before us." The

arbitrators then suggest certain hypotheses as to what the will might contain, and add, "In the absence of sufficient cause being shewn to the contrary, it may be suspected that it was destroyed through the foolishness or carelessness of the woman. Be this as it may, we are not disposed to be led by suspicions in determining the case, but at any rate it shall be our duty not to lose sight of our inclination thus caused to favour *Chowdhry Murtaza Hossein*." From the proceedings before the arbitrators it would appear that both parties agreed that the missing document had existed. The *Chowdrain* alleged that the original had been taken away by the Appellant, but admitted that she had a copy of it signed by the testator; the other party imputed to her that she kept back the original.

A question strongly contested before their Lordships was whether this objection to the filing of the award was sufficiently raised upon the record. It does not appear to have been distinctly raised on the proceeding, when the issues were settled. The sixth issue seems to have been framed upon the objection stated orally by Mr. *Arathoon*, which, as taken down by the Judge, is in these words: "The will was invalid, being made within a month of the *talookdar's* death, and the arbitrators were wrong in attaching any importance to it." The objection, however, had substantially been put forward in the petition impugning the award which the Appellant presented to Mr. *Glynn* on the 31st of March, 1871; and also in a written statement tendered in this suit but rejected by the Court for want of sufficient verification, which therefore cannot be treated as part of the record. Again, it appears that when the case came before the Deputy-Commissioner the point was in a manner raised before him, and treated as included in the sixth issue. The Judge's note, after stating the sixth issue, and that the Plaintiff does not care so far as this case is concerned to dispute the invalidity of the will, proceeds thus: "Mr. *Arathoon* argues that the award partly follows the will, in other parts the will is disregarded; that this is sufficient cause to refuse to file the award; but besides this there is a codicil which the arbitrators do not appear to have looked at." The Judge says, "There is nothing on the record to shew that any codicil was executed, and that point need not be considered. Had any codicil been in existence it should have been brought forward in evidence."

Now, if by the word "codicil" was meant the missing will referred to in paragraph 9 of the will produced, this mode of disposing of the objection was unsatisfactory, because in the statement of the arbitrators upon the face of the award which has been already read there is a clear *constat* that the document said to have been attested by *Rajah Farzand Ali Khan* and *Rajah Jugmohun Singh* existed. The Judge, however, went on to dispose of the question as to the effect of the invalidity of the will under the statute, but took no further notice of the question raised by Mr. *Arathoon* as to "the codicil."

The general principle of their Lordships is that of not dealing very strictly with the form of the pleadings if they find that a material point was substantially raised. They are disposed, though not without some little doubt and hesitation, to treat this particular point as sufficiently raised in the Courts below, and therefore to be one with which they are bound to deal upon appeal. The question which it involves appears to their Lordships to constitute the only formidable objection which can be taken to the filing of this award.

The contention is that it was miscarriage on the part of the arbitrators to make the award unless they had the whole of the will before them, which they cannot be said to have had in the absence of the document in question. Their Lordships have felt considerable difficulty upon this point. They are sensible, on the one hand, of the extreme impolicy of allowing parties to get out of awards upon objections which really do not affect the substantial justice of the case; and, on the other hand, they feel the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration do not

entitle them to do. Upon the whole, however, their Lordships have come to the conclusion that the objection is not fatal to the filing of this award. They may observe that, looking at the whole will, they are disposed to believe that this missing document was really confined to some question relating to the marriage of the eldest grand-daughter, which is the substance of the 9th paragraph, if that be treated as ending with the word "followed." On the true construction of the whole document the words "detail of expenses," and all that follows, seem to be no part of the 9th paragraph, although treated by the arbitrators, when they settled their issues, as within it.

It is, however, possible that the missing document may be something more than their Lordships suppose; and if there had been a clear *constat* that the Defendant objected on this ground to the arbitrators proceeding to make an award, and that they had nevertheless gone on to make their award upon the terms of the will before them, their Lordships might have thought the objection sufficient. Looking, however, to the proceedings before the arbitrators, and particularly to the document which is called the rejoinder, they think that, notwithstanding the knowledge that this document was withheld, the Defendant did submit to take his chances of the arbitration, and that he cannot now, on the general rule upon which all Courts act with respect to awards, be allowed, having taken his chances of the arbitration, to set aside the award upon the ground of the objection taken. In the very first paragraph of this rejoinder he no doubt says: "But the arguments of the Plaintiff carry no weight with them unless the other will which forms an essential part be produced, because in the will produced it is enjoined that a regard should be paid to the will therein referred to, which signifies that the provisions of the latter will are to be carried out and not of the former." But what is the conclusion that he draws? Not that the arbitrators are to abstain from making an award, for he says: "Wherefore, in the event of the other will not forthcoming, the arbitrators are, under the law, competent in every respect to determine the dispute, according to the British law, according to the custom, or according to Mahomedan law, and to render justice to me. But notwithstanding all the objections taken to the powers of the arbitrators, and to myself, the Plaintiff has exceeded all proper bounds, and instead of giving fit answers to my objections has made frivolous statements. Although silence is preferable to the refutation of such statements, I apprehend that if I keep quiet my silence may be construed in a manner which might shew that I have been unable to refute the Plaintiff's statements, or, that I have admitted them. I am also of opinion that, in order to obtain justice at the hands of the arbitrators, it is better for me to bring to their notice the true facts; I therefore beg to submit a rejoinder to the Plaintiff's reply, in the following paragraphs." Therefore, as far as that 1st paragraph goes, it is not an objection to their proceeding to make an award at all because they have not the whole will before them, but it is a suggestion that they should make an award in a particular manner, namely, by declaring that, the whole will not having been produced, it is not to be operative, but that the dispute is to be determined according to the British law, which their Lordships take to be the course of succession prescribed by Act I. of 1869 as to the *talookdary* estate, according to the custom, which is probably some supposed family custom applying to the personal estate other than the *talookdary* estate, or according to the general Mahomedan law. That is one alternative which is put forward by this document. The other is where he says, "As for that part of the will which relates to *Khanpur*, I beg to urge that inferential, optional, and adverse constructions have been put on it suited to the interests of the Plaintiff. Such constructions have not been put by any one of the community who has had occasion to read the will, except by the agents of the Plaintiff, nor does that part of the will any how convey the meaning attached to it by the Plaintiff." Then he says, "I believe the other will, which the Plaintiff assiduously tries to conceal, sup-

ports this assertion of mine. Every letter and every word of a will signifies nothing less than the declaration of the intentions of the testator. This is supported by law. No one is competent to put thereon an optional or implied construction. I, however, expect that the learned (meaning, apparently, the arbitrators) will clear up the meaning of the will, and will, in consequence of concealment of the other will, interpret the will" (that must mean the will before them) "favourably to myself and detrimentally to the Plaintiff. The will produced allows maintenance only to the Plaintiff and her descendants which may be born after the time the will was drawn up, out of *mouzahs Shareefabad* and *Alapur*. This does not give her any right as against myself." Therefore he goes on to treat as still open to the decision of the arbitrators the question of the construction of that will, and only claims a right to have presumptions drawn in favour of himself.

There was some dispute as to this rejoinder and the time when it came before the arbitrators. That it came before the arbitrators seems to be pretty clear by the translation of the petition, but there is some confusion occasioned as to the time by the supposed date of that petition. It is clear that the petition covered the rejoinder, and it is quite clear, from the internal evidence in the rejoinder itself, that it was addressed to the arbitrators, and proceeded upon the assumption on the part of the writer that the arbitration was still open. Their Lordships conceive that that document must have been before the arbitrators, and can hardly suppose, in the absence of clear proof, that it was before them after the arbitration was closed. At all events, it shews what was in the mind of the party and what were the points which he intended to raise upon the omission to produce the missing will. Again, it appears from the proceeding of the 19th of February, 1871, that the parties had then also, with full knowledge of the absence of the missing will, expressed their willingness to allow the case to be dealt with by the arbitrators in its absence. The statement on that occasion by the arbitrators is:—"The parties after some discussion have expressed their willingness to give up the different footings on which they grounded their claims, *i. e.*, they have withdrawn their claim to partition under the Mahomedan law of succession, according to custom or English law, and have agreed that those points of the will in respect of which they are at issue should be cleared up and the rest left untouched." The proceeding then goes on to frame certain issues, of which the first is one as to the real and true interpretation of that which is called the ninth paragraph, but which obviously means the detail which follows the ninth paragraph, and which deals with the different *talooks*, *Khanpur*, *Shareefabad*, and *Alapur*, which were some of the subjects of the award. This issue contains these words: "What is the real and true interpretation of the ninth paragraph of the will, and what was the real intention and object of the testator? In other words, whether the entire *talook Khanpur* should be divided in equal moities between the parties, or exclusively of *Shareefabad* and *Alapur*." Again, there is a passage in the award which reads as if the arbitrators had then before them the document called a rejoinder, and were accepting the proposition put to them by the Defendant in the latter part of it. The following is the passage in question: "Be this as it may, we are not disposed to be led by suspicions in determining the case, but at any rate it shall be our duty not to lose sight of our inclination thus caused to favour *Chowdhry Murtaza Hossein*." On the whole, therefore, their Lordships think that the Appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

Their Lordships, therefore, will humbly

advise Her Majesty to dismiss the present appeal; and to affirm the order of the Deputy-Commissioner, which is the operative order; but, having regard to the confusion which has been caused in a great measure by the absence or withholding of this document, for which the arbitrators, on plausible grounds, treat the Plaintiff as responsible, their Lordships are of opinion that there should be no costs of this appeal. But the appeal having been decided in favour of the Respondent, the Appellant must pay the costs of the Respondent upon the application for leave to appeal made on the 9th of March, as those costs were ordered to abide the result of this appeal.

3rd November, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

RAJAH VELLANKI VENKATA KRISHNA ROW, (Plaintiff)* ... } *Appellant,*

versus

VENKATA RAMA LAKSHMI NARSAYYA and others, (Defendants)... } *Respondents.*

Hindu Law—Adoption in the Dravida Country—Widow's power to adopt with consent of Sapindas—Motives for making an adoption.

According to the Hindu Law, a widow who has received from her deceased husband and express power to adopt a son in the event of his natural-born son dying under age and unmarried may on the happening of that event make a valid adoption.

Bhoobun Moyee Debee v. *Ram Kishore Acharge Choudhry* (1) distinguished.

Under the law which prevails in the *Dravida* country, a widow without any permission from her husband may if duly authorized by his kinsmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband.

The observations of the Judicial Committee in the *Ramnud case* (1) to the effect "that there should be such evidence of the assent of kinsmen as suffices to shew that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive," considered and explained.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The case out of which this appeal arises is a suit in which the Appellant, claiming to be the adopted son of *Rajah Vellanki Venkata Ramanayya Row*,* who was the penultimate *Zemindar* of *Gampalagudem*, is seeking to recover that *zemindary* against the parties in possession. Those parties, the Respondents, are the daughters of the above-named, whom it will be convenient to call the original, *Zemindar*; and it seems now to be admitted that, although put in possession by the Collector after the death of his widow, they have, in fact, no title; that they must have been so put in, either under the option which the Government at one time entertained, that as to certain *zemindaries* in the Presidency of *Madras* they had a right to settle the succession, or under an erroneous impression that these ladies were the next heirs of the last *Zemindar*. The impression would be erroneous, because it is clear that, the original *Zemindar* having left a son, the whole inheritance vested in the latter, although he died afterwards an infant, and unmarried; that the widow took as heiress to her son; and that, failing her, his sisters, if they had a remote right to succeed as *bundhoos* (a question upon which their Lordships express no opinion whatever), could only so succeed after the *sapindas*, of whom there are several, had been exhausted. These ladies, however, being in possession, have, of course, a right to set up a *jus tertii*, or on any other

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* 4 Cowell's I. A., p. 1.

(1) 10 Moore's I. A. Ca., 270; 2 P. C. J., p. 14.

(1) 12 Moore's I. A. Ca., 397; 2 P. C. J., 361.

* Rajah Venkata Rama Gopala Row, I I. L. R., Madras, p. 184.

sufficient ground to question the title of the party who is seeking to oust them from possession.

Of the issues settled in the cause, the first is the only one on which any question now turns. It is in these terms: "Whether the Plaintiff was adopted by the first and second Defendants' mother, and whether such adoption is in consonance with law?" It embraces the two points which have been argued before their Lordships. As to the facts, there is little or no dispute. The original *Zemindar* died in 1849. He was succeeded by his only son, the last *Zemindar*, who lived for five years after his father's death, and died in 1854, a minor, unmarried. According to the Hindu law his mother was his heiress, and was admitted as such, and took possession of the *zemindary*. It is also found by both Courts, and is now not contested, that some years after the death of the last *Zemindar*, his mother adopted the present Plaintiff; that all the ceremonies required for such a purpose were complied with; and that the consent was obtained of all the surviving *sapindas* of the family of the original *Zemindar*, who concurred in and sanctioned that adoption.

The two questions that have arisen upon the first issue are, first, whether the descent having been thus cast upon the natural-born son of the original *Zemindar*, there remained in his mother any power to adopt a son to her husband; and secondly, whether the adoption is bad upon the particular ground upon which the High Court, reversing the decision of the Lower Court, has proceeded in this case. It seems to their Lordships to be desirable to deal in the first instance with the first of these questions, since it goes to the general power of adoption.

In order to determine that question it is desirable to see what would, in such a case, be the power of a mother who had from her deceased husband an express power to adopt a son in the event of his natural son dying under age and unmarried. It has been fairly conceded that such a power would exist, and the authorities seem to be express upon the point. It is sufficient to read the following passage from Mr. *Macnaghten's* Principles and Precedents, at p. 80, vol. i.: "It is written in the *Dattaka Mimansa*' A man destitute of a son (*aputra*) is one to whom no son has been born, or whose son has died,' for a text of *Sounaka* expresses 'one to whom no son has been born or whose son has died, having fasted for a son, &c.;' but it seems to be admitted that a man having a legitimate son may not only authorize his wife to adopt a son after his death failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead; and it has also been ruled that authority to a wife to adopt in the event of a disagreement between her and a son of the husband then living will not avail, though authority to adopt in the event of that son's death would be valid." If then there had been a written authority to the widow to adopt, the fact of the descent being cast would have made no difference unless the case fell within the authority of that of *Chundrabullee*, reported in the 10th *Moore* (1); in which it was decided that, the son having died leaving a widow in whom the inheritance had vested, the mother could not defeat the estate which had so become vested by making an adoption, though in pursuance of a written authority from her husband. That authority does not govern the present case, in which the adoption is made in derogation of the adoptive mother's estate; and indeed expressly recognises the distinction.

Such then being the law supposing the husband had given a written authority to adopt, we have to consider what, with reference to this particular property, was the law, there being no such authority.

The estate is admitted to lie in what is known as the *Dravida* country, and is therefore property to which the law, as settled by the *Ramnud Case* (2), applies. The general proposition which their Lordships, affirming the decision of the High Court of *Madras*, established in that case was that, according to the law prevalent in the *Dravida* country, a Hindu woman, not having her husband's permission, may, if duly authorized by his kindred, adopt a

(1) *Bhoobun Moyee Debee* v. *Ram Kishore Acharge Chowdhry*. 10 Moore's I. A. Ca., 279.
(2) 12 Moore's Ind. Ap. Ca., 397; 2 P. C. J., 361.

son to him. The judgment of the Committee, after declaring this to be the local law goes on to deal with the foundation on which it rests, treating it as established by positive authority rather than by some supposed analogies to other parts of the Hindu law, and then proceeds to consider what constitutes a sufficient authority on the part of the husband's kindred,—a question to which reference will afterwards be made Assuming the general proposition to be thus established, their Lordships see no reason why it should not apply to every case in which a widow might make an adoption under a written authority from her husband They are therefore of opinion there is no ground for saying that because the estate descended to the son natural-born of the original *Zemindar*, and the widow of the latter took it as heiress of her son and not immediately from her husband, the adoption made by her, if otherwise valid, therefore became invalid These considerations seem to their Lordships to dispose of the first objection

It is not necessary to consider in what way successive adoptions operate It is sufficient to say that the law has established that they may take place

Their Lordships will now consider the second question, being that which was really the *ratio decidendi* of the High Court of *Madras* The judgment under appeal says, "We thought there was no reason to doubt the evidence of the fact of the form of adoption having been gone through, supported, as that evidence was, by written documents But we thought that it was not made out that there had been such an assent on the part of the kinsmen as to shew, to quote the words of the judgment of the Privy Council in the *Ramnad Case* (1), 'that the act was done by the widow in the proper and *bonâ fide* performance of a religious duty'" And then proceeding to examine the evidence of what took place immediately after the death of the son, and to consider the correspondence, it says, "The letters of the widow seem to shew that the object was to adopt the boy for the purpose of perpetuating the descent of the property in the same apparent line The earliest letter of September 28th, 1854, is not in evidence, but the letter of the 12th of October of the same year in reply to it, recites it as expressing an intention on the part of the widow to 'constitute a boy in the family as heir to' her rights There is no appearance of any anxiety or desire on the part of the widow for the proper and *bonâ fide* performance of any religious duty to her husband Her object appears to have been to hold the estate till her death, and then continue the line in the person of the Plaintiff, who, as a matter of fact, did not upon adoption nor until his adoptive mother's death seek to assume the position of an adopted son" It appears to their Lordships that the conclusions of fact which the learned Judges of the High Court have drawn from the correspondence and the other evidence in the cause are not quite correct, and that they have also given an interpretation and meaning to what was said by this committee in the *Ramnad Case* which the particular passage in that judgment does not fairly support

If we go back to the time of the son's death, we find that almost immediately after that event his mother entertained the notion of adoption, that she was admitted heir on the 24th of June, 1854, and on the 28th of September, 1854 wrote the letter referred to by the High Court, which clearly contemplated some kind of adoption We have not the original of that letter, we have merely what is stated in reply to it by way of recital, and taking that to be correct, the High Court have insisted on her saying that she meant to "constitute a boy in the family as heir to' her rights Their Lordships think that in dealing with a letter of this kind, written by a Hindu lady, it is desirable not to rest upon a minute criticism of the particular expressions used, but to look to what was the substance of the transaction If, as was also suggested by Mr *Leith*, in an argument founded on some of the subsequent ceremonies that were said to have taken place, she intended merely to adopt an heir to herself, there was really no ground why she should

(1) 12 Moore's Ind Ap Cs, 397, 2 P C J, 361

have convoked a family council, or have gone to the *sapindas* of her husband at all. The authority of the *sapindas* was only necessary in order to enable her to adopt an heir in the ordinary sense of the Hindu law,—an heir who should be heir to herself and husband, and capable of performing the religious ceremonies which are supposed to be for the benefit of the souls of both.

Again, some stress has been laid upon the fact of the delay; but, as has been already said, her first application was made as early as the 28th of September, 1854, and she was then told by the Collector (who seems at that time to have been considered to possess much larger powers in determining the succession to *zemindaries* than, as it has since been settled, he really had) that she had no power to adopt, and that she could not adopt. The purpose of adoption, however, remained in her mind, and the adoption actually took place in June, 1862, for she gave the Collector notice of it as early as the 27th of June, 1862. Yet even then the Collector repudiated the adoption, apparently proceeding upon what is the general law of the greater part of *India*, and not upon what has since been established to be the law in the *Dravida* district. And assuming that the permission of the Government was necessary to an adoption, he wrote, "The Government passed minutes on the 14th of April, 1855, to the effect that your making an adoption being illegal by reason of the absence of the consent of your husband, permission for the same would not be accorded;" and again, "Such being the case, the adoption you say you have now made being without authority, and at variance with Hindu law and the orders of the Government, the same is of no use. This adoption will not, therefore, be recognised, and this is written to inform you of the same." This continued resistance of the Government authorities to the adoption may, it seems to their Lordships, constitute a sufficient answer to any argument founded upon the facts, that there was no mutation of names, and that the adopted son did not, while the adopted mother continued to live, enter ostensibly into the enjoyment of the estate or exercise those functions which, if his adoption had been recognised from the first, he would otherwise have exercised. That the non-mutation of names and the non-enjoyment of the estate by the son were contrary to the intention of the widow is shewn by the letter, in which she writes to the boy, "By reason of your not having yet returned from *Sauwarapetta*, whither you went to see your natural father and mother, the course of affairs here does not progress well. It is not, therefore, becoming that you should thus neglect, in spite of my having adopted you as my son and made you the rightful heir of my estate, real and personal. You ought to come soon and enter upon the possession of your *mittah*, devote your attention to largely improving the same, and at the same time maintain me and your servants, and take upon yourself all my troubles and cares. As I am a female, you should manage all affairs and abide by my instructions until you come of proper age." Her wish and intention seem to have been throughout to divest herself of her estate and to put the adopted son into the position which, upon the strictest construction of the law of adoption, he would have held. That intention was defeated by the unfortunate view which the Government authorities appear to have taken of her powers.

This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in the *Ramnad Case?* (1) The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. After dealing with the *vexata quæstio* which does not arise in this case, whether such an adoption can be made with the assent of one or more *sapindas* in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said:—"It is not easy to lay down an inflexible rule for

(1) 12 Moore's I. A. Ca., 397; 2 P. C. J., 361.

the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence," not, be it observed, of the widow's motives but "of the assent of kinsmen, as suffices to shew that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bonâ fide* attained."

Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that *sapinda*, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the *sapindas*; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that, at all events, such presumption should be made until the contrary is shewn.

Therefore it seems to their Lordships that on neither ground can it be said that this adoption was not consonant to law, and they must humbly advise Her Majesty to allow the present appeal, to reverse the decision of the High Court, and to affirm the decision of the Lower Court, with the costs of the appeal in the High Court. They think the Appellant ought also to have the costs of this appeal.

3rd and 4th November, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Allahabad.

NARAIN SINGH and others, (Plaintiffs)* ... } *Appellants,*

versus

SHIMBHOO SINGH and others, (Defendants) ... } *Respondents.*

First and Second Mortgages—Dispossession of Second Mortgagee—Cause of Action—Limitation—Interest.

Z, being indebted to *A*, executed in his favor a written mortgage of certain lands, in which it was agreed that if the debt was not repaid within a fixed time, *A* should be put into possession of the lands. Subsequently *Z* executed in favor of *P*, to whom also he owed money, a second mortgage of the same lands subject to the same condition. *P* not receiving payment within the stipulated time, sued *Z* on the mortgage and obtained a decree for possession of the lands, under which he was put into possession in the year 1846. After *P* had obtained his decree, *A*, whose debt had likewise remained unpaid, brought a suit as first mortgagee against *Z* and *P* for the possession of the lands, and obtaining a decree, recovered possession in the year 1847, dispossessing *P*. In the year 1870, the heirs of *Z* having paid off the debt due to *A*, resumed possession, whereupon the heirs of *P* applied to be restored to possession in execution of the decree obtained by *P* in 1846. This application having been rejected on the ground that that decree had been fully executed when *P* obtained possession under it, the heirs of *P* instituted a suit against the heirs of *Z* to recover possession and for interest during the time they were dispossessed.

Held by their Lordships of the Judicial Committee, reversing the decision of the High Court, that the heirs, of *P* were entitled to possession on *A's* mortgage being paid off, and that their cause of action accrued and limitation ran against them from the time when the heirs of *Z* resumed possession.

Held, also, that they were not entitled to a decree for the interest accruing during the time they were dispossessed.

4th November, 1876.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

In this case the Plaintiffs, as sons and heirs of *Poohup Singh*, a mortgagee, seek

* 4 Cowell's I A, p 15.

to recover possession of 20 *biswahs* of the *zemindary* right of *mouzah Lallpoor*. The Defendants in the suit are the representatives of the mortgagor. The Plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, *Pookup Singh*, "in that, under a mortgage deed, dated *Phagoon Badi*, 7th *Sumbut*, 1896, *Pookup Singh*, the ancestor of the Plaintiffs, having obtained a decree from the *Sudder Ameen's* Court, was put in possession on the 31st of August, 1846." Most of the Defendants admit the claim, but the Defendants, *Man Singh*, *Shimbhoo Girdharee*, and *Motee* put in an answer, by the second paragraph of which they admitted that under the former decree the Plaintiffs' ancestor was in possession for upwards of a year; but they set up, in the fourth paragraph of the same written statement, that "the mortgage alleged by the Plaintiffs is wholly unfounded. The Defendants' ancestor did not receive the mortgage money from the ancestor of the Plaintiffs; and *Pookup Singh*, the ancestor of the Plaintiffs, was a person notorious for his expertness in court affairs. He had, with a view to deprive *Asaram* and *Sheololl* of their mortgage money, obtained by deception a decree on the mortgage deed in suit; and the Defendants' father had, according to the *Shastras*, no right to transfer and waste the Defendants' ancestral property, without any legal necessity, to satisfy illegal demands. Hence, under the *Shastras* also, the mortgage alleged by the Plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the Plaintiffs' ancestor did obtain possession by virtue of a decree, and that he remained in possession for a year, the Defendants *also, in the same written statement*, alleged that the mortgage was collusive and a *benamee* transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the Defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the Plaintiffs' ancestor did get into possession on the 31st of August, 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, *Asaram* and *Sheololl*. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage deed do not appear, but, as far as can be collected, it was a mortgage bond, by which it was stipulated that in the event of the non-payment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the Plaintiffs to be put into possession.

It appears that the Plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the Plaintiffs as mortgagees a title to the land as against the Defendants, but it gave them no title as against the prior mortgagees, *Asaram* and *Sheololl*. When *Asaram* and *Sheololl* turned the Plaintiff's ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to *Asaram* and *Sheololl*, but it did not destroy the right which the Plaintiffs obtained against the Defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues:—first, whether the original mortgagors executed the mortgage deed in respect of the property in suit on receiving the full mortgage consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage deed could take effect against the Defendants according to the Hindu law. The Judge says in his judgment: "It is apparent that Plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage deed, and the payment of mortgage consideration; and the fact of the decree having been made is admitted by the Defendants. Again, all the Defendants, excepting four, two of whom have made no defence, confess the claim,

which is further supported by the evidence of *Moulvie Inayut Ali*, pleader, *Choonee Loll*, *putwaree*, and two other persons, both named *Hoolasee*, witnesses for Plaintiffs. The plea urged by Defendants must therefore be overruled; and they have failed to refute the claim." He therefore gave a decree in favour of the Plaintiffs.

Upon that an appeal was preferred by *Shimbhoo* alone to the High Court; and one of his grounds of appeal is that there was "no cause of action and foundation for the Plaintiffs' suit; neither the deed of mortgage nor the decree has been produced; the conditions agreed upon between the parties cannot be ascertained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st of April, 1872, could not give any legitimate cause of action. Nor did any right of action accrue to the Plaintiffs by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the Plaintiff by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the Plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it, and keep the possession from the Plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the Plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the Defendants. The Court proceed: "The right of the Plaintiffs or their forefather to possession was created by the mortgage deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the Plaintiffs a title. The High Court proceeded: "The dispossession of *Pookup Singh* after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title; namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained, he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible, and cannot be decreed even against the confessing Defendants." The High Court held that the Plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the Plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the Plaintiffs after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by *Pookup Singh*, the Plaintiffs' ancestor. In the first place, as already stated, the written statement of the Defendants admits that there was that former decree. They say that "under the former decree the Plaintiffs' ancestor was in possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when *Asaram* and *Sheololl*, the first mortgagees, brought an action against the second mortgagee, *Pertab Singh*, the ancestor of the Plaintiffs, and *Lulloo* and others, the *Zemindars*, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of *Pertab Singh* against the *Zemindars* was in evidence. The *Sudder* Court says: "The Plaintiffs sued *Lulloo* and others, *Zemindars* of the above-named village, for

possession on a mortgage bond dated the 18th *Kower*, 1859 *Sumbut;* but in consequence of their having omitted to specify the nature of the tenure, they were nonsuited. *Pookup Singh* also sued the *Zemindars* on a mortgage bond, and obtained a decree, which was upheld in appeal." There was a finding then in that case that *Pookup Singh* did sue the *Zemindars* on the mortgage bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the Plaintiffs had been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The *Moonsiff* decided that they were entitled to have an execution. In that suit, *Shimbhoo*, who is the present Defendant, was one of the parties, and in that case the judgment was produced. The *Moonsiff* says: "The record of the case having been brought forward, it appears that the objection of the Defendants, judgment-debtors," that is, of *Shimbhoo*, one of the present Defendants, "is that *Pookup Singh*, the original decree-holder and deceased ancestor of the Plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the Plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is, "to recover possession as mortgagees over the entire 20 *biswahs zemindary* right in *mouzah Lallpoor, pergunnah Garee*, within the jurisdiction of the *Iglass Tehselee*, valued at Rs. 5000,"—the valuation is not a matter of importance,—"the principal amount of the mortgage loan, and to recover Rs. 6999 15*a*. 0*p*. interest thereon, during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999." Now the Plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be, how much is due to the Plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem. The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for Rs. 6999 interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to what the judgment ought to be. He says: "Claim to recover possession as mortgagees over the entire 20 *biswahs zemindary* right in *mouzah Lallpoor, pergunnah Garee*, valued at Rs. 5000, principal of the mortgage loan, and Rs. 6999, 15*a*. 0*p*. interest on the mortgage amount." Then he says: "Ordered that Plaintiffs' claim be decreed with costs against the Defendants, that the pleaders get their fees." Then he says:—"Subject matter of decree. Recovery of possession as mortgagees, over the entire 20 *biswahs* right in *mouzah Lallpoor, pergunnah Garee*, valued at Rs. 5000, the principal amount of the mortgage loan, and of Rs. 6999. 15*a*. 0*p*. interest on the mortgage amount for the period of the Plaintiff's dispossession; total Rs. 11,999. 15*a*. 0*p*." If by that decree the lower Court intended to give the Plaintiff a decree not only for recovery of the possession of the land, but also to recover Rs. 6999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the Plaintiffs merely to the possession of the land. In that case, the Plaintiffs having got possession of the land, the question, as before observed, will remain open until the Defendants

seek to redeem the land. Then the question will arise, how much is due to the Plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage.

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the Plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the Appellants are entitled to the costs of this appeal.

24th, 25th and 28th November, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ABEDOONISSA KHATOON (Defendant)* ... } *Appellant,*

versus

AMEEROONISSA KHATOON (Plaintiff) ... } *Respondent.*

Res judicata—Execution Proceedings—Act VIII. of 1859, ss. 102, 103 and 208—Act XXIII. of 1861, s. 11.

The question which, under s. 11, Act XXIII. of 1861, may be determined by a Court executing a decree, must be between parties to the suit in which the decree was passed, and must relate to the execution of the decree. A person who was not on the record when the decree was made, does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is, consequently, not one which the Court executing the decree is competent to entertain. A declaration by a Court in execution proceedings, that a person not a party to the suit applying for execution is legitimate, since it is made without jurisdiction, cannot, under s. 2, Act VIII. of 1859, be pleaded as a bar to a regular suit in which it is sought to establish the legitimacy of the applicant.

Ss. 102 and 103 of Act VIII. of 1859 relate only to proceedings prior to decree, and not to proceedings in execution.

S. 208 of the same Act does not apply where the person seeking to execute is not a transferee from the original decree-holder either by assignment or operation by law. The section does not apply to cases where the right to an equitable interest in a decree is seriously contested; and was not intended to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir.

Since proceedings under s. 208, Act VIII. of 1859, are by s. 364 of the Act, not liable to appeal, a suit would, probably, lie to reverse an order passed therein.

28th November, 1876.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

THE facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated:

Wahed Ali brought a suit against his father *Abdool Ali* to recover the possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus: The father had executed certain *hibbanamahs* in favour of his son when that son was an infant. It was alleged on the part of the father that the son had subsequently executed certain *ikrarnamahs*, whereby he divested himself of the benefit which he derived under the previous *hibbanamahs*. The Court of first instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that *Wahed* appealed to the High Court. Pending the appeal, *Wahed* died: and thereupon the High Court, as it appears to their Lordships, under the powers given them by sect. 103 of Act VIII. of 1859, substituted his widow *Abedoonissa* for *Wahed* for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the *ikrarnamahs* to have been invalid, and reversed the decision of the Court below. The Court observe that since the death of *Wahed* "disputes have arisen, and litigation is now pending concerning his proper legal representative; and for the purpose of prosecuting this appeal we have admitted

* 4 Cowell's I A., p. 66.

his widow *Mussumat Abedoonissa Khatoon* to be his legal representative." At the conclusion of the judgment they thus express themselves: "The decree of the Court below is reversed, with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that *Moulvie Wahed Ali* was, in his lifetime, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the Respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of *Wahed* are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—"It is declared that the several *ikrarnamahs* and *miras pottahs*, dated respectively the 29th *Falgoon*, 1259, 16th *Aughran*, 1263, 6th *Jeyt*, 1264, and the 15th *Aughran*, 1263, were of no effect, and void against *Moulvie Wahed Ali* in his lifetime, and are void against his lawful representatives. And it is further ordered and decreed that the Defendants, Respondents, who appeared in this appeal, do pay to the Plaintiffs, Appellants, the sum of Rs. 3,000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are, by no means satisfied that this decree *improvide emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But in the view which they take of the case it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty in Council, and in 1875, the judgment was reversed. In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow *Abedoonissa* applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, *Wajed Ali*, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by *Abdool Ali*. Certain other parties also applied for execution, Messrs. *Wise* and *Dunne*; but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of *Dacca*, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of *Wajed Ali*, the son whom the widow had put forward as being legitimately born to *Wahed*. Unfortunately, we have not the original judgment of the Judge of *Dacca* before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under sections 102 and 103, and section 208 of Act VIII. of 1859, the case may, so far as anything has been shewn to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of *Dacca*, and directed him to determine the question of the legitimacy of *Wajed Ali*. After a second remand, this question was heard and decided by the Judge of *Dacca* and decided against the widow, the Judge holding that *Wajed Ali* was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of *Dacca*, and held that *Wajed Ali* was the legitimate son of *Wahed*. They refer to the proceedings in this manner: They state: "The question that is now before us is,

whether the person who goes by the name of *Wajed Ali* is or is not a posthumous son of the said *Wahed Ali;* and whether, therefore, one *Abedoonissa* who is admittedly the guardian of *Wajed Ali*, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said *Wajed Ali*,"—and they decree,—"that *Abedoonissa* be declared entitled to execute the whole of her decree against the judgment-debtor before us,"—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of *Wajed Ali*. It appears to their Lordships, that she, in her character of guardian of *Wajed Ali*, became a new party in these proceedings, just to the same extent that *Wajed Ali* would have become himself if, after he had come of age, he had appeared by his attorney.

Upon this, *Abdool Ali* having died, his widow *Ameeroonissa* instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds; in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of *Wajed;* and secondly, upon the merits. On the other hand, *Abedoonissa* contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that *Wajed* was not the son of *Wahed;* and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that in the execution proceeding, which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court has jurisdiction in such a proceeding to try it.

Some attempt was made to establish that *Abdool* had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of *Dacca;* but the Judge of *Dacca* decided that he had not jurisdiction to determine the question in that suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII. of 1859, and the second Act XXIII. of 1861. The sections of the first Act relied upon by the Court in their first remand are sections 102, 103, and 208. The first sections, 102 and 103, relate to the substitution, in the case of the death of a sole Plaintiff or surviving Plaintiff, of a legal representative of such Plaintiff. The 102nd section refers to cases where there is no dispute. Sect. 103 is the section which, as before observed, was acted upon in this case, when *Abedoonissa* was allowed to prosecute the suit, and is to this effect: "If any dispute arise as to who is the legal representative of a deceased Plaintiff, it shall be competent to the Court either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." Under the terms of this section, it not being decided by the Court that *Abedoonissa* was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit"; those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of *Wajed*, because this section, which comes under the heading of "Proceeding before Judgment" has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that *Wajed* had any interest whatever in it. Then we come to sect. 208, which undoubtedly

is a section relating to proceedings for execution and after judgment and decree. It is to this effect:—"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder." It appears to their Lordships, in the first place, that, assuming *Wajed* to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred, on which the law could operate, to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section.

Their Lordships have further to observe that they agree with the Chief Justice in the view which he expressed: that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that under sect. 364 of this Act no appeal would lie from any judgment or decision given in a proceeding under sect. 208; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, sect. 208 does not apply. Even if it did apply, it would appear to their Lordships that inasmuch as proceedings under it are not subject to appeal probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII. then being disposed of, we next come to the second Act, Act XXIII. of 1861. The sole section relied upon has been the 11th, which is in these terms: "All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the Appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: "Any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree." There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words of this section beyond any legitimate construction which could be put upon them to apply them to the present case. In their judgment *Wajed Ali* appearing by his mother (and as before observed it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or *mooktear*), was in no proper sense of the word a party to this suit. No rights of *Wajed Ali* were determined or considered in the suit. He was not on the

record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are therefore of opinion that this section does not apply.

Under these circumstances their Lordships have come to the conclusion that the issue that had been referred to in the case was not *res judicata* by a competent Court in a competent proceeding; and for this reason they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

28th, 29th, and 30th November, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KONWUR DOORGANATH ROY, (Plaintiff)* } *Appellant,*

versus

RAM CHUNDER SEN and others, (Defendants) ... } *Respondents.*

Hindu Law—Endowment—Powers of Sebait—Alienation—Notice to Purchaser.

A Plaintiff who seeks to set aside an alienation of lands on the ground that they are *dewuttor*, i. e., dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact, that the rents of a particular *mehal* have been applied for a considerable period to the worship of an idol, is not sufficient proof that the *mehal* is *dewuttor*.

The *Sebait*, or manager, of a *dewuttor* estate has authority where the purposes of the endowment require it to raise money by alienating a part of the estate, his position being analogus to that of a manager of an infant heir under the Hindu law. The cases of *Hunoomanpersad Panday* v. *Mussumat Babooee Munraj Koonwaree* (1) and *Prosunno-Kumari Debya* v. *Golab Chand Baboo* (2) referred to and approved.

The written conveyance of certain lands stated them to be *dewuttor*, and to be alienated to raise money to repair the temple of the idol. In a suit to set aside the alienation, it appeared that, at the time of the transaction, the temple required repairs, but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed, *held*, that the sale was valid.

Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced.

30th November, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is a suit brought by the Appellant *Konwur Doorganath Roy* to set aside certain alienations of two-thirds of an ancestral *mehal* called *Gopejan*, made by his grandmother *Rani Rashmoni*, on the ground that the *mehal* had been dedicated to the worship of an idol *Radhamohun Thakoor*. The Respondents are the successors of the original grantees, or persons deriving title from them. To shew the position of *Rashmoni* at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband *Roy Bijoy Krishna*, an *anumati-patri* has been put in, which gave her, undoubtedly, special powers. The *anumati-patri*, or so much of it as is material, is as follows:—"You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral *debkirti* (worship of the gods), &c., and offer the *jolpinda* (funeral cake and libations of water) of my ancestors. For the observance of all these rites, and of the *jolpinda* to the ancestors, as well as the preservation of the *zemindaries*, *lakhiraj*,

* 4 Cowell's I. A., p. 52.

(1) 6 Moore's Ind. Ap. Ca., 393; 1 P. C. J., p. 552.
(2) 14 B. L. R., p. 450; S. C. L. R. 2 I. A., 145; *Ante* p. 49.

dewuttor, &c., I in my sound mind give you permission on my death to keep possession of my *zemindaries*, *dewuttor*, &c., recording your own name in the Collectorate *Sherishta*, to remain in enjoyment of the profits, and to defray the expenses of the *debkirti* during your lifetime, and to adopt one or two sons born in the family of true *Brahmans*. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if you should desire it, get his name recorded in the *zemindary tahoot*, and surrender the entire management to him," and then there is this statement: "Now I am a debtor to *mahajuns* (creditors). Some *mehals* of the *zemindary* are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the *zemindary* or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to *dewuttor* property in this document, but this document itself creates no endowment; and it is necessary for the Plaintiff to shew *aliunde* that there was an existing endowment in favour of this particular idol to which the word "*dewuttor*" may be referred.

With regard to the position of *Rashmoni* under the *anumati-patri*, it would seem that she took a life interest in the properties, and that power was given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to *Rashmoni* to alienate the estate; but she had, as the manager of the estate, power, if it were *dewuttor* dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a *mourusi mokurruri pottah*, which she granted to two persons, *Nemai Soondur Roy* and *Ram Soondur Sen*. This *pottah* describes the estate thus; *Turruf Wargopjan*, alias *Gowaljan*, which is admitted to be the estate *Gopejan*, "the patrimonial *dewuttor* rent free land of *Bijoy Krishna Roy*, my late husband, the boundaries of which are on the east the *Ganges*," and so on, "is the *dewuttor* property of the *Sri Sri Iswur Radhamohun Thakoor* of *Raninuggur*, which is in my possession and enjoyment as *Sebait* of the idol." Then the grantor notices the fact that 120 *beegahs*, or one-third of that *mehal*, had been decreed to *Bhagiruthi Debi*, the widow of one of her husband's brothers, *Ram Krishna Roy*. "With the exception of 120 *beegahs* of *mathan* land decreed in the suit of *Bhagiruthi Debi*, widow of the late *Ram Krishna Roy*, the eldest brother of my late husband, the remaining *lakhiraj* lands," and so on. The document proceeds: "Now the temple of the *Sri Sri Iswur* being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a *mourusi-mokurruri-talook* of the entire *lakhiraj zemindary* rights in the said *mouzah* at a fixed premium of Rs. 325, for a consideration of Company's Rs. 1900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by *Rashmoni* in favour of *Soondur Krishna Sen*, one of the family of one of the grantees of the *mokurruri*. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the *mokurruri* rent, and it says: "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favour of *Bhagiruthi*, "a *mourusi* and *mokurruri talook*, representing the entire right in the *lakhiraj zemindary*, was given in settlement of *Nemai Soondur Roy*, inhabitant of *Naharpara*, and *Ram Soondur Sen*, inhabitant of *Koridha*, at an annual *jumma* of Rs. 325, exclusive of collection charges, on the 18th of *Cheyt* of the year 1254. They hold possession of the property as a *mourusi* and *mokurruri talook*, and are paying the fixed *jumma*. I, agreeably to the instructions of my late husband, have commenced building the temples of *Sri Sri Iswar Radhamohun Thakoor Jeo*, and others, but being in want of means, am unable to carry out

the instructions of my husband. I have voluntarily, in my sound senses, sold to you for Company's Rs. 1,700 my own entire share of 14 *annas*, 15 *gundahs*, 1 *cowri*, 2 *kags* out of 16 *annas* of the said *mourusi mokurruri mouzah*, the *jumma* of which is Rs. 300."

Mr. *Leith*, on the part of the Appellant, undertook to satisfy their Lordships that this *mehal* of *Gopejan* had been dedicated to the idol, and therefore it was incompetent for *Rashmoni* to make these alienations.

Now, apart from the admissions contained in the *mourusi pottah* and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to shew that this land was so dedicated.

Mr. *Leith* opened his case by an endeavour to shew a deed of foundation or endowment of the idol by the gift of this estate from *Rajah Mahanund*, who was the father of *Rajah Bijoy Krishna*, the husband of *Rani Rashmoni*.

It may be convenient to state here the position of the family so far as it is material to the present case. *Rajah Mahanund*, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son *Bijoy*, who left a widow, *Rashmoni*, giving her the *anumati-patri*, to which reference has already been made. She, it appeared, lived until February, 1870. She exercised the power of adoption given to her by her husband, and adopted *Krishna Chunder*, who married *Rani Prosunnomyi Debi*. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favour of the Appellant, *Konwur Doorganath Roy*. It appears that *Rajah Bijoy* had two brothers, and one of them married a lady of the name of *Bhagiruthi Debi*, who in the year 1855 brought a suit against *Rashmoni*, and obtained the decree already mentioned, to recover one-third of the *mehal* of *Gopejan*.

If the deed of endowment from *Rajah Mahanund* were satisfactorily proved, and it were an endowment which dedicated this *mehal* to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

The proof of this deed of endowment, which is said to have been executed by the *Rajah Mahanund*, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the *rubicari* of a former suit, is relied upon as shewing its contents, the description there given is so obscure that it is impossible to say whether the whole of the *mehal* of *Gopejan* was included in the supposed dedication or not.

First, with respect to the nature of the proof; what is relied upon as evidence of the deed is a *rubicari* of a proceeding in a former suit brought by a creditor against *Rashmoni* in the year 1840. It appears that in that suit certain property was attached, and that *Rashmoni*, in order to get rid of the attachment, set up that the property so attached was *dewuttor* property dedicated to the idol *Radhamohun Thakoor*. It appears from the *rubicari* that this deed was put forward by a man called *Bhuttacharjya*, who was the *tasildar* of *Rani Rashmoni*. Neither the deed itself nor a copy has been produced in the present suit. No witness has been called who ever saw it; and it is to be observed that though *Bhuttacharjya* was called as a witness in the suit brought by *Prosunnomoyi* on behalf of the present Appellant to set aside these deeds during the lifetime of *Rashmoni*, and which was dismissed, because it was considered to be incompetent to institute it during the lifetime of *Rashmoni*, he was not asked any question about this deed.

The state of the case then is this: No evidence has been given of the existence of such a deed, except the mention of it in the *rubicari*; no witness has been called who ever saw it. The man who produced it in the creditor's suit, when called

in *Prosunnomoyi's* suit, does not refer to it; and the only search which has been proved is a search made by some clerk in the *sherishta* of the *zemindary*—a young clerk who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there.

In that state of things their Lordships think it is very doubtful whether secondary evidence of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine in the first place whether it satisfies them that such a deed really existed at all. Now, from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a dcoument of the kind was put forward by *Bhuttacharjya* on behalf of *Rashmoni* in the creditor's suit is proved by the *rubicari;* but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But assuming that a deed did exist, and that it was to the effect which is referred to in the *rubicari*, their Lordships find that the question what property was included in it is left in considerable obscurity. It appears that the property which had been attached was a brick-built house and garden. The *rubicari* states, "It appears from a perusal of the whole of the papers of the record, that for the payment of the money due to the Plaintiff, the brick-built house and garden, &c., belonging to the Defendant, were under attachment. After issue of notice of auction sale, the objector above-mentioned filed a petition, stating, among other matters, that the properties which were assigned by *Rajah Mahanund Roy*, father-in-law of the Defendant, for the worship of the idol *Radhamohun Thakoor*, &c., established by the *Rajah*, cannot be sold or transferred by his heirs." It appears that there was an order that the sale should be stayed, and that the objector should file proofs of his statement. The *rubicari* states, "Accordingly the objector filed the *shevaitnama* of the 5th of *Aughran*, 1202, under seal and signature of *Rajah Mahanund*, accompanied by an *isumnuvisi* containing the names of four witnesses." Then, "The objector has also filed a copy of the *nikas* paper of the year 1213, bearing the seal and signature of the Collector, to prove that the properties of the *debsheva*, as aforesaid, are part and parcel of the *lakhiraj mouzah Gowaljan*." That appears to be this *mouzah Gopejan*. This is the only phrase which can be relied upon as shewing that the entire *mehal* was included in the supposed endowment. But the passage is in itself obscure. The literal reading of it is that the brick-built house, garden, &c., which had been devoted to the idol, were part and parcel of the *lakhiraj mouzah Gowaljan*. It is quite consistent with that statement that these parcels had been taken out of that *lakhiraj mouzah* and devoted to the idol.

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this *mehal*.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the *dewan* and *mookhtear* and one or two other witnesses that the rents of this *mehal Gopejan* were applied to the worship of this idol. But that evidence is extremely vague and extremely loose. The *mookhtear* says in several places that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family *mehals* were applied to sustain their temples and worship. But supposing it to be taken that the rents of this *mehal* were applied during the period that the witnesses speak of, to the worship of the idol *Radhamohun*, that fact is by no means sufficient to establish the *onus* which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no

proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts shewing that the rents were separately collected and applied for the worship of this idol. For anything that appears, the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to shew that an endowment was made, other than that *rubicari* to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the Plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular *mehal* for a certain period to this idol is some evidence that the family were aware that the rents were properly and by right so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication, from what occurred in the suit brought by *Bhagiruthi*, the widow of the eldest brother of *Bijoy*, that the family understood that there was no such endowment. That suit was brought by *Bhagiruthi* to recover from *Rashmoni* one-third of the *mehal* in question. She did not claim it as property to which she was entitled as joint *Sebait*, but she claimed it as one-third of the family estate to which she, as widow of one of the brothers, was entitled. That is her claim. *Rashmoni* does not set up as a defence that the *mehal* was *dewuttor* property devoted to this idol, that she was the *Sebait*, and entitled, at all events, to the possession and the management of it—she sets up no case of that sort—but allows a decree to be passed against her in favour of *Bhagiruthi* to recover one-third of the *mehal*, and in that decree the property is described, not as *dewuttor*, but as *brumuttor* property.

Now if this *mehal* had been really dedicated to the idol, it would no longer have been a partible estate. *Rashmoni* would, as *Sebait*, have been entitled to the possession of it, and to the management and disposition of the revenues; and all that *Bhagiruthi* could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore there is not only weakness of proof on the part of the Plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not *dewuttor* property such as it is alleged to be on the part of the Plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the *mourusi pottah* and of the bill of sale. Mr. *Leith*, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being *dewuttor*. But the statements in these deeds are relied upon by the Plaintiff as an admission which estops the parties to them from asserting that these lands were not *dewuttor*. But if the statements are relied on in this way, they must be taken as a whole; and so taking them it would appear that, granting the lands were *dewuttor*, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The *mokurruri* was granted, according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part of the *mokurruri* rent was granted in consideration of money stated to be required for the completion of the temple which it was stated was already in course of erection. If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been *dewuttor* land.

What, then, is the Plaintiff's position? These deeds are thirty years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shewn that the represent-

ation, although made, was not believed by the grantees, and that they colluded with *Rashmoni* to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to shew that the original grantees did not believe the statements appearing upon the face of the deeds; indeed if they had made inquiry they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if *Rashmoni* offered this *mokurruri pottah* to raise money for the purpose of doing the repairs that the temple required, the purchaser who *bonâ fide* took it upon that representation would clearly be entitled to keep his purchase. It may be that *Rashmoni* did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in *Hunoomanpersad Panday* v. *Mussumat Babooee Munraj Koonwaree* (1). "The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shewn to have acted *malâ fide*, will not be affected though it be shewn that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that under such circumstances he is bound to see to the application of the money." That passage was adopted in a very late case before this Board: *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1). In that case a *Sebait* had incurred debts, and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol; and this tribunal held that the position of the *Sebait* was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a *mokurruri pottah* was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bonâ fide*, the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers

(1) 6 Moore's Ind. Ap. Ca., 393; 1 P. C. J., p. 552.

(1) Law Rep. 2 Ind. Ap., p. 145; 14 B. L. R., 450; *Ante* page 449.

to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the Plaintiff that this answer had not been put forward by the Defendants, and undoubtedly they have relied more strongly upon the defence that the land was not *dewuttor* land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes, for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the Respondents; and it is to be observed that in the suit brought by *Prosunnomoyi* during the lifetime of *Rashmoni*, in which the original grantee, *Sen*, was a party, he there set up the defence in a perfectly correct form, namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the Plaintiff could not succeed on this plaint in setting aside the deeds; because if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been grated, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples; but that would not be a sufficient ground for setting aside the deeds altogether. The Plaintiff in that case should have offered to reimburse the *bonâ fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the Appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal, with costs.

30th November and 1st December, 1876.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

RAJAH VURMAH VALIA, (Plaintiff)* ... } *Appellant*,

versus

RAVI VURMAH MUTHA and others, (Defendants) ... } *Respondents*.

Trustees of a religious endowment—Alienation—Custom.

The founder of a Hindu temple who provides that the *wallers* (trustees or managers) thereof for the time being, shall be the *Karnavans* (chiefs) of four distinct families, may be supposed to have established this species of corporation with the object of securing the due performance of the worship and the due administration of the property of the temple by the instrumentality of a class of person whom he has selected on grounds of special fitness; and it cannot be supposed that he intended to empower such trustees at their mere will to transfer their office and its duties, with all the trust property, to a person unconnected with the families from which the trustees were to be taken, to be used according to his discretion. There is no authority under the general principles of Hindu law for holding that such trustees have power to make such a transfer.

Where a custom relied on as sanctioning such a transfer, implies the right to sell the trusteeship for

* 4 Cowell's I. A., p. 76.

the pecuniary advantage of the trustees, that circumstance alone may justify a decision that the custom relied on is bad in law.

Where from the absence of direct evidence of the nature of a Hindu religious foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution.

The cases of *Gridharee Dass* v. *Nundo Kishore Dass Mohunt* (1), and *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*; (2), referred to and approved.

1st December, 1876.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

This is an appeal by the person who has been throughout the argument called the *Cherakel Rajah* against a decree of the Civil Court of *Tellicherry* and a decree of the High Court of *Madras*, both dismissing his suit. The *Rajah* claims to be the assignee of the *uraima* right, or right of management, of the *Tracharamana pagoda* and its subordinate *chetroms*, under an assignment from the persons known as the *urallers* of that religious foundation. The early history of the foundation seems to be lost; no trustworthy account of its origin is to be found in the evidence taken on the remand by the High Court. The nature of the existing institution, however, is shewn pretty clearly upon the proceedings. It appears that the so-called *pagoda* is not a *pagoda* in the ordinary sense of the word, but a mere platform in the middle of the forest, upon which, once in every year, certain ceremonies take place in honor of a particular idol; that to this annual festival a large number of persons resort; that considerable presents and offerings are made there by the worshippers; and that the festival is a matter of general interest to the Hindu inhabitants of that part of the country. It also appears that the property of the trust consists partly of a large landed estate, and partly of jewels of considerable value, which were kept in a place called *Karimpana Goprum*. The *Rajah* having obtained from the *urallers* the assignment contained in Exhibit E, succeeded in getting into possession of the whole or greater portion of the landed property; but his right to the custody of the jewels was disputed by the Defendants to this suit and others; who actively resisted his attempt to remove them from their ordinary place of custody. Their being a real or supposed risk of a breach of the peace, the usual reference to the magistrate took place. Whilst that was pending, the *Rajah* asserted that the *goprum* had been broken open and some of the jewels abstracted. However that may be, it is certain that the persons accused of having robbed the *goprum* were acquitted of any criminal offence; that the jewels which they were said to have stolen were placed in the hands of the magistrate, who passed an order forbidding the *Rajah* to remove the property, or any portion of it, from its usual place of security in the *goprum* until he had the authority of the Civil Court for so doing; and directing that the keys of the room which contained the jewels should remain in the hands of the person who is the third Defendant on this record. Upon this the *Cherakel Rajah* brought the present suit.

It seems to their Lordships that there was some little confusion and misconception in the Indian Courts as to the nature of the suit. The Civil Judge speaks of it as a suit for specific performance. Again, Mr. Justice *Holloway*, in the second ground of his judgment on the appeal, seems to draw a distinction between the jewels and the other property belonging to the institution, and to express an opinion that in order to dispose of the Plaintiff's claim, it was sufficient to say that the jewels having been devoted to the service of an idol, were *extra commercium*, and could not pass under the assignment. The suit is clearly not one for specific performance. It is not brought against the other parties to the contract, the *urallers*, but against persons, strangers to the contract, who are disputing the right of the Plaintiff under his assignment to take possession of a portion of the property belonging to the *pagoda*.

(1) 11 Moore's I. A., Ca., 405; 2 P. C. J., p. 306.
(2) 1 Macpherson's I. A., 209; *Ante* page 341.

Again, if it be conceded that the assignment has legally transferred all the rights of the *urallers* to the *Rajah*, and that the *urallers* had an unqualified right to the custody of these jewels, and the power of removing them to any place they pleased, and of keeping them there, it would hardly be an answer to the suit to say that the jewels, being devoted to an idol, were *extra commercium*. The suit seems to their Lordships to be in the nature of an action for detinue, brought to recover jewels, the right to the custody of which the *Rajah* says has passed to him by virtue of the assignment, wherein the Plaintiff has to make out his title to the goods, which by an apt plea has been put in issue.

The parties having put in their written statements, certain issues were settled in the cause.

Of these their Lordships have only to deal with the first and second. The first is, was the deed of assignment valid? the second, has the Plaintiff thereby acquired all the rights of the *urallers?*

It is to be observed, however, that this second issue covers something more than the broad and general question whether the *urallers* were legally competent to transfer the property of this *pagoda* to an individual upon the trusts upon which they themselves held it. If this question be decided as the Courts in *India* have decided it, there is of course an end of the Plaintiff's case. But if it were decided in his favour, a further question would arise, viz., whether according to the constitution of this particular institution, the concurrence of the *Kottayam Rajah*, or that of some of the ministerial officers of the institution, and in particular of the third Defendant, was not necessary in order to validate the assignment. Upon these and other questions relating to the rights and powers of the Defendants, which are more distinctly raised by the subsequent issues, Mr. *Mayne* has not as yet addressed their Lordships, and the conclusion to which their Lordships have come renders it unnecessary to discuss them. They propose therefore to consider only the broad and general question decided by the Indian Courts, viz., whether the *urallers* were legally competent to transfer their *uraima* right by the Exhibit E.

It is admitted that according to the constitution of the institution the *urallers* for the time being were to be the *karnavans* or chief members of four different *tarwads*. It was, therefore, presumably the intention of the founder that the *uraima* right should be exercised by four persons representing four distinct families.

The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful man, as probably this *Cherakel Rajah* is, and therefore the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand. Mr. *Mayne* almost admitted that the broad principle *delegatus non potest delegare* would *primâ facie* apply to such a case. He argued, however, that the decisions of the Court of Chancery, of which

some have been cited in the Judgment of the Civil Judge, are of no authority upon a question arising between *Hindus* touching a *Hindu* religious foundation; and he relied on various cases decided in *India*, as favouring, if they do not directly affirm, the propositions which the Appellant has to establish. In their Lordships' opinion, the authorities cited by him do little or nothing to advance the Appellant's case. In the first (1) the decision was against the particular transfer in question. The authority relied upon was a mere expression of opinion on the part of certain *pundits*, founded on the text of the *Dàyabhaga* (a treatise not necessarily of authority, except in *Bengal*), that a certain deed of gift executed by the owner of lands in *Bengal* would carry *dewuttor* lands with the obligation of keeping up the worship of the idol. The next case which was cited(2) from the *Bengal* S. D. A. reports for 1850, really has no application to the present; or, if it has any, is inconsistent with the Appellant's contention. The Court then said: "But a further objection arises as to the Plaintiff's claim, viz., that were the deed established, and were it shewn that it was the intention of the donor to transfer to the donee his rights of office as well as personal rights, and also the duties incumbent on the office of *mohunt*, there has been no public acknowledgment of the Plaintiff by the assembly of *mohunts* and others in due form, as is proved on the record to be customary on the death of one *mohunt* and the appointment of his successor." In that case, therefore, evidence of what the constitution of the foundation was had been given; the transfer which was insisted upon was shewn to be inconsistent with that constitution, and was treated as invalid.

Again, the preponderance of the authorities in *Madras* appears to be against the present contention. The first case, cited from the first volume of *Madras* High Court Reports *(3)*, decided that the assignment in question was not valid, because all the *urallers* had not joined in it.

It cannot be inferred from such a ruling, that there was any implied decision, or even, as Mr. *Mayne* would put it, a dictum, in favour of the proposition that an assignment executed by all the *urallers* of any foundation of this kind would operate as an effectual transfer of their trust. The Court merely decided on one patent defect of title, without considering whether, if that defect had not existed, the title could have been supported.

The next case was that before Messrs. *Innes* and *Collette*. That is to some extent in favour of Mr. *Mayne's* view, though it related to a charitable and not to a religious foundation, and we have not clearly before us what the facts were as to that foundation. That the broad distinction which the Civil Judge takes between a religious and a charitable foundation can be supported, their Lordships are not prepared to say. Then came the decision of Mr. Justice *Holloway*, when he was a Judge of *Calicut* (1). It is said that the High Court afterwards remanded this cause for the trial of certain issues as to the alleged rights of the Plaintiff, who, it may be observed, was the same person as the Plaintiff in the present case. Some of those rights, however, were different from that now asserted. The Plaintiff did not there claim, as here, only under an assignment from certain *urallers*. He also set up superior rights to those of the *urallers*, claiming a power to remove as well as a power to appoint them. It is not shewn to their Lordships' satisfaction that Mr. Justice *Holloway's* general position in that case was finally or conclusively overruled by the High Court.

This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of *Madras* which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct; and consequently that the *urallers* had no power under what may be termed the common law of *India* to transfer their *uraima* right to the Plaintiff, the *Cherakel Rajah*.

(1) *Kounla Kant Ghosal* 4 Sel. Rep. 196; New Ed., p. 247

(2) *Mohunt Gopal Duss Sudder* Dec. Cal. 250.

(3) *Ukanda Varriyai* 1 Mad. H. C. R., 262.

(1) *Rajah Verum Rajah of Cherakel* v. *Karimbil Ambu Mutta Nambu and others*, unreported.

But it is said that in *India*, and particularly in that part of *India* in which this *pagoda* is situated, custom must prevail against the general law. That such would be the consequence of a well-proved and established custom their Lordships do not deny. In the present case, however, the civil Judge has distinctly found against the existence of the custom; and although the High Court has not dealt at large with the evidence given in the cause, Mr. Justice *Kindersley*, at all events, seems to have treated the alleged custom as not established. If the two Courts had clearly concurred in a finding that the custom had not been established, their Lordships would have applied their ordinary rule in such cases; but there being some slight doubt about the effect of the second judgment, they have allowed Mr. *Mayne* to draw their attention to the evidence. After hearing that evidence they feel bound to say that it is wholly insufficient to induce them to overrule the finding of the Civil Judge. It appears to them that no general custom such as that contended for can be established by such very vague and loose evidence. They would further observe that they have grave doubts whether any such general custom can, in cases like the present, be set up and proved in that way. They conceive that when, owing to the absence of documentary or other direct evidence of the nature of the foundation and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution. This seems to have been decided in the case of *Gridharee Dass* v. *Nundo Kishore Dass Mohunt* (1). That came before this Board, on appeal from a decision of the High Court of *Bengal*, when Sir *Barnes Peacock* was Chief Justice; and in the Chief Justice's judgment, which was afterwards affirmed by this Board, there is this passage: "Numerous cases have been cited to shew what was the usage, but the law to be laid down by this Court must be as to what is the usage of each *mohuntee*. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *mohuntee*." And their Lordships on the appeal said, "It is to be observed that the only law as to these *mohunts* and their office, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to shew that any appointment has ever been made in reversion on any former occasion." That seems to their Lordships to point, though perhaps less distinctly than the passage in Chief Justice *Peacock's* judgment, to the necessity of proof of the custom of the particular *mohuntee*. The same principle was recently affirmed by this Board, in the case of *Rameswarem Pagoda* (1). At page 228 their Lordships observe: "But the constitution and rules of religious brotherhoods attached to *Hindu* temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them. That principle was laid down by this Committee in an appeal involving the succession to the office of *mohunt* of a richly endowed *Mutt* in *Rajgunge*, in these terms." And the judgment then cites the passage from the 11th *Moore's* Indian Appeals which has been just read, and proceeds to consider the evidence of usage as to the particular *pagoda*.

Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify

(1) 11 Moore's Ind. Ap. Ca., 405; 2 P. C. J., p 306.

(1) Law Rep. 1 I. A., p 209; *Ante* page 344.

a decision that the custom was bad in law.

Upon these grounds their Lordships are of opinion that no case has been made for interfering with the decrees under appeal; and they most humbly advise Her Majesty to affirm those decrees and to dismiss this appeal.

The Respondents not having appeared there will be no order as to costs.

6th, 7th and 8th February; and 10th March, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir Lord Blackburn, the Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Recorder of Rangoon.

WILLIAM IRVINE, (Defendant)* ... } *Appellant,*

versus

THE UNION BANK OF AUSTRALIA, (Plaintiff) } *Respondent.*

Ratification—Company—Acts done by Directors in excess of authority.

The ratification by a company of particular acts done by its directors in excess of the authority given them by the articles of the Company, does not extend the powers of the directors so as to give validity to acts of a similar character done subsequently.

10th March, 1877.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

THIS is an appeal from a decree of the Recorder of *Rangoon* in a suit in which the Respondents, suing in the name of their inspector, were Plaintiffs, and the Appellant was one of the Defendants.

The suit was brought to recover the sum of £15,296. 17*s.* 6*d.*, for money advanced by the bank to the *Oriental Rice Company, Limited*, and to enforce an equitable mortgage as a security for the advances.

The Plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the company of certain title deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of *Rangoon* for securing the repayment of the said sum of £15,296. 17*s.* 6*d.*, and that upon non-payment of that amount the Defendant might be foreclosed from his equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the said sum, or such other sum as the Court might find to be due to the Plaintiffs, with interest and costs.

The Company were made co-Defendants in the suit, but they did not appear or defend.

The Defendant (Appellant) claimed the property under a purchase at a sale in execution of a decree against the company, by which he acquired the right, title, and interest of the company, and nothing more. That purchase was made on the 31st of May, 1872.

The principal question to be decided is what is the sum for which the *Union Bank* is entitled to a charge upon the property. On the part of the bank it was contended that they are entitled to a charge for the full amount claimed, and on the part of the Defendant (Appellant), that the charge is limited to the amount of one-half of the actually paid-up capital of the company, which paid-up capital the Appellant in his written statement alleged was never more than £17,100.

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital.

Their Lordships then expressed their opinion upon the point, and stopped the learned counsel for the Respondent. They were of opinion that it should be taken at

* 4 Cowell's I. A., p. 86; 3 I. L. R. Cal., p. 280.

£17,100, the amount found by the learned Recorder.

The company was originally formed in the colony of *Victoria* by articles of association, dated the 25th of April, 1861, and on the 18th of August, 1864, it was duly registered as a company limited by guarantee under an Act of the Legislature of *Victoria*, which followed and adopted the provisions of the *Companies Act*, 1862.

By that registration the company, by virtue of the section of the Colonial Act corresponding with sect. 196 of the *Companies Act* of 1862, became subject to all the provisions, so far as they are applicable to the present case, of the Colonial *Companies Act*, in the same manner in all respects as if it had been formed under that Act.

The articles of association contained no restriction or limitation on the company's power of borrowing.

As regards the directors, however, their authority to borrow was limited; for it was expressly stipulated by Art. 50 of the articles of association, which were registered under the *Companies Act*, and of which the bank was bound to take notice, "that subject and without prejudice to the power therein given to the meetings of shareholders and the conditions and restrictions therein contained, the directors for the time being should have, amongst others, the following powers, that is to say, the power of borrowing and taking up on the credit of the said company or of its property any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time*, one-half of the then actually paid-up capital of the said company, and that for the purpose of securing any sum or sums which might be so borrowed by the directors, they should be at liberty to mortgage, with or without power of sale, and otherwise to charge and incumber, all or any part of the property, estate, and effects, real and personal, of the said company, and to accept, make, or indorse, any bill of exchange or promissory note on behalf of the said company, or to overdraw the account of the said company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said company, and the affairs and concerns of the said company, both in *India* and *Victoria* and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said company, both in *India* and *Victoria* and elsewhere, according to the provisions and subject to the restrictions of the said articles of association, should be confided to and be under the direction of the said directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the directors to borrow or take up upon the credit of the company as an existing debt at the same time an amount or amounts exceeding one-half of the actually paid-up capital of the company. There is no doubt that the authority of the directors, limited as it was by the articles of association, was capable of being extended under the provisions of Art. 31. But by that article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The article is in the following words:—

"One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of the provisions or powers herein contained, or to remove any director or trustee, or to increase or diminish the number of directors, but that upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the directors either to borrow or to mortgage was over extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned counsel for the Respondent, that the limitation of the power of borrowing and of mortgaging, contained in Art. 50, was merely a limitation of the authority of the directors conferred by the same article; that

it was not part of the constitution of the company, which, if the company had been originally formed under the *Companies Act* of 1862, must have been contained in the memorandum; and, consequently, that it was not a limitation of the general powers of the company, or of the whole body of shareholders; and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the directors in borrowing in excess of their authority were ever duly ratified by the company.

The learned Recorder considered that there was sufficient evidence to shew that the shareholders acquiesced in and approved of the acts of the directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorize an act, cannot give it validity by ratifying it.

By the 21st of the articles it is provided that an ordinary half-yearly meeting shall be held during the months of October and April in each year.

By the 22nd, that an extraordinary general meeting may be called at any time for a special object.

By the 25th, that a notice shall be sent to each shareholder, stating the day and place of the meeting, and "also the business proposed to be transacted thereat."

By the 26th, that at every general half-yearly meeting the accounts and a statement of the company's affairs, &c., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the directors or auditors, so as to bind all the members for the time being of the company, and all persons claiming under them."

The notice that a half-yearly meeting was to be held would sufficiently indicate that it was for the purposes mentioned in Art. 26, but would not indicate that it was for any other purpose.

The report of the directors referred to in Art. 26 seems to their Lordships the same thing as the statement of the company's affairs previously mentioned in the same article. There is nothing in the articles requiring the directors to circulate the reports among the shareholders before the meetings. There is no evidence in the case that the reports were in fact circulated before the half-yearly meetings, and the form of the reports bearing dates on the days of the half-yearly meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the company), at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-pearly meeting.

But if the object was to give the directors in future an extended authority beyond what is given by Art. 50, their Lordships think that it would be an alteration of the provisions contained in the articles which, under clause 31, could only be made by a vote of one-half of all the shareholders of the company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority, and conferring a general power to do similar acts in future.

This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings, gave validity to acts of a similar character done subsequently.

For instance, it is important in considering whether the ratification at the half-yearly meeting held on the 30th of April, 1868, of the act of the directors in borrowing £13,000 when £10,000 previously borrowed remained unpaid, if made out, so far extended the powers of the directors as to authorize them to take up as an existing debt at the same time a further sum of £23,000 when the sums of £13,000 and £10,000 should have been paid off, notwithstanding the provisions of Art. 31, which rendered the votes of one-half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February, 1871, £10,000 under the letter of credit No. 150, and £5000 under the letter of credit No. 153. The balance remaining due of all sums previously advanced by the bank had been reduced at the end of 1870 to £8. 8*s*. 9*d*.

The last general half-yearly meeting of the company was held on the 13th of October, 1869. At that meeting the directors submitted their report for the period ending the 30th of June, 1869, and that report was adopted.

According to the evidence of Mr. *Curtayne* the letter of credit No. 153 was issued on the 9th of September, 1869. The fact of the directors having obtained that letter of credit could not and did not appear in the report of the directors for the period ending June, 1869, and the act of obtaining that letter of credit or of borrowing money thereon does not appear to have been ever reported or made known to the shareholders or ratified by them. The claim therefore as to that £5000 must be rejected unless the ratification of the act of the directors in obtaining previous letters of credit for £10,000 and £5000, Nos. 150 and 141, as stated in the report of the 29th of October, 1868, which was ratified at the half-yearly meeting held on that date, authorized the directors to obtain the letter of credit No. 153 after the letter of credit No. 141 of the 11th of September, 1868, for £5000 referred to in that report had been paid off.

Their Lordships are of opinion that the ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain the letter of credit No. 153, or to borrow the £5000 now claimed as having been advanced thereon on the 11th of February, 1871. The sum of £5000 advanced on the 17th of February, 1871, on letter of credit No. 153 must therefore be disallowed.

The only item remaining to be considered is the £10,000 advanced on the 11th of February, 1871, on the letter of credit No. 150.

That letter of credit, according to the evidence of Mr. *Curtayne*, was obtained on the 23rd of December, 1867. It authorized the *Chartered Bank of India, Australia*, and *China*, in *Rangoon*, they then being the agents there of the *Union Bank*, to honour the rice company's drafts through their manager, Mr. *Jamieson*, on the *Union Bank of Australia*, in *London* to the extent of £10,000, at any time until the 29th of March, 1869.

The obtaining of that letter of credit was mentioned in the report of the directors, presented at the meeting of the 29th of October, 1868.

The following is the statement contained in the report:—

"In addition to the bank credit for £10,000 with which Mr. *Jamieson* had been hitherto furnished to enable him to conduct the financial wants at *Rangoon*, another credit for £5000 has been forwarded, which Mr. *Jamieson* advises will be of great assistance in his operations."

That report was read and adopted at the said meeting.

It did not necessarily follow because a letter of credit for £10,000 was obtained that the directors would act upon it, in violation of Art. 50, by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one-half of the paid-up capital of the

company. The directors did not exceed the authority conferred upon them by the articles of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of £5000 might have been taken up and paid off, and then another sum of £5000 taken up under it without an excess of authority.

At the time of the adoption of the report, on the 29th of October, 1868, the letter of credit then existing was to expire on the 29th of March, 1869. It was not mentioned in the report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a limited time. It is not at all unusual, but it is not a matter of course to extend the time if the original credit has not been acted upon.

Even if the adoption of the report mentioning the credit for £10,000 authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the report to lead to the supposition that the directors had any intention to renew the letter of credit or to borrow money upon it after the 29th of March, 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for £10,000, or even to borrow upon it £10,000 at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow £10,000 at one time on the 11th of February, 1871, more than two years after the date of the meeting of October, 1868, and when the company might possibly consist of an entirely different body of shareholders.

But however this may be their Lordships are of opinion that there was no evidence to shew that any sufficient notice of the substance or effect of the reports which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the company in pursuance of the 25th clause of the articles of association so as to lead the absent shareholders to know or even to imagine that the directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the directors, to be laid before the meeting, an act of the directors in excess of their authority could be rendered binding upon the whole body of shareholders.

Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the company would have become charged as a security for the repayment of the amount.

The case of *Royal British Bank* v. *Turquand* (1), and the same case in error (2), were cited in the course of argument to shew that the excess of authority was a matter only between the shareholders and the directors, and that it does not affect the rights of the bank. In that case it was said by Chief Justice *Jervis*: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the statute and the deed of settlement; but they are not bound to do more. The party here (that is in *Turquand's Case*) on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the bank had referred to clause 50 of the articles of association they would have found that the directors were expressly prohibited from borrowing beyond a certain amount.

The case of *Royal British Bank* v. *Turquand* (1) was decided with reference to a company registered under 7 & 8 Vict. c. 110, and Chief Justice *Jervis* remarked that the lender, finding that the authority might have been made complete by a resolution would have had a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done. In the

(1) 5 El. & Bl. 248. (2) 6 El. & Bl. 327.

present case, however, the bank would have found that, by the articles of association, the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the directors by Art. 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of sect. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of sect. 53 of the *Companies Act*, and would have been found amongst his records.

Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of *Royal British Bank* v. *Turquand* (1).

It is unnecessary to consider what would have been the rights of the bank if the amount which they advanced had not been more than one-half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the bank, would have exceeded the amount which the directors were authorized to borrow. In the present case, the £10,000 and £5000 were both lent by the bank itself.

It was argued that the advances made by the bank under the letter of credit did not amount to a lending by the bank or a borrowing by the directors. There is nothing in that objection. If, however, it was not a borrowing, the directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repayment of it. It was only for securing moneys borrowed that the directors were authorized to mortgage or charge the property of the company.

(1) 5 El. & Bl. 248.

For the above reasons their Lordships are of opinion that the Plaintiffs are not entitled as against the Defendant to a charge on the property beyond the amount of one-half of £17,100, the paid-up capital of the company.

The amount therefore allowed to the Plaintiffs by the decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the decree be reversed, and that it be declared that the Plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of £8550 only.

It was objected at the hearing on the part of the Appellant that the decree ought to have been for a foreclosure, and not for a sale, but at the close of the case their Lordships were informed that the property had been sold under the decree, and that the money had been deposited in Court; and that the Appellant does not object to the sale.

Their Lordships will therefore further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the Plaintiffs and of the Defendant respectively, as taxed by the lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the Plaintiffs a sum of rupees equivalent, at the rate of exchange current between *Rangoon* and *England* at the time of the filing of the suit, to the principal sum of £8550, with interest thereon, at the rate of 8 per cent., from the 5th of October, 1872, to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the Defendant Appellant.

The Respondent must pay the costs of this appeal.

9th, 10th, 15th and 16th February, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

PAULIEM VALLOO CHETTY, (Plaintiff)* ... } *Appellant,*

versus

PAULIEM SOORYAH CHETTY, (Defendant) } *Respondent.*

Concurrent judgments on facts—Devise to heir—Acquisitions by a Hindu subjects to the Mitakshara law—Education.

The rule of the Judicial Committee of the Privy Council not to permit the concurrent judgments of two Courts on a question of fact to be disputed may be relaxed in a case where the question of facts is closely mixed up with questions of law.

Quære, whether when a *Hindu* devises to his son's property which in the absence of such devise they would take as his heirs, the sons shall be considered to take as devisees or as heirs.

Quære, where a member of a joint *Hindu* family subject to the *Mitakshara* law has received a general education at the expense of the joint family funds, but is shown to have derived no material wealth from these funds, does property which he afterwards acquires by the exercise of his industry and intelligence in successful trading become joint in the contemplation of the *Hindu* law? Decisions of the Indian Courts bearing on this question observed on.

16th February, 1877.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This case has been argued at considerable though not unnecessary length, and in the course of the argument several questions of law of much importance have been raised; but, in the view which their Lordships take of the case, it ultimately resolves itself into one or two questions of fact attended with no great difficulty.

Those questions arise in this way: *Chuckeray*, the original Plaintiff, upon whose death the present Plaintiff, his son, was substituted on the record, was the son of *Aroonachellum*. *Aroonachellum* was one of four brothers, sons of *Maurec*. *Chuckeray* brought his suit for the purpose of setting aside the will of *Aroonachellum*, made in favour of his brothers, upon various grounds; but the only ground now necessary to refer to is that the property of *Aroonachellum* was joint, because it was ancestral—derived from his father—and therefore that *Aroonachellum* could not dispose of it by will, or, at all events, could not dispose of more than a part of it.

This case has come before three Courts in *India*. It was first heard by Mr. Justice *Kernan*, who framed his decree on the ground that, in his opinion, the property of *Aroonachellum* was not ancestral, but was self-acquired. The case then came before the Cheif Justice and Mr. Justice *Holloway*, who differed in opinion; the Chief Justice holding that the property was self-acquired, Mr. Justice *Holloway* holding that it was ancestral. The opinion of the senior Judge prevailing, there was an appeal to a Full Bench High Court, which, with the exception of Mr. Justice *Holloway*, held that the property was self-acquired, and that the will was valid. Their Lordships have not in this case insisted on the rule that they will not permit, under ordinary circumstances, the concurrent judgments of two Courts on a question of fact to be disputed, because the questions of fact appeared to be a good deal mixed up with questions of law.

On the part of the Appellants it was not denied that *Aroonachellum* had, in the ordinary sense of the word, made his own fortune, that the property which he devised to his brothers was acquired by his successful trading and by the exercise of his industry and intelligence; but it was contended that that property was to be deemed in point of law to have been derived from his father *Maurec*, firstly, because he had originally received a certain amount of property from *Maurec*,

* 4 Cowell's I. A., p. 109; I. L. R. 1 Mad. p. 252.

with which he had commenced his trading, and which became, as it has been termed, the nucleus round which his fortune gathered; and, secondly, because, even if he did not acquire anything from his father, nevertheless, inasmuch as he was educated out of the funds of the family, all his acquisitions became joint in contemplation of law.

The first question is a pure question of fact. Upon it *Sooryah*, the Defendant, the executor of the will of *Aroonachellum*, was examined, and he is reported by the Judge of the Court of first instance to have been a satisfactory and trustworthy witness. This witness, amongst other things, says, "The sons of *Mauree* got no property of our father; on the contrary, we supported the father. He was dubash in *Baker's* house in 1805 or 1806. *Kistnamah*"—he was the eldest son—"was not assisted by any funds derived from my father. *Mauree* suffered loss to 25,000 or so, and *Kistnamah* paid that out of his own money." Then he further says, "especially that *Mauree's* assets were not enough to pay debts,—insolvent, in fact. The debts *Mauree* left were ten times larger than the property he left. We paid a *lac* for Court costs after his death from 1814 to 1834. *Kistnamah* carried on on his own account; so did *Aroonachellum*; so did *Cothundaram* and self"—that is, the other brothers. "During the life of father we were always in the same house living, and also *Sawmy*"—he was a cousin—"and cooked and ate together. Up to the death of *Maurce* there was no division. We each worked separately, and the brothers had to pay 30,000"—rupees or *pagodas*, it does not appear which—"for the debts of father, owing to security given by him, but we laboured separately, and had our property separate."

In their Lordships' opinion, if this evidence, uncontradicted as it is, had stood alone, it would have amply supported the finding of fact of the three Courts. But it is materially corroborated. In the first place, it is corroborated in this way: A suit was brought against *Mauree* in 1805 (*Mauree* died in 1814) by one *Devaljee*, who had obtained a loan from *Mauree* on a mortgage, *Devaljee* alleging that *Mauree* held possession of the mortgaged premises and received the proceeds for a long time after the mortgage had been paid off. This suit was attended with considerable expense to *Mauree* in his lifetime; and it went on, and was a source of great expense and considerable loss to his sons, until it was finally decided in 1835. We have the Master's various reports in the course of it; and it is enough to say that from these reports it appears that *Mauree* at the time of his death had been overpaid to the amount of more than 8000 *pagodas*, which he owed to *Devaljee*, and that this sum exceeded considerably any assets which *Mauree* had. *Mauree* left a will leaving his property to his sons. But their Lordships do not think it necessary to determine a question raised here, though apparently not in *India*, whether, if there had been a surplus after satisfying *Mauree's* liabilities, his sons would have taken by descent or by devise. Three of his sons renounced probate. The eldest son, *Kistnamah*, took out administration with the will annexed, and, as administrator with the will annexed, obtained possession of the property. It appears that *Kistnamah* up to the time of his death retained this property, as it was right and prudent for him to do, in order to meet the possible adverse result of the suit of *Devaljee*; that in defending the suit, and in the expenses of administration, he disbursed considerably more than the whole value of the property; and that, although the greater part of these disbursements were ultimately disallowed as against the creditors, the representatives of *Devaljee*, the deficiency was made good out of his estate; that after his death, which occurred in 1826, no assets of *Mauree* came to the hands of his surviving sons, except the half-share of the garden at *Athepattam* and some other immoveable property of small value, all of which was afterwards sold under the final decree of the Court in satisfaction of the claim of *Devaljee's* estate.

The statement of the witness *Sooryah* is also further corroborated in this way:—one *Nurrainsawmy*, the son of *Kistnamah*, the eldest son of *Mauree*, brought a suit very much of the same description as the

present for the purpose of disputing the will of *Kistnamah*, on the ground that *Kistnamah's* property was joint. In that suit the whole of the family agreed in treating the property of *Kistnamah* as self-acquired; and if *Kistnamah's* property was self-acquired, and not derived from *Mauree*, some presumption arises that the property of *Aroonachellum* was not derived from *Mauree*.

On these grounds their Lordships entirely concur with the finding of the Courts upon the first question; namely, that *Aroonachellum* did not receive any property from his father on which he commenced his trading, or which could in any sense be properly called the nucleus of his trading fortune,

The next contention is: that *Aroonachellum* having been educated out of the joint funds of the family, his acquisitions became in point of law joint. In support of the allegation of fact on which it is sought to found this legal inference the only evidence produced is the answer of the Defendants, *Sooryah* among them, in a suit filed by one *Sawmy*, a grandson of *Nullamutta*, who was the father of *Mauree*; *Sawmy* contending, amongst other things, that the property of *Mauree* was ancestral, derived from *Mauree's* father *Nullamutta*; and the four brothers, *Kistnamah*, *Aroonachellum*, *Cothundaram*, and *Sooryah*, contesting that proposition, and contending that the property of their father *Mauree* was self-acquired. That answer contained this passage: "*Aroonachellum* was educated by his said father *Mauree* by and out of his separate funds or means; and when this Defendant *Aroonachellum* was of sufficient age he was put forward in life by his said father, and by and through his means and influence only, and afterwards by and through the industry and exertions of this Defendant *Aroonachellum* on his own behalf." If this passage be relied upon as an admission it must be taken as whole, and it contains a distinct assertion, that whatever were the charges of *Aroonachellum's* education—and it nowhere appears what sort of education he had—those charges were borne by the separate estate of his father, over which he had an absolute power of disposition. There was, therefore, at that time, no joint estate in the proper sense of the word; and the foundation of fact then fails upon which the legal inference was to have been based.

This being their Lordships' view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the Appellant, which, stated in plain terms, amounts to this: that if a member of a joint *Hindu* family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property,—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' veiw, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the 10th vol. of *Sutherland's* 'Weekly Reporter,' in which a judgment was given by Mr. Justice *Jackson* and Mr. Justice *Mitter*, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in *Madras*; the first being to the effect that a woman adopting a dancing girl, and supplying her with some means of carrying on her profession, was entitled to share in her gains; and the second to the effect that the gains of a *vakeel* who has received no special education for his profession are to be shared in by the joint family of which he was a member; decisions which have been to a certain extent also acted upon in *Bombay*. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of *Bengal* is not more correct than what appears to be the doctrine of the Courts of *Madras*.

For these reasons their Lordships are

of opinion that the judgment of the Court below was right, and they will humbly advise Her Majesty that that judgment be affirmed, and this appeal be dismissed with costs.

1st and 2nd March, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Bombay.

VASUDEV SADASHIV MODAK, (Plaintiff)* } *Appellant,*

versus

THE COLLECTOR OF RATNAGIRI, (Defendant) } *Respondent.*

"The Pensions Act, 1871"—Jurisdiction—Deshmukh.

A Plaintiff alleging that, as the hereditary *Deshmukh* of certain *Mehals*, he was entitled to be paid directly by the *ryots* of these *Mehals* a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land revenue" and as such excluded from the jurisdiction of the Civil Courts by Section 4 of "the Pensions Act, 1871."

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an appeal against a judgment of the High Court of *Bombay* confirming a judgment of the Judge of first instance, which, before the settlement of issues in the cause, dismissed the suit of the Appellant on the ground that it was excluded from the jurisdiction of the Civil Courts by the *Pensions Act*, 1871. The material sections of the statute are the 4th and the 3rd.

The 4th says, "Except as hereinafter provided"—and it is admitted that the case does not fall within any of the statutory exceptions—"no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or grant for which such pension or grant may have been substituted;" and the 3rd, which is an interpretation section, says, "In this Act the expression 'grant of money or land revenue' includes anything payable on the part of Government in respect of any right, privilege, perquisite, or office."

It is to be observed that upon this appeal it would be impossible for their Lordships to pronounce affirmatively that the suit is not one which under the Act is excluded from the jurisdiction of the Civil Courts. The case as put by the learned counsel for the Appellant is simply that the materials before the Courts were insufficient to shew that they had not jurisdiction, and that therefore the cause should be remitted to *India* for a fuller trial there on this issue.

The materials which were before the Court were the plaint, the oral examination by the Judge of the Plaintiff's pleader, the *sunnud* of the 3rd of March, 1777, and the judgment in a former suit instituted by the Appellant against the Government before the passing of the Act, which is set out in the record. The question is whether, taking all these together, the Judge had not sufficient grounds for saying that the suit was within the meaning and operation of the *Pensions Act*, 1871.

The Plaintiff's case was that he was the hereditary *deshmukh* of certain *turufs* or districts; that as such he and his ancestors had long been entitled to receive directly from the *ryots* a percentage equivalent to six *pie* in the rupee upon that part of the revenue which was assessed in cash;

* 4 Cowell's I. A., p. 119; I. L. R. 2 Bom., p. 99.

a smaller percentage upon that part which was assessed in grain; and certain other dues which their Lordships think may be dismissed from consideration; because, though the articles in respect of which they were payable were articles upon which revenue was levied under the former native governments, they have long since been abandoned by the British Government as the subjects of revenue, and the rights of the *deshmukh* in respect of them are really not in issue in this suit. The questions arising between the parties may be fully tried and determined upon the first two items of revenue.

These rights of the *deshmukhs* were, as the Plaintiff says, confirmed, or, as the other side put it, regranted by the *sunnud* of 1777. And the Plaintiff alleges that up to the year 1842 he received his dues directly from the *ryots*, but that since 1842 the Government has received them on his behalf, and become accountable to him for them. It is an undisputed fact that in the year 1868 there was a new revenue settlement, since which the whole of the revenue receivable by Government and assessed upon the *ryots* has been a money assessment, no part of the revenue being now assessed in grain.

Upon this state of facts, two distinct questions arise; first, whether in its inception and original character the *deshmukh's* right is not one within the scope and operation of the Act of 1871? Secondly, whether, if that be not the case, the right has not been brought within the scope and operation of the Act by the alterations in its character that have subsequently taken place?

The judgment of the High Court of *Bombay* answers the first of these questions in the affirmative, and proceeds on that finding. It says, "Now according to Plaintiff's own shewing, it is clear that the allowance was, in its inception, either a pension or a grant of money or land revenue, or both. It was a pension or annual sum conferred, and it was a grant of land revenue made for services to be rendered. The mode in which it was to be levied appears to be immaterial. The Government of the time, having the undoubted right to levy assessment on all cultivated lands not expressly exempted from assessment, assigned a portion of such assessment or land revenue, varying each year according to the amount of the assessment which the Government reserved to itself, for the remuneration of the *watandars*."

Their Lordships, without adopting every word of that judgment as their own, are of opinion that the general conclusion is correct, and think it is established by the *sunnud* of 1777. That document recites the representation or petition of the Appellant's ancestors, from which it appears that whatever may have been the nature of the original right, the right of receiving these *haks* from the *ryots* had, at all events for a considerable number of years, been suspended; that as early as the time of *Sivaji* the *haks* were resumed by the Government of the day, and the value of them credited to the Government—that is, treated as part of the general revenue of the country—certain fixed salaries being paid to the *deshmukhs*; and that this system, with some variation as to the amount of the salary, continued during the time of *Kanoji Angria*, and was in force when the country again came under *Mahratta* rule. The petition of the then *deshmukhs* to the *Peishwa* prayed to have the old and suppressed allowances restored to them; stating, however, that there was a dispute between them and certain other parties as to who were the proper *watandars*. The result was that the *Peishwa* recognised the right of the Appellant's ancestors as between them and the rival claimants, and made an order upon the *mahajuns* and the *khots* of the villages of the *mehals* or *turufs* in question, enjoining them to cause the amount of the *hak* on the Government *jamabandi*, whatever it may amount to, according to the established practice, to be paid by the *ryots* to the Petitioners, their sons and grandsons. Now the original right of these *deshmukhs*, the beginning of which seems to be lost in antiquity, was substantially, as the High Court has put it, in the nature of a grant of revenue. Their functions were those of a collector of revenue for the Government. They were authorized to retain out of what they received from

the *ryots*, a certain percentage upon that which was fixed as the Government revenue for themselves, paying the balance to the Government. It is difficult to see how the Government could impose upon the *ryots* the obligation of paying these allowances to their officers, except by the exercise of their sovereign right of imposing and receiving a revenue from all lands which were not in their nature rent free. The land revenue system in *India* is founded upon the notion that the State is entitled to receive a certain portion of the produce of all lands not especially exempted from assessment. Of course some governments have been more exacting than others, but the general action of native governments was to take a certain proportion. From the gross amount assessed the expenses of collection must necessarily be deducted; and whether the collectors were paid by salary, or allowed to receive a commission on their collections directly from the *ryots*, the sum which went into the coffers of the Government was equally reduced by the amount of their allowances.

Their Lordships are of opinion that whatever the foundation of the *deshmukhs'* rights originally was, the *sunnud* must now be treated as the foundation of those rights as they exist. At the date of that document the receipt of the old allowances had long been interrupted. The whole of what was received from *ryots* went into the coffers of the State, which paid its collectors by salaries; and consequently the restoration of the old allowances by the *Peishwa* was in substance a grant by him of part of his land revenue, and therefore falls within the terms of the 4th section without the aid of the 3rd as a grant of money or land revenue, conferred by a former government. Therefore their Lordships agree with the High Court in the conclusion to which they came upon the first question; and that is, of course, sufficient to dispose of the present appeal.

If it were necessary to go further and to consider whether the claim, however it might have stood on the *sunnud*, has been brought within the Act by what has since taken place, their Lordships would be of opinion that the judgment in the former suit affords sufficient grounds for so deciding.

That suit proceeded upon the alteration made under the revenue settlement of 1868. The Plaintiff appears to have claimed six *pie* in the rupee upon the total amount of the assessment, which then consisted wholly of money. The Government met that claim by a contention that upon so much of the existing assessment as might be considered to represent the former grain assessment he was entitled only to the smaller percentage. The Judge decided this question in the Plaintiff's favour, and allowed him the larger percentage upon the whole of the assessment; and did so upon this, among other grounds, viz., that by the change in the system of assessment his interest might have been affected, and therefore that it was equitable to allow him the larger percentage upon the whole of the then assessment.

His claim in the present suit adopts this definition of his rights, and seeks to enforce them accordingly. The former judgment therefore seems to shew that what is now payable by Government is so payable out of the general land revenue in respect of a right, privilege, perquisite, or office formerly enjoyed within the meaning of the 3rd section of the Act; and to negative the statement in the plaint to the effect that since 1842 the Government has received the *deshmukh's* allowances as something distinct from revenue from the *ryots* on his behalf and as his agent, under circumstances which would make them liable to him as for money had and received.

It appears, therefore, to their Lordships that no ground has been made for disturbing the judgment of the Court below, and they must humbly advise Her Majesty accordingly. They would have been extremely sorry if they had to remand the cause, because though it might have been satisfactory to have fuller information on some points raised in the argument, they are satisfied upon the materials before them that a fuller trial would equally result in the conclusion that the suit is within the *Pensions Act*, 1871, and that the Plaintiff must seek his remedy by the procedure thereby provided.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal, and to confirm the judgments below, with the costs of the appeal.

2nd, 6th and 8th March; & 9th June, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of Seetapore, in Oudh.

THAKOOR HARDEO BUX, (one of the Plaintiffs)* } *Appellant,*

versus

THAKOOR JAWAHIR SINGH, (Defendant) } *Respondent.*

Oudh Estates Act (I. of 1869), s. 3—Registered Talookdar—Beneficial Interest—Act II. of 1863, s. 1 and Act XXXII. of 1871, s. 4—Appeals.

An *Oudh talook* standing in the name of *J. S.*, as *kabuliatdar*, having been confiscated under Lord *Canning's* proclamation of March 1858, was summarily settled with *J. S.* on the 24th April following. A *talookdary sannud* was granted to *J. S.*, and he was subsequently registered as *talookdar* under the provisions of Act I. of 1869.

In a suit against *J. S.* by persons alleging themselves to be joint in family and estate with him, to have their interest in the *talook* declared, held by the Commissioner of *Seetapore* in *Oudh*, confirming the decision of the settlement Officer, that, under Act I. of 1869, the Defendant was protected by his *Sannud* against any claim of the Plaintiffs in respect of the *talook*. *Held* by the Privy Council on appeal, that as a person who has been registered as a *talookdar* under Act I. of 1869, and has thereby acquired a *talookdary* right in the whole property, may, nevertheless, have, made himself a trustee of a portion of the beneficial interest in lands comprised within the *talook* for another, and be liable to account accordingly; the suit must be remanded for trial as to whether the Defendant had agreed, or become bound, to hold the villages comprised in the summary settlement and *sannud*, the rents and profits thereof, in trust for the Plaintiffs.

The cases of *Musumat Thukrain Sookraj* v. *The Goverment of India* (1) and *The Widow of Shunker Sahai* v. *Rajah Kashi Pershad.* (1) approved.

The words "Court of highest civil jurisdiction in any Province" in Act II. of 1863, have reference to the general jurisdiction of the Courts, and not to the finality of decisions in particular cases. A Court which, under the provisions of Act XXXII. of 1871, is a subordinate Court, has no authority, under Act II. of 1863, to admit an appeal to Her Majesty in Council even where its decision is final.

9th June, 1877.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is an appeal from a decree of the Commissioner of *Seetapore*, in *Oudh*, dated the 10th of June, 1872, affirming a decree of the Settlement Officer of that district, dated the 21st of December, 1871.

When the appeal was called on for hearing, Mr. *Doyne*, the learned counsel for the Respondent, took a preliminary objection, and contended that the Commissioner had no legal authority to admit the appeal. In support of his contention, he referred to the *Oudh Civil Courts Act* (No. XXXII. of 1871), and to Act No. II. of 1863. By the 4th section of the former Act, five grades of Civil Courts in the province of *Oudh* were established, of which that of the Judicial Commissioner was the highest. By section 15, clause 3, of the same Act, an appeal from a decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by sect. 4 it was enacted that if the Court of first appeal confirms the decision of the Court of first instance, such decision shall be final.

By sect. 1 of Act II. of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the non-regulation provinces in *India*, the right of appeal was limited to final judgments, decrees, or orders, made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the Appellant that, as the judgment of the

* 4 Cowell's I. A., p. 178; I. L. R. 3 Cal., p. 522.

(1) 14 Moore's I. A., 112; 2 P. C. J. 705.

(1) L. R. 4 I. A. 198; *Ante* p. 280.

Commissioner affirming the judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of highest civil jurisdiction in the province. It should be remarked that, in the *Privy Council Appeals Act* of 1874, which was passed after the appeal in the present case was allowed, and which repealed Act No. II. of 1863, the words "Court of final appellate jurisdiction" are used in place of the words "Court of highest civil jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of highest civil jurisdiction in the province within the meaning of Act II. of 1863, notwithstanding the decision of the Commissioner was final. If the Commissioner had reversed the decree of the Settlement Officer, his decision would not have been final, but an appeal might have been preferred to a higher Court of civil jurisdiction in the province—viz., to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of highest civil jurisdiction in any province," in Act II. of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of highest civil jurisdiction in the province, within the meaning of that section, because an appeal from his decision in the particular case did not lie to a higher Court in the province, a Court of small causes would be equally a Court of highest civil jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the Appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned counsel on both sides and adopted.

Under the special leave a petition of appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by *Hardeo Bux*, the Appellant, and *Purbut Singh* against the present Respondent. *Purbut Singh* has not joined in this appeal.

The Plaintiffs in their plaint stated that during the king's time the *talooks* of *Bassaindeeh* and *Sijaolia* formed one *talook*, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned *talook Sijaolia* from *Bassaindeeh;* that *talook Bassaindeeh* formed the share of *Havanchal Singh*, father of *Hardeo Bux*, Plaintiff, *Fatch Singh*, father of *Purbut Singh*, Plaintiff, and *Bhawani Singh*, father of *Jawahar Singh*, the Defendant; that the Plaintiff's fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the Defendant treated them as his superiors, and never interfered in the affairs of the estate; that Defendant's father was junior, and was treated by the Plaintiffs' fathers as if he were their own son; that they (the Plaintiffs' fathers) got the *kabooliat* executed in his name with the view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said *talook;* that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living together and their expenses paid out of the profits of the same estate; that the Plaintiffs had continued to enjoy the possession of the *talook* while the Defendant had been the *kabooliatdar;* that as the Defendant was *kabooliatdar* the *sunnud* had been granted to him; that for one or two months the Defendant had, under the *sunnud*, given rise to enmity, and intended to dispossess them, and put a stop to the profits enjoyed by them for the time past, and wished to deprive the real owners of their right while the said *sunnud* did not

contemplate to destroy the rights of the Plaintiffs; that in the arbitration case of *Bisheshar Bux and Ganga Bux, talookdars of Sorara*, the Defendant had, in his own deposition, stated that in case of his (Defendant's) brothers claiming their shares he would not decline to give them their shares; that the Defendant had altogether forgotten this written admission. Wherefore the Plaintiffs prayed that, after proper inquiry, orders be passed that they be not deprived of their right.

In their written statement, dated the 6th of October, 1865, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th of September, 1865, to give up possession, but that previously to that time they had held continuous possession. They prayed that under the conditions laid down in the *sunnud*, in clause 2, Circular 2 of 1861, the Government of *India* letter No. 23, dated the 19th of October, 1859, and Circular No. 6 of the 19th of June, 1861, justice be done to them, and that they might not be deprived of their right.

The Defendant, in his written statement, alleged that the *talook* in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one *kabooliat*; that he had held possession without any one as co-sharer; and that he of his own free will had been assisting his near relations with food, &c., without their having any right; and that a summary settlement had been made with, and a Government *sunnud* granted to him alone.

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the Defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the Defendant was protected by Act No. I. of 1869. He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the Plaintiff relating to another matter, the Financial Commissioner stated, "That the Defendant was protected by his *sunnud*; that the Plaintiffs could get nothing, and that it was perfectly useless their continuing litigation."

The Plaintiff *Hardeo Bux* appealed from that decision to the Commissioner, who, without giving any reasons, dismissed the appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. Subsequently, upon an application by the Plaintiff to the same Commissioner for a certificate that the case was a fit one for appeal to the Privy Council, the Commissioner made the following remarks:—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on application from the Appellant for a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to *talooks* in *Oudh* previously taken by the Courts of the Financial and Judicial Commissioners; and, though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the Appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this order will be filed with the record."

The suit was commenced long before Act I. of 1869 was passed viz., as far back as the 28th of August, 1865, but the judgment of the Settlement Officer, the Court

of first instance, was not pronounced for upwards of six years afterwards. Some of the proceedings which were taken in the meantime are detailed in the judgment of the Settlement Officer, and well might he describe them as "most extraordinary."

The lands to which the suit relates were included in that part of Lord *Canning's* Proclamation of March 1858, which declared that the proprietary right in the soil was confiscated to the British Government which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th of October, 1859, set out in the 1st schedule to Act I. of 1869, it was declared that every *talookdar*, with whom a summary settlement had been made since the re-occupation of the province has thereby acquired a permanent hereditary and transferable proprietary right in the *talook* for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the *talook*.

By sect. 3 the Governor-General in Council desired that the Chief Commissioner of *Oudh* should have ready a list of the *talookdars* upon whom a permanent proprietary right had then been conferred.

Previously to that letter, viz., on the 24th of April, 1858, a summary settlement of the lands had been made with the Defendant. He was consequently included in the list of *talookdars*, and a *sunnud* was granted to him. After the passing of Act I. of 1869 he was also registered in List No. 1 under Act No. I. of 1869, sect. 8, and also in List No. 5 (*Oudh Government Gazette*, August 7th, 1869).

The order for the summary settlement with the Defendant was made by Colonel *Barrow*, the then Special Commissioner. The Defendant, in his application for the summary settlement, stated that he had no partner other than the Plaintiff *Hardeo Bux*.

On the 4th of April, 1866, pending the investigation of the case, the then officiating Settlement Officer, Mr. *Wood*, the Court of first instance, wrote to Colonel *Barrow*, the Commissioner of the *Lucknow* Division, a letter, of which the following is a copy:—

"Sir—You doubtless recollect *Thakoor Jawahar Singh*, of *Bassaindeeh*, who was rewarded for his loyalty during the late disturbances.

"2. I find that you, as Special Revenue Commissioner, on re-occupation directed that the *thakoor* was to be admitted to engage for his *talook*.

"3. In Statement A, the *thakoor* admitted to you that his cousin, *Hardeo Bux*, was his sole co-sharer. Notwithstanding this admission, you directed that settlement was to be made with *Jawahar Singh*. Do you recollect whether you intended such settlement with him alone, as *Sadur Malgoozar*, as a matter of convenience (1), and that *Hardeo Bux*, the acknowledged co-sharer, was to be recognised at this settlement according to the nature of the rights.

"4. An early answer will oblige."

To that letter Colonel *Barrow*, on the 8th of April, 1866, sent the following answer:—

"Sir,—Referring to your letter without No., dated the 4th instant, in the case of *Thakoor Jawahar Singh*, of *Bassaindeeh*, I have the honour to request you will be so good as to forward to me the summary settlement file with Special and Chief Commissioner's orders thereon, as it will enable me better to remember the circumstances, if I see what was written.

"2. It is within my recollection that settlement was made solely with *Jawahar Singh*, because he had given active assistance to Government in 1858."

Subsequently, on the 25th of September, 1866, Colonel *Barrow* wrote to the Settlement Officer as follows:—

"Sir,—I have now received the vernacular papers of the summary settlement of the estate of *Jawahar Singh*, of *Bassaindeeh*, and regret they do not afford much information.

"2. *Jawahar Singh* was one of those who early tendered allegiance after the rebellion, and afforded active assistance to the British Government. I have little doubt but that, in consequence of this, the estate was conferred on his name alone,

(1) Circular 6 of 1862, par. 6.

and it was the meaning and intention of the settlement of 1858, not only to have but one head in each estate, but that those estates should remain for ever undivided. This latter condition, as you are aware, was departed from under the orders of the Governor-General making all estates heritable and transferable, under which order *talookdars* can now divide and will away their villages as they like. It is a question, though, whether any one can or not be admitted to share in a *talook*.

"3. The policy of the summary settlement was to create and maintain large and undivided estates, a system, I believe myself, admirably suited to this country, but, as that is no longer possible, there can be no reason why sharers should be barred, and provision ought to have been made for their cases by those who departed from one of the principles of the settlement of 1858-59.

Upon the receipt of that letter, the Settlement Officer being, as he stated, at a loss how to proceed, recorded a memorandum dated the 23rd of October, 1866, and forwarded it on the same day to the Commissioner of the *Seetapore* Division for orders. The following is a copy of the memorandum:—

"At length I have received Colonel *Barrow's* reply to my letter of the 4th of April last. The delay arose from his not having received the summary settlement file from the Financial Commissioner's office.

"As I am at a loss how to proceed with this case, I submit the proceedings for the orders of the Commissioner, as to whether such a claim is cognisable or not under existing circulars.

"I must state that, in the case marginally noted (1), it was proved beyond a doubt that a division of the *talook* was effected about twenty years prior to annexation, when four of the seven brothers held their share jointly in common, and three held their share in like manner. The Commissioner will see *that the parties to the suit had lived together as an undivided family up to last year*, when, through an accident (the *Sadar Monsarim's* Report, under Circular 37 of 1864), a dispute broke out, and *Jawahar Singh* broke off his connection with his cousins.

"I beg to refer the Commissioner to the vernacular papers filed by the Plaintiffs, including an attested copy of *Jawahar Singh's* statement as an arbitrator in the case marginally noted (2), wherein he admitted the Plaintiff's right to separate their shares if they desired it.

"As I am seeking the Commissioner's instructions in the case, I withhold the expression of my opinion on the merits of the claim.

"October 23, 1866."

Three months after the date of the memorandum the Commissioner sent to the Financial Commissioner in a letter dated the 22nd of January, 1867, as follows:—

"Sir,—I have the honour to submit for orders a memorandum, dated the 23rd of October, 1866, with annexures from the Officiating Settlement Officer, *Seetapore*, respecting the claim of *Hardeo Bux* to a share of *talook Bassaindeeh* for which *Jawahar Singh* holds a *sunnud*.

"2. Some of the villages held by *Jawahar Singh* under the *sunnud* are ancestral, some acquired, while others again, having been decreed to *Jawahar Singh* at regular settlement, are not covered by the *sunnud*. *Jawahar Singh* admitted before Colonel *Barrow*, on the 24th of April, 1858, that his cousin, *Hardeo Bux*, was his sharer. This admission was made on the summary settlement statement, and manifestly referred to the whole estate, and not, as *Jawahar Singh* now pleads, to a single village. Further, in the case of *Gunga Bux* and *Bisheshur Bux*, *Jawahar Singh* deposed, on the 7th of July, 1859, that it was the custom in his family to allow partition, if any sharer desired it, and several partitions were made prior to annexation, shewing that this has erroneously been considered a *talook*.

"3. The Settlement Officer made a reference in this case to Colonel *Barrow* when Commissioner of *Lucknow* (*vide* his replies, No. 597 of the 6th of April, 1866,

(1) *Darrao Singh, &c., v. Khurram Singh.*

(1) *Bisheshur Bux v. Gunga Bux.*

and No. 1913 of the 25th of September, 1866), which shew that *Jawahar Singh* has some special claims, as having been one of the first to tender his allegiance, and as having rendered active assistance to Government; but, as the settlement statement of April, 1858, contains a distinct admission by *Jawahar Singh* that *Hardeo Bux* was his sharer, the question arises (*vide* paragraph 6 of Settlement Circular, No. 6 of 1862) whether the settlement in the name of *Jawahar Singh* only, and a grant of a *sunnud* to him bars the claim of *Hardeo Bux* to a share? I recollect that a case was referred to Government in 1862, in which it was held that a settlement had been made with a *Rannee* as *Sadur Malgoozar* only, but the particulars may have differed in some respects."

To that letter the officiating Financial Commissioner, on the 26th of January in the same year, sent the following reply:—

"Sir,—In reply to your No. 31 of the 22nd instant, I have the honour to state that the proceedings shew that *Hardeo Bux* got maintenance in the *Nawabee*; but nothing on the record tends to distinctly prove *that he had proprietorship over any particular portion of this estate in the Nawabee*, but, at present, it will not be necessary to enter on the subject of what *Hardeo Bux* should get as a relative, the Chief Commissioner having under consideration new rules that will provide for *talookdars'* relatives who are barred by the *sunnud*. In the meantime, it would not, perhaps, be a bad plan to give the management of the village—to the *jumma* of which *Jawahar Singh* objects—to *Hardeo Bux*, if he accepts the assignment, as he would appear to do.

"2. The general question between the two must remain pending in the Settlement Court until the issue of the new rules. All proceedings are, accordingly, returned."

In the succeeding April the Settlement Officer again applied for instructions, and the Financial Commissioner replied that "no orders could be passed until the measures then under consideration in regard to the claims of co-sharers in *talooks* should be completed."

In consequence of these orders the proceedings appear to have been suspended until the 18th of December, 1871, when the Plaintiffs presented a petition praying for final orders. In the meantime Act I. of 1869 had been passed. The then Settlement Officer took up the case, and on the 21st of December, 1871, held, as before stated, that the Plaintiffs' claim was barred by that Act.

Their Lordships cannot help remarking upon the irregularity of many of the above proceedings. They cannot attach any weight to Colonel *Barrow's* recollection to which he refers in his letter of the 6th of April, 1866. If any information from Colonel *Barrow* was considered necessary he ought to have been examined as a witness. The Settlement Officer who was acting as a Judge ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter on the 25th of September, 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel *Barrow* does not appear to have always entertained the opinion that the settlement was made with *Jawahar Singh* for his benefit alone, for in his Minute, dated the 11th of April, 1868, he says:—

"I have been much troubled by this case in many ways, and *Jawahar Singh*, by his bad faith with his relation, *who had lived with him as an undivided family in the Nawabee*, is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and *Hardeo Bux*. *Perchance that may yet be carried out.*"

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavour to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments, or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. As properly remarked by the Chief Com-

missioner in his Circular No. 6, p. 39: "The Courts are open to all and must be guided by their own rules."

Colonel *Barrow* had no authority to stay until the issue of new rules the proceedings then pending judicially before the Settlement Officer. It does not appear whether now rules were ever issued. The Settlement Officer in his judgment treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I. of 1869.

If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act I. of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the Plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. I. of 1869?

In support of the appeal the case of *Thukrain Sookraj Koowar* v. *The Government and Others* (1) was referred to.

In that case the Plaintiff's husband, the younger branch of the great *Oudh* family of *Bhinga*, had up to the time of the annexation of *Oudh*, been in the undisturbed and absolute possession of an estate called *Deotaha*, which had been united in the time of the native Government with the large *talook* of *Bhinga*, of which the *Rajah* of *Bhinga*, the representative of the elder branch of the family, was the *talookdar*, the Plaintiff's husband paying to the *talookdar* his proportion of the *jumma* assessed upon the whole *talook*.

Upon the making of the summary settlement in 1858-59, after the suppression of the Mutiny, the Plaintiff was about to apply to the British Government for a summary settlement of the *mehal* which belonged to her husband, and which had descended to her. She was, however, dissuaded by the *Rajah* of *Bhinga* from so doing, he fully acknowledging in writing her right, and suggesting that, as she was old, she had better leave the protection of her interest to him, and pledged himself that her possession of the *mehal* should be respected and safe. The summary settlement was accordingly made with him alone. Subsequently one-half of the *Rajah's* estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire *mehal* of the Appellant as part of the one-half of his estates, and the Plaintiff's estate called *Deotaha* was taken by Government, and the greater part of it made over to *Oudh* loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th of October, 1859, constituted the *talookdar* the absolute owner of the whole estate, including the Appellant's estate, *Deotaha*, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering judgment Lord Justice *James*, speaking of the Government letter of the 10th of October, 1859, said (1) "In English language it gave the registered *talookdar* the absolutely legal title as against the State and against adverse claimants to the *talookdary*; but it did not relieve the *talookdar* from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the Appellant was the acknowledged *cestui que trust* of the registered *talookdar*, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations or Government Acts in force in *Oudh*; and that the cruel wrong of which this lady has been the victim is due to the misapprehension of

(1) 14 Moore's Ind. Ap. Ca. 112; 2 P. C. J., p. 705.

(1) 14 Moore's Ind. Ap. Ca. at p. 127.

the law by the Commissioner. It is almost superfluous to add that the lady being clearly, as she was, the equitable owner, the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under-proprietary right, being the interest to which the Appellant was entitled at the time of the annexation of *Oudh*, was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the *talookdar* prior to the summary settlement to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the *talookdar* prior to his obtaining the summary settlement, but merely a representation by him that he had no partner except the Plaintiff.

In the case of the widow of *Shunker Sahai* v. *Rajah Kashi Pershad*, decided in the Privy Council the 29th of July, 1873 (1), there was also no written agreement signed by the *talookdar*, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of *Shunker Sahai* was entitled as co-partner with *Rajah Kashi Pershad* to one-third share in seven villages. The summary settlement of 1858 was made with the *Rajah* as *talookdar* of twenty-six villages, including the seven in which the Plaintiff was interested. In his application for the settlement he stated that in 1264 *Fusleo* the summary settlement was made as to the seven villages in partnership with both him and the widow at one-third as the share of the widow and two-thirds for himself. In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the *Rajah* as *talookdar*, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the *Rajah* alone, and he alone engaged for the revenue. The *sunnud* of the *talookdary*, including the seven villages, was under the letter of the 10th of October, 1859, granted to the *Rajah* alone. The *Rajah* disputed the widow's claim, and she sued for proprietary and also for under-proprietary rights. It was held by the Court of first instance that her suit for the former was barred by the *sunnud* being in the name of *Rajah Kashi Pershad* only, and that she could not recover under-proprietary rights, because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the judicial Committee that there was no ground for holding that the summary settlement and subsequent order of 1859 conferred *talookdary* rights on the widow, but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the judgment, which does not appear to have been yet reported. They say :—

"The construction which their Lordships would put upon the words 'and that the name of *Shunker Sahai's* widow be recorded as a shareholder' is not that the Settlement Officer gave or intended to give the widow the right of making a summary settlement as *talookdar*, but simply desired to place on record for her benefit her admitted beneficial interest in some, and some only, of the villages which made up the settled *talook*. . . .

"Mr. *Capper* seems to have admitted, as to the seven villages, that though the Appellant had not been in independent possession of one-third of the collections, yet that the *Rajah* might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the *talookdar*. Colonel *Barrow*,

(1) 4 Cowell's I. A., 198; *Ante* p. 280.

however, appears to have held that the admission of the *Rajah* at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed, and that, accordingly, the relation of trustee and *cestui que trust* having, so to speak, been established between them, she was entitled to one-third share of the profits of the villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a *talookdar* under Act I. of 1869, and has thereby acquired a *talookdary* right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the *talook* for another, and be liable to account accordingly.

In that case the *cestui que trust* was a stranger. In this the Plaintiffs claimed as persons constituting with the Defendant a joint *Hindu* family.

It appears that the Respondent, in his application for a summary settlement in the case now under consideration, stated that there was no partner of his other than *Hardeo Bux*, but he said nothing as to *Purbut Singh*.

On the 22nd of March, 1866, the Plaintiff deposed that he, *Purbut Singh*, and the Respondent all lived together, *and had everything in common up to January then last*, which was nearly eight years after the date of the summary settlement, and more than six from the date of the *sunnud*.

Their Lordships are of opinion that up to the time of Lord *Canning's* proclamation the whole of the villages mentioned in the summary settlement were the joint family property of the Petitioner and *Purbut Singh* and the Defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The Defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case on the 8th of July, 1859, that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Purbut Singh*, who were his partners, should claim they could get their shares divided. He said, "They at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property, or whether the Defendant merely made an allowance to the Plaintiffs.

The Defendant, in his deposition, deposed that his statement made at the time of the summary settlement referred to *mouzah Gungoa* only. But that seems to be at variance with the statement A, which refers to the eighty-two villages mentioned in column 3.

The Lower Courts appear to have decided the case merely upon the ground that the Defendant was protected by the *sunnud*, without adverting to sect. 15 of Act I. of 1869, or inquiring whether, notwithstanding the summary settlement, the *sunnud*, and the statute, the Plaintiffs or the Appellant had, either before or after the passing of Act I. of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The Defendant's *sunnud* is not on the record. They have no evidence of all the circumstances under which the summary settlement was made, nor of those under which the *sunnud* was granted, nor of what was done with respect to it or the property comprised in it before the registration of the Defendant under Act I. of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the Respondent has in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and *sunnud*, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the Appellant and *Purbut Singh*, or either and which

of them; that either party be at liberty to adduce such evidence upon the trial of that issue as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

23rd & 24th March, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

PREM NARAIN SINGH and others, (Defendants)* } *Appellants,*

versus

PARASRAM SINGH and BHOLANATH SINGH, (Plaintiffs) ... } *Respondents.*

PREM NNRAIN SINGH and others, (Defendants)... } *Appellants,*

versus

ROODER NARAIN SINGH and others, (Plaintiffs) } *Respondents.*

Ikrarnamah set aside—Undue Influence.

Where an *Ikrarnamah*, executed by three young men, (two of them being under age) parting with a half of their property, without any consideration very shortly after they had come to their property, whilst they were not fully acquainted with their rights, and without any professional advice, and under circumstances likely to overawe them and materially to affect the free exercise of their will, was set aside.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This suit was brought under the following circumstances. *Theoraj Singh* had three sons. One of his sons, *Taj Narain*, who died in 1819, left two widows, who died respectively in 1857 and 1859. The widow who died last left a daughter *Sribatti*, who married *Omrao Singh*,—a daughter who became insane during her mother's lifetime. This daughter had three sons, *Rooder Narain*, *Parasram*, and *Bholanath*, who are the Plaintiffs in the two suits, which may be treated for all purposes as one. The Defendants are, some of them the sons, and others the grandsons of *Behari* and *Purbhoo Narain*, the other two sons of *Theoraj Singh*. The Plaintiffs bring their suit for the purpose of setting aside an *ikrarnamah*, executed by them on the 22nd of December, 1859, whereby they gave up what may be stated generally as a half of their share of the property of their grandfather *Taj Narain* to the Defendants, and they also claim to recover that half which they then gave up.

The subordinate Judge decided the case in favour of the Defendants, dismissing the Plaintiff's suit. That decision was reversed by the High Court, who set aside this *ikrarnamah* upon grounds which may be thus shortly stated,—that the *ikrarnamah* was given without consideration; that the eldest Plaintiff was just of age, and the two others under age, at the time that it was granted; that they executed it without sufficient information of their rights, or sufficient advice, and under undue influence and pressure.

It appears to their Lordships convenient in the first place to consider what were the rights of the respective parties at the date in the case which is most material, namely, the death of *Indrabatti*, the latter surviving widow of *Taj Narain*, which occurred on the 7th of December, 1859. At that time *Sribatti*, the daughter of *Indrabatti*, was alive and married to *Omrao Singh*, but a lunatic. Her three sons, who have been before mentioned, were, according to their Lordships' view, of about the ages which are ascribed to them by the High Court; but they do not think it necessary, any more than the High Court did, to state precisely what they consider to be the age of each. It will be enough to say that the eldest does not appear to have been very much over age. According to their Lordships' view,

* 4 Cowells I. A., p. 101.

these three grandsons of *Tej Narain* were clearly entitled to the property of *Tej Narain*.

Then comes the questions, what that property was? Now it appears that in 1802, a deed of family partition was executed. At that time the *mouzahs* belonging to the family were fifty. Two may be put out of the question. One seems to have been appropriated to the support of the widow of *Deoraj*, a brother of *Theoraj Singh*; forty-eight remain. Of those, forty were divided among the three brothers, *Behari*, *Tej Narain*, and *Purbhoo Narain*; *Tej Narain* taking fourteen, and the other two brothers thirteen. It appears further that there were eight *mouzahs* which were held free from Government revenue, and which were not divided either by name or by metes and bounds, but with respect to which there is this general expression at the end of the document: "Whereas we, all the shareholders, have divided among ourselves all the villages belonging to our ancestral inheritance." The effect of this document appears to their Lordships to be that, with respect to the forty villages, they were actually divided, as it were, physically; and with reference to the others, that there was a division, each party having a third share. And it appears to them further, that the High Court is right in saying that this division was recognised, for they come to the conclusion that upon the death of *Tej Narain* his widows were permitted and did take possession, and keep possession, not only of the fourteen *mouzahs*, but of the undivided share, as far as it could be taken possession of, of the other *mouzahs*; they were permitted to take possession and did retain possession until their deaths.

That being so, in their Lordships' view, *Rooder Narain*, *Parasram*, and *Bholanath*, the Plaintiffs, were entitled clearly to the whole property in dispute; and their uncles and cousins, who were the Defendants, had no title or claim to title to any portion of them. It has been indeed said that before a certain decision, which is called the *Shivagunga Case* (1), there may have been an impression that the law was different, but, on referring to that case, it does not appear to their Lordships that it bears upon the present question. It may be enough to say that in that case it was decided that "in a united *Hindu* family" (and that term must be borne in mind) "where there is ancestral property, and one of the members of the family acquires separate estate, on the death of that member such separate acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or, in default, to his daughters, who, while they take their father's share in the ancestral property, subject to all rights," and so on. Then, "Where property belonging in common to a united *Hindu* family has been divided, the share of a deceased member of the family goes in the general course of descent of separate acquired property." But in this case it appears to their Lordships that at the date to which reference has been made, namely, the death of the last surviving widow, *Indrabatti*, there was no joint property and no joint family, for not only had the property been all divided in 1802, but the family were separated in food and in lodging. It appears to their Lordships, therefore, that even if this *Shivagunga Case* (1) had never been decided, there could have been no rational doubt or dispute that the Plaintiffs were the heirs of their grandfather in respect to the whole of the estate now claimed.

Those being in their Lordships' view the rights of the parties, it remains to inquire what was done. There is undoubtedly a good deal of conflicting evidence, but the view which their Lordships take of it is in substance this: The Defendants, *Inder Narain*, *Bodh Narain*, and *Ram Gopal* appear to have come to the family house, from which the deceased had removed shortly before her death to a place which is sometimes called *Babhni*. They appear to have come with a large body of retainers, undoubtedly calculated to inspire terror, and to have taken pos-

(1) *Katama Natchiar* v. *Rajah of Shivagunga*, 9 Moore's Ind. Ap. Cs., 539, marginal note.

session of the whole property of the deceased, to which they had no right whatever, thereby acquiring a very great advantange over these young men. It may be that the young men were prepared also to resist, and to use force for the maintenance of their rights, and that they would have been assisted by their father, *Omrao*, and by *Juggat*, as he is sometimes called, or *Jugroap*, the father-in-law of the eldest of them. Both sides appear by their petitions to have entertained serious apprehensions of an affray. The Government thought it necessary to interfere. They sent officers for the purpose of keeping the peace, and they issued orders summoning the parties before them, and binding them to keep the peace.

It was in this state of circumstances that the proceeding took place to which great importance has been attached by the Appellants. What is called a *punchayet* was formed. Three persons acted as arbitrators, *Hem Narain*, and *Dabi Singh*, who appear to have been neighbouring *Zemindars*, and *Juggat Koonwar*, who was the father-in-law of the eldest of the grandsons. We have but little information as to what was referred to this *punchayet* and what the *punchayet* recommended, in fact almost the only information on this subject which we have is from a deposition of *Dabi Singh* taken in another suit, to which suit perhaps it may be as well now to refer for the purpose of getting rid of it. It appears that soon after the execution of this *ikrarnamah Omrao Singh*, the father of the Plaintiffs filed a suit for the purpose of obtaining possession of the property in dispute on behalf of *Sribatti*, his wife, whom he alleged not to have been a lunatic at the time of the death of *Indrabatti*, and therefore to have succeeded to her inheritance. He also in that suit sought to set aside this *ikrarnamah*. That case came before this Board (1) and was eventually decided upon the ground that it was shewn that *Sribatti* was a lunatic and could not inherit, therefore *Rooder Narain*, *Parasram*, and *Bholanath*, her sons, would inherit instead of her. That was the only point decided. Their Lordships at this Board gave no decision whatever upon the question of the *ikrarnamah*. So much by way of parenthesis. This witness, *Dabi Singh*, who had been examined in that case, gives an account which appears to be almost the only account we have of what took place before the *punchayet*. He says, "No coercion, &c., was exercised on any one. *Baboo Omrao Singh* also was present at the time of the execution of the *ikrarnamah*, and he also consented to the execution of the *ikrarnamah*, at the same time having appointed a *punchayet* composed of *Baboo Hem Narain Singh* and me the witness, and *Juggat Narain Koonwar* and others. He said in an entreating manner that *Rooder Narain Singh's* grandmother has said that she gave an eight *annas* share to her daughter's sons, and an eight *annas* share to *Baboo Inder Narain Singh*, and others, the husband's relatives. In conformity with this, settle our dispute. We did so accordingly," and so on. With respect to this it may be observed that, on the part of the Defendants, evidence was given to the effect that the widow *Indrabatti* had in fact treated the Defendants as entitled to the property, but had put it to them as it were *ad misericordiam* to allow her grandsons to have a half share of it. The High Court disbelieved that evidence; and it would appear that they disbelieved also this statement of this witness. If this statement is untrue, we have no reliable evidence whatever of what came before the *punchayet* or what was done by it. If it is true it would appear to amount to this, that the Defendants having with a high hand taken possession of an estate to which they had no right, the father of the Plaintiffs, who is sometimes described as a timid man, entreats them to give half to his sons, on the ground that *Mussumat Indrabatti* had left it to them, or desired that it should be left. If this be so, so far from shewing that the Plaintiffs were acquainted with their rights, it tends to shew that they were not acquainted with them; and that they had some notion that *Indra-*

(1) *Bodnarain Singh* v. *Omrao Singh*, 18 Moore's I. A. C., 5.9. 2 P. C. J. 607.

batti had a power of disposing of the estate, which she had not. But the compromise, as it has been called, entered into in reference to this *punchayet* is altogether silent as to what is recommended to be done by the arbitrators. It is to this effect: "Whereas, in consequence of the death of *Indrabatti*," and so on, "who was our maternal grandmother, and my (*Baboo Omrao Singh's*) mother-in-law, a dispute about her estate existed between us," and so on; "and whereas, by the arbitration of a *punchayet* composed of" so and so, "besides respectable neighbours, the dispute between us, which might have resulted in a serious affray, was settled amicably between us by the arbitrators to-day, and now there is no cause of dispute which might result in an affray between us; therefore we have executed this acknowledgment, undertaking to abstain from any affray. We do declare that if we again raise any cause for an affray we shall personally, without demur, pay a fine" of so and so. This document is altogether silent as to any division of the property or anything to be done by the parties, except to abstain from an affray; and it may be here observed that it would appear conclusively from this document, what indeed might be inferred from other evidence, that there was very serious apprehension of an affray, and that a breach of the peace was, to say the least, imminent, a state of things altogether inconsistent with the account of the Defendant's witnesses (the one subject on which they all agree) that there was not only no affray, but absolutely no apprehension on the part of anybody of the possibility of an affray, but that everything was perfectly peaceful and orderly. Seven days after the date of this document the *ikrarnamah* in question was executed. It may be here observed that this *ikrarnamah* contains no reference whatever to the *punchayet* or to the document which had been executed seven days before. It speaks of *Indrabatti* having taken possession of all the shares and how she sent in her lifetime for *Inder Narain* and *Bodh Narain*, and so on, "and gave us the declarants out of the whole of her share an eight *annas* of the immoveable property." It states, therefore, a gift by this lady of half the property when manifestly she had no power to dispose of any of it. It may perhaps be here observed, with reference to the doubt expressed by the High Court, as to whether it is true that this lady did dispose or affect to dispose of the property in the manner alleged, that she asserted at the time she took possession of the property, and subsequently in a petition of 1852, that she had the sole right to the property, and that the Plaintiffs were her sole heirs. This document, which need not be further referred to, contains an agreement to divide the property between the Plaintiffs and Defendants. On the 28th of January following there was a proceeding which has been a good deal relied upon on the part of the Defendants. It appears that both these young men went before the Criminal Court, and they there made depositions which have been referred to,—depositions very like each other,—in which they state that they have been charged with an unlawful assembly, but deny that they had taken part in an unlawful assembly, and state the substance of this *ikrarnamah* as a compromise, which they had entered into for the purpose of shewing that they ought not to be convicted of any such offence, and they are bound over in their recognizances not to commit an offence. The young men seem to have been brought before the Court and put under recognizances some considerable time before, in pursuance of an order of the Court. These depositions appear to their Lordships substantially a part of the same transaction, and it may be that at the time the Plaintiffs were under the impression that the *ikrarnamah* they had executed was binding upon them. But, undoubtedly, not long afterwards, in the action which is brought by their father, they seek to repudiate, as far as they can repudiate, the transaction.

Looking at the whole case, the main features of it appear to be these: These young men execute a deed, whereby they part with a half of their property. It is, in their Lordships' view, executed without any consideration whatever. It is executed very shortly after they had come to their property, and when it may be con-

sidered as at all events doubtful whether they were fully acquainted with their rights; indeed the evidence in the case tends to shew that they were not fully acquainted with their rights. At the time of the execution of a most important document they do not appear to have had any professional advice; and further, the appearance of their uncles, with a large force, the possession which was taken of their property, the criminal proceedings, and the other circumstances which have been referred to, constituted a state of things likely to overawe them, and materially to affect the free exercise of their will.

It appears to their Lordships, therefore, that it would not be equitable that this *ikrarnamah* should be upheld. Under these circumstances they are of opinion that the judgment of the High Court was correct, and they will humbly advise Her Majesty that that judgment should be affirmed, and this appeal dismissed with costs.

17th and 18th April, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Chief Court of the Punjab.

BARON FORESTER AND WIFE (widow of D. O. DYCE SOMBRE), and others, (Plaintiffs)* ... } *Appellants,*

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL, (Defendant) ... } *Respondent.*

Execution—Privy Council Order awarding Costs—Interest on Costs—Act XXIII. of 1861, ss. 10 and 11.

Where an order passed by her Majesty in Council on report of the Judicial Committee awards costs, but is silent as to interest on the costs so awarded, it is not competent to the Court which has to execute the order to direct payment of the costs with interest.

The principle of the decisions in cases arising under ss. 10 and 11 of Act XXIII. of 861, which have established a similar rule of practice in executing decrees passed by the Courts in *India*, approved.

Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have 'agreed' to submit the matter to the discretion of the Court executing the order.

18th April, 1877.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

These appeals arise out of proceedings taken in the Chief Court of the *Punjab* to give effect to an Order of Her Majesty in Council made on the 5th day of February, 1873. That order was designed to determine finally a litigation which had subsisted for a great many years, first, between the committee of the late Mr. *Dyce Sombre*, and, after the death of that gentleman, between his representatives and the Government of *India* touching the liability of the Government for a seizure of certain arms and military stores effected upon the death of the *Begum Sumroo*. It was a peculiar order, because, after reversing the decisions of the Indian Courts, declaring the seizure to have been wrongful, and ascertaining the value of the arms and munitions of war, and the amount of the damages to be paid by the Defendants to the Plaintiffs, it proceeded, with the consent of the counsel on both sides, to direct payment of that sum to be made in this country, leaving nothing to be carried out in *India* except the final direction as to costs, which was, "that the costs of the Appellants in the Chief Court of the *Punjab*, and in the Court of the Commissioner at *Hissar* and in the Court of the Deputy-Commissioner of *Delhi*, be taxed and ascertained by the proper officers of those Courts respectively, and that the amount of the costs of the Appellants in all the Courts in *India* be paid to the Appellants in *India* by the Respondent."

* 4 Cowell's I. A., p. 187; 3 I. L. R. Cal., p. 161.

After various proceedings had in the Chief Court of the *Punjab* the order under appeal was made. The following are the material passages in it: "The costs taxed and ascertained to have been incurred in *India* by the Plaintiffs, Appellants, which shall be payable by the Defendant, Respondent, amount as per memorandum at foot to Rs. 12,354 12*a*., but no interest is allowed on such costs." And, "The Court further orders and decrees that the Defendant shall refund to the Plaintiffs the sum of Rs. 1014, with interest thereon, from the 11th of September, 1849, to date of payment, at the rate of 12 per cent. per annum, and a further sum of Rs. 5309, with interest thereon, from the 4th of August, 1865, to date of payment, at the rate of 12 per cent. per annum."

Against this order the appeal and the cross appeal have been brought. The appeal of the Plaintiffs is in effect that interest ought to have been allowed upon the Rs. 12,354. 12a. in a certain way. The Judges of the Chief Court of the *Punjab* had held that, in executing the order of Her Majesty in Council, they were not at liberty to give any interest upon the costs, because the order contained no direction for the payment of interest in respect of such costs; and it may further be observed that the mode in which the Plaintiffs in the Court below sought to have the interest which they claimed computed was a very peculiar one. They asked to have the gross principal amount of the Plaintiffs' costs, viz., the Rs. 12,354. 12*a*., divided into four sums, and to have interest computed on each of such sums from the date of the decree of the Court wherein the costs which it represented had been incurred. So far as their Lordships are aware, there is no instance of such a course having been adopted, certainly none has been brought before them during the somewhat lengthy argument which has taken place upon these appeals. The committee that made the report to Her Majesty upon which the Order in Council was made, if it had intended to place, by means of some such direction, the parties in the situation in which it considered they would have stood if everything had been done rightly in the lower Courts, would of course have been competent to do so; but that a subordinate Court executing an order in Council which is silent upon interest, is at liberty to interpolate such a very special direction into that order is a proposition which seems to their Lordships to be wholly unsustainable. It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the *Punjab* is right in its conclusion; that where the Order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned counsel for the Appellants relied upon what they said had been the course of practice in *India*. In determining what is the existing practice in *India*, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in *India*. Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII. of 1861. The words of the 10th section are, "When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." This clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned counsel for the Plaintiffs, however, relied on certain decisions of the High Court of *Bengal*, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them, with interest from the date of the decree to the date of payment. It appears, however, that the more re-

cent and authoritative decisions upon the 11th section of Act XXIII. of 1861 are the other way. It is sufficient to mention the case reported in the 6th *Weekly Reporter* at page 109, which was a decision of the Full Bench of the High Court of *Bengal;* and that before Mr. Justice *Bittleston*, which is reported in the 3rd *Madras* High Court Reports, page 421. Those cases seem to have established as to decrees of Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases or some of them related to the principal moneys decreed, or to mesne profits; but so far from there being any authority in favour of a distinction between these and costs, the case of *Rodger* v. *Comptoir d' Escompte de Paris* (1), is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of *India* and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an Order of Her Majesty in Council has also been considered in the two cases cited from the *Weekly Reporter*, in which judgment was given by Mr. Justice *Mitter;* and it appears, that as to Orders in Council as well as to decrees of the Indian Courts, the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the Plaintiffs have failed to shew that the order made by the Chief Court of the *Punjab* is erroneous, in that it has refused to allow interest on the sum of Rs. 12,354. 12*a*.

Their Lordships have now to consider the cross appeal. The first point taken on that appeal is that the Defendants have been erroneously charged so much of the Rs. 12,354. 12*a*. as consists of costs which were incurred in the *Delhi* Court before Mr. *Gubbins*, and were dealt with by the Order in Council of the 3rd of February, 1858. Now, that prior Order in Council came about in this way: When the suit was first brought in the *Zillah* Court of *Delhi* by the committee of the lunatic, Mr. *Dyce Sombre*, Mr. *Gubbins*, the Judge of that Court, dismissed it on the ground that the claim was barred by the *Statute of Limitations*. His decision was confirmed on appeal by the *Sudder* Court of *Agra*. Against both decrees there was an appeal to Her Majesty in Council. The Judicial Committee thought that the decisions were erroneous; reversed them; and directed that the costs of the suit, so far as they had been occasioned by the improper plea of the *Statute of Limitations* should be paid by the Defendants to the Plaintiffs. That order for payment was never wholly carried out. It was partially carried out, because the costs incurred in the Appellate Court were paid; but the costs incurred in the Court of first instance—the Court of Mr. *Gubbins*—do not appear to have been paid; and it is contended on the part of the Defendants now that those costs cannot properly be given as part of the costs payable under the Order in Council of 1873.

It appears to their Lordships wholly unnecessary to consider the arguments which have been addressed to them touching the plea set up in the Courts of the *Punjab*, that the claim for these unpaid costs was barred by the *Statute of Limitations*, or the orders passed upon it. Whether it would have been proper for their Lordships in any case to express an opinion as to the merits or effect of those orders, in such a proceeding as this, is very questionable; but it appears to their Lordships that those orders, taking them at their highest, could only bar the remedy given by the Order in Council of 1858 for the recovery of those costs; and that upon the true construction of the order of 1873, it was the intention of this Committee to give the Plaintiffs the whole costs of the suit, so far as they had not been paid, whether incurred in the three Courts in which they are directed to be taxed, or

(1) 7 Moo. P. C. (N. S.) 331; Law Rep. 8 P. C. 465.

in the Court of Mr. *Gubbins*. The ordering part of the Order in Council directs not only that the costs in the three specified Courts are to be taxed, but that the amount of the costs of the Appellants in all the Courts in *India* are to be paid to the Appellants in *India* by the Respondents; and the judgment of the Committee on which this order was drawn generally expresses that the Plaintiffs were to receive their costs of the suit. It also appears that when this matter was discussed in the Court below, Mr. *Plowden*, who appeared for the Defendant, consented to the costs in question being ascertained in that Court, and that thereupon the Court made an order that they should be included in the Rs. 12,354. 12*a*. and paid by the Defendant to the Plaintiffs. This seems to their Lordships to have been a very proper concession on the part of Mr. *Plowden*; inasmuch as it was equitable that these costs should be paid to the successful party; and reasonable that there should be one order made for the payment of all the costs of the suit, instead of leaving open any questions touching the rights of the Plaintiffs under the Order in Council of 1858.

Their Lordships, therefore, feel no doubt in affirming the judgment of the Chief Court of the *Punjab* upon this point.

The next question raised by the cross appeal was with reference to the refund of the sum of Rs. 1014. There were three points made upon this item: one, that the principal had already been repaid; another, that it was subject to the same objection as that which has just been disposed of with respect to part of the Rs. 12,354; and the third, that it ought not to have been ordered to be refunded with interest. Of the supposed repayment there is no evidence whatever. The Senior Judge of the Chief Court of the *Punjab*, says:—"The Court, referring to annexure D., has now before it a sealed copy of the order of Mr. *Gubbins*, dated the 11th of September, 1849, shewing that the sum of Rs. 1014 was paid by the Plaintiffs for the Defendant's costs in that year;" and no suggestion that it had ever been refunded, seems to have been made before him. As to the second point, it is sufficient to say that the general obligation of Government to refund whatever they had received in respect of the costs awarded by the erroneous decrees, although there was no positive direction for a refund in the Order in Council, having been admitted, and properly admitted, the objection that this particular sum was paid for costs incurred in Mr. *Gubbin's* Court, cannot, for the reasons already given, be allowed to prevail.

Upon the question whether this sum, and the further sum of Rs. 5309, ought to have been ordered to be refunded with interest, their Lordships are of opinion that this case stands clear of what is ruled in the final part of Lord *Cairns'* judgment in *Rodgers* v. *The Comptoir d'Escompte de Paris*, (1), because they find that in the proceedings of the Chief Court of the *Punjab* there was a submission to the discretion of the Court, whether interest on these sums should be allowed or not. With the exercise of that discretion in the particular case their Lordships are not disposed to interfere, considering that it is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest.

It has, however, been admitted at the Bar, that there has been an error in the mode in which the interest on the Rs. 5309 has been directed to be computed, by reason of that sum having been received in three different portions, and at three different dates. It will be necessary to correct this error, but as it ought to have been pointed out to the Court below, the variation in the order will not affect their Lordships' order as to the costs of the appeal.

Their Lordships will therefore humbly advise Her Majesty to vary the order under appeal so far as it directs interest at the rate of 12 per centum per annum on the sum of Rs. 5309, to be computed and paid from the 4th of August, 1865, by directing that as to Rs. 3159, part of the said sum of Rs. 5309, such interest be computed and paid from the 27th of

(1) 7. Moo. P. C. (N. S.) 331; Law Rep. 3 P. C. 465.

August, 1867; that as to Rs. 1150, other part of the said sum, such interest be computed and paid from the 27th of August, 1867; and that as to the further sum of Rs. 1000, being the remainder of the said sum, such interest be computed and paid from the 4th of August, 1865; but, subject to such variations, to confirm the said order under appeal, and to dismiss both the appeal and cross appeal. Both parties being thus found to be in the wrong, there will be no costs of the appeals on either side.

18th and 19th April; and 14th May, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Chief Court of the Punjab.

DELHI and LONDON BANK, LIMITED, (Plaintiff)* } *Appellant,*

versus

MELMOTH A. D. ORCHARD, (Defendant) } *Respondent.*

Limitation (Act XIV. of 1859), ss., 20, 21—Execution of Decree—Interpretation of Statutes—Res-judicata—Act VIII. of 1859, s. 2.

A decree was obtained in the Court of the Deputy-Commissioner of *Delhi* on the 5th of October, 1866, prior to the date when Act XIV. of 1859 was extended to the *Punjab*, viz., the 1st of January, 1867. On the 22nd of October, 1869, an application admittedly *bonâ fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order. A subsequent application for execution was made on the 4th of May, 1871, which was also refused on a similar ground. On appeal the Commissioner and Chief Court conferred this order. *Held*, reversing the decision of the Court below, that execution of the decree was not barred by s. 21, Act XIV. of 1859.

In interpreting statutes, the words 'must' and 'shall' may, in some cases, be substituted for the word 'may' but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word 'may' should be taken as used in its natural, i.e., in a permission, and not in an obligatory, sense.

In construing s. 21, Act XIV. of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of act; and the words "but process of execution may be issued, &c.," mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the act was passed, or within three years next after the passing of the act, whichever should first expire.

An order passed by a Court rejecting a *bonâ fide* application by a judgment-creditor for the execution of his decree on the ground that the period allowed by law for execution had expired, *held* not to be an adjudication within the rule of *res-judicata*, or within s. 2, Act VIII. of 1859

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is an appeal from a judgment and order of the Chief Court in the *Punjab*, dated the 31st of July, 1874, reversing on review a former judgment and order of the same Court of the 17th of March, 1873, and thereby disallowing the execution of a decree obtained by the Appellants against the Respondent for the recovery of a sum of Rs. 14,508. 14*a*. for debt and costs.

The judgment was recovered on the 5th of October, 1866, in the Court of the Deputy-Commissioner of *Delhi*. Subsequently to the decree the Defendant made various payments on account up to the month of October, 1869. On the 22nd of that month the Plaintiffs presented a petition to the Deputy-Commissioner, claiming a balance of Rs. 19,227. 3*a*. for principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at *Meerut*, transferring the decree, in order that it might be executed in that Court.

It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that

* 4 Cowell's I. A., p. 127; 3 I. L. R. Cal., p. 47.

on the 10th of December, 1869, the Deputy-Commissioner made the following order:—

"The decree is of a prior date to the introduction of Act XIV. of 1859. It should be executed according to the civil law of the *Punjab;* and as, according to the said law, the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that (the petition) be sent to the record-room."

There can be no doubt that the application made on the 22nd of October, 1869, was *boná fide*, and, indeed, the learned counsel for the Respondent has very properly admitted that it was so.

No appeal was preferred from the order of the 10th of December, 1869; but the Defendant, notwithstanding the order, made further payments on account.

On the 4th of May, 1871, the Plaintiff, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs. 23,772. 13*a*. 7*p*., made a fresh application to the Deputy-Commissioner for a certificate and transfer of the decree to the Court of *Meerut* for execution, and prayed that a summons might be issued under the provisions of Act VIII. of 1859.

Upon that petition the Deputy-Commissioner, on the 6th of May, 1871, made the following order:—

"As the application for execution has already been rejected and sent to the record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the record-room."

With reference to the statement that the period for execution had then totally expired, it may be as well to point out that Act XIV. of 1859 was extended to the *Punjab* on the 1st of January, 1867, and consequently that the period of three years from the time when the Act came into operation in the *Punjab* had expired before the application of the 4th of May, 1871, was made. On the 30th of June, 1871, the Deputy-Commissioner refused to review his judgment, and on the 10th of July of that year the Plaintiff appealed to the Commissioner, who, on the 18th of August, 1871, dismissed the appeal, holding, amongst other things, that the three years' grace under the limitation law expired on the 1st of January, 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force.

The case was appealed to the Chief Court of the *Punjab*, which at first rejected the appeal. Subsequently a Full Bench of that Court, on the 17th of March, 1873, upon review, decreed the appeal with costs, and, reversing the orders of the Lower Courts, ordered and decreed the Appellant's application for execution with costs and the costs of the Appellant in the Appellate Court. They said:—

"The application for execution in 1869 to the Assistant-Commissioner at *Delhi* was, in the opinion of this Court, a *boná fide* proceeding to enforce the decree of 1866. It was a proceeding to enforce the decree, and not merely to keep the decree in force. Before the expiration of three years from the date of that proceeding the present application was filed."

Subsequently, on the 31st of July, 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th of March, 1873, upon the ground that the decree having been obtained before the introduction of Act XIV. of 1859 into the *Punjab*, the case must be governed by the provisions of sect. 21, and not by sect. 20. The case was decided by Mr. Justice *Boulnois* and Mr. Justice *Melvill* upon the authority of the cases of *Báiúdekúvar* v. *Máljí Náran* (1), and *Makúndá Valad Búlalachúrya* v. *Sita-rám and Nilo* (2). Mr. Justice *Thornton* held a contrary opinion, and recorded his reasons for dissent.

It was not contended that the decision of the Chief Court of the 17th of March,

(1) 3 Bomb. H. C. Ap. Cas. 177.
(2) 5 Bomb. H. C. Ap. Cas. 102.

1873, was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

The case depends upon the proper construction to be put on sects. 20 and 21 of Act XIV. of 1859. The following are the words of those two sections:—

"20. No process of execution shall issue from any Court not established by royal charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

"21. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

It was pointed out, in the case of *Gooroo Dass Auckholee and Others* v. *Modhoo Koondoo and Others* (1), that according to the literal wording of sect. 20 no process of execution could ever issue to enforce a judgment, even within a week from date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the section was that no process of execution should be issued to enforce a judgment or order of a Court not established by royal charter, after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution.

That was held to be the proper construction of sect. 20, both in that case and in the subsequent Full Bench case of *Kangaleechurn Ghosal* v. *Bonomalee Mullick and Others* (2).

(1) 6 Suth. W. R. (Mis. Full Bench Rul.) 98.
(2) 7 Suth W. R. 515.

In the latter case it was held that, under the 21st section, execution might issue after the expiration of three years from the time of the passing of the Act to enforce a judgment which was in force at the time when the Act was passed, provided some proceeding to enforce the judgment within the meaning of sect. 20 had been taken within three years next proceeding the application for execution.

That decision was followed by the High Court in *Madras*, in the case of *Karuppanan* v. *Muthannan* (1).

The High Court in *Bombay* put a different construction upon sect. 21. The cases are referred to in the judgment now under appeal (2). They held that the words, "nothing in the preceding section shall apply to judgments in force at the time of the passing of this Act," could not be rejected without violating a fundamental rule for the construction of statutes; and that the words, "may be issued," should be read as "must be issued;" and the Chief Court treated the words "judgment in force at the time of the passing of this Act," as applicable to a judgment in force at the time of the extension of the Act to the *Punjab*, though not in force at the time of the passing of Act XIV. of 1859.

It cannot be disputed that the construction put upon the Act by the High Court at *Calcutta*, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at *Bombay*, and by the Chief Court in the *Punjab*, is correct, a judgment-creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV. of 1859 was passed, or a judgment which was in force in the *Punjab* at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconve-

(1) 5 Mad. H. C. Rep. 105.
(2) See the *Bombay* cases cited on page

nience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the *Punjab* at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

There is no doubt that in some cases the word "must," or the word "shall," may be substituted for the word "may;" but that can be done only for the purpose of giving effect to the intention of the Legislature; but, in the absence of proof of such intention, the word "may" must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense.

On the construction of this inartificially drawn statute their Lordships are of opinion that the words, "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words "*but* process of execution *may* be issued," mean that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen.

It appears, then, to their Lordships that the words, "nothing in the preceding section" (as used in sect. 21), mean that the prohibition laid down in sect. 20 should not apply to judgments in force at the time of the passing of the Act.

Without expressing their concurrence in all the reasoning of the full Bench in the *Calcutta* case above cited, their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy-Commissioner of *Delhi*, on the 22nd of October, 1869, being *bonâ fide*, though unsuccessful, was a proceeding to enforce the judgment within the meaning of sect. 20; and that that proceeding having been taken within three years next preceding the application made on the 4th of May 1871, to which the judgment now under appeal relates, such last-mentioned application was not barred by the 21st section of Act XIV. of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy-Commissioner of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an adjudication within the rule of *res judicata*, or within sect. 2 of Act VIII. of 1859.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the *Punjab*, of the 31st of July, 1874, be reversed, and that the judgment and order of the 17th of March, 1873, be affirmed and stand in force; and that the Defendant do pay to the Plaintiffs their costs incurred in the Chief Court of the *Punjab* subsequently to that decree. The Respondent must pay the costs of this appeal.

3rd May, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SHEO SOONDARY, (Defendant)* ... ... } *Appellant,*

versus

PIRTHEE SINGH and others, (Plaintiffs) ... } *Respondents.*

Hindu Law—Dayabhaga—Succession of Half-brother in a joint family.

According to the *Dayabhaga* a brother of the

* 4 Cowell's I. A., p. 147.

whole blood in a joint family succeeds in preference to a brother of the half-blood to the share of a deceased brother.

Rajkishore Lahoory v. *Govind Chunder Lahoory* (1) approved.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH :—

The single question in this appeal is whether in a joint family a brother of the half-blood is entitled to succeed equally with a brother of the whole blood to the share of a deceased brother. It arises at the close of a long litigation, and in consequence of a remand which was made by Her Majesty, upon the recommendation of this Committee, on the hearing of a former appeal in this suit. It is not necessary to recount at any length the proceedings in the suit, because the determination of the above question will support either the decree of the subordinate Judge or the decree of the High Court which reversed that decision; but it may be stated that the action was brought by the present Respondent, *Pirthee Singh*, against the Court of Wards, who were representing *Sheo Soondary*, to recover an estate called *talook Sunkra* in *zillah Bhaugulpore*. The estate had belonged to *Soomaer Singh*, the common ancestor of the Plaintiff and *Sheo Soondary*, and on the original hearing of the suit in *India*, and upon the former appeal here, it appeared that two only of his descendants were before the Court, namely, the Plaintiff and the Defendant. *Pirthee Singh* was one of the sons of *Soomaer*, and *Sheo Soondary* was a granddaughter of *Manick*, another son. *Manick* left an only son of the name of *Durbijoy*, and he had died leaving his daughter, *Sheo Soondary*, as his heir and representative.

The questions originally contested in the suit were whether *Pirthee Singh* was the legitimate or illegitimate son of *Soomaer Singh*, and an issue was directed to try that question. The other question was one of law, whether the law of primogeniture obtained in the family of *Soomaer Singh* or not. Those were the two questions upon the former appeal. It became, however, necessary to ascertain whether the family were governed by the law of the *Mitakshara* or by the law of the *Dayabhaga*, and how that was remained uncertain upon the record as it was brought up before this Committee. The result of the appeal was that their Lordships recommended that the cause should be remanded to try the following issues: "First, whether *Soomaer Singh* left any and what legitimate sons other than *Manick Singh* in the pleadings mentioned and the Respondent; and, if so, whether they are living or dead? And if any of them are dead, when they respectively died, and whether they left any and what male descendants." That issue was sent down, because upon the hearing of the appeal it appeared that there were other sons of *Soomaer* besides those who were the parties to the record, and their Lordships felt that it would not be right to give a decision disposing of this property without some inquiry being made respecting the other sons. The facts which appeared upon the trial of this issue have led to the question which is now before their Lordships for decision. The second issue was, "Whether the estate of *Soomaer Singh*, which was formerly within the limits of *zillah Beerbhoom*, having been transferred to *zillah Bhaugulpore*, the succession thereby becomes liable to be regulated by the law of the *Mitakshara*, or whether by reason of any local or family custom such succession, notwithstanding the transfer, continues to be governed by the law of the *Dayabhaga*." The finding of both the Courts upon that issue was that this family is governed by the law of the *Dayabhaga*.

Upon the trial of the first issue it appeared that *Soomaer* left six sons by three wives; *Manick*, the son of the eldest wife; four others, *Durbar*, *Tilluk*, *Hurry*, and *Ghansi*, sons by his second wife; the Plaintiff, *Pirthee Singh*, being the only son of the third. The question arose below whether *Pirthee Singh*, as a brother of the half-blood, succeeded equally with *Tilluk*, brother of the whole blood, to the shares of *Durbar*, *Ghansi*, and *Hurry*, who are

(1) I. L. R. 1 *Cal.* 27; 24 Suth. W. R. 234.

dead. The subordinate Judge held that he did not so succeed; that he was only entitled to his own share as one of the six sons of *Soomaer*, and therefore to only one-sixth of the property. Upon an appeal to the High Court that decision, so far as it related to the share of *Pirthee Singh*, was reversed, and it was held that he was entitleda ltogether to six *annas* and eight *pies* share of this estate, made up of the shares to which they held him to be entitled as heir to his half-brother, and his own share.

Their Lordships have been referred to the *Dayabhaga* and the commentators upon the text of the *Dayabhaga*, and they have also been referred to a decision of the Full Bench of the High Court of *Bengal*, in which the question now to be determined was raised and very fully considered. That decision is opposed to the judgment of the High Court in the case under appeal; but at the time this judgment was given, the decision of the Full Bench had not been delivered, and the High Court appear to have determined the question in this suit without going very fully into the doctrine. They probably acted upon certain decisions which have been given by Divisional Courts of the High Court of *Bengal*, which held that the half-brother was entitled to share in the same way as a uterine brother. The cases which have so held are *Tilluk Chunder Roy* v. *Ram Luckhee Dossee* (1), *Kylash Chunder Sircar* v. *Gooroo Churn Sircar* (2) (in which the Court went fully into the text-books and commentators), and *Shib Narain Bose* v. *Ram Nidhee Bose* (3). These decisions come near together in point of time. They are not decisions running over a long period of years, which might in that case be considered to have declared the law with regard to the succession to property, and which under such circumstances their Lordships would have been unwilling to disturb; but they are decisions of a recent date and coming very nearly together.

(1) 2 Suth. W. R. 41. (2) 3 Suth. W. R. 43 (3) 9 Suth. W. R. 87.

The recent case in which the question came before the full Court for consideration is *Rajkishore Lahoory* v. *Govind Chunder Lahoory* (1). That case is entitled to great authority from the manner in which it came before the Court. The question is precisely that which is raised in the present appeal, and upon the hearing before the Divisional Bench, the Judges, upon being referred to the decisions in the Divisional Courts on the subject, felt considerable doubt whether they had been correctly decided; and the question being one of great importance, they thought it right to refer the then appeal for decision to the full Court. That accordingly was done. Mr. Justice *Macpherson* gave judgment of the Court, in which all the other Judges, being five in number, concurred.

It cannot be denied that the construction of the text in the *Dayabhaga* itself is not free from difficulty. In the early sections of the chapter in which it is discussed (the 11th chapter), the law appears to be laid down with tolerable clearness, that the half-brother does not succeed to the share of his half-brother's estate in the case of an undivided family which has never separated. But in clause 35, a doubt is thrown upon the certainty of the doctrine thus laid down by a citation from *Yama*, which runs thus: "The whole of the undivided immoveable estate appertains to all the brethren; but divided immoveables must on no account be taken by the half-brother." This citation occurs in one of a series of paragraphs which discuss the effect of brothers becoming re-united after a separation; and it would appear that the law is different with regard to half-brothers who, having once separated, are re-united, from that which governs the case of half-brothers who have never separated.

Their Lordships do not think it necessary to discuss at length the different passages in the *Dayabhaga* and the commentaries of text-writers upon them, because that has been done very fully in the able and well-considered judgment of the High Court delivered by Mr. Justice

(1) I. L. R., 1 Cal., 27; 24 Suth. W. R. 231.

Macpherson (1). It is a question of positive law, and finding the law expounded, and, as their Lordships think, correctly declared by the High Court, it is sufficient to say on the present occasion that they adopt the opinion of the High Court and the grounds upon which their judgment is founded. There is no doubt that the brother of the whole blood stands with regard to religious offices in a higher position than the brother of the half-blood. The brother of the whole blood offers three oblations to the ancestors of the deceased on the father's side, and three on the mother's; whereas the brother of the half-blood offers three to the paternal ancestors only. Therefore, there are reasons peculiar to the *Hindu* law of succession, as expounded by the *Dayabhaga*, which may have led to the distinction in the mode in which the succession to brothers takes place. The High Court, having gone through the authorities, have declared what appears to them to be the result in the following sentences: "We thus have it that, (*a*) applying the principle which is the basis of the whole scheme of inheritance propounded in the *Dayabhaga*, the whole brother undoubtedly succeeds in preference to the half-brother: (*b*) In the *Dayabhaga*, ch. xi., s. 5, clauses 9, 11, and 12, it is expressly said that the whole brother succeeds before the half-brother; and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood: (*c*) The son of a whole brother is expressly declared to rank before the son of a half-brother, and the principle upon which this is declared applies equally to the case of brothers and half-brothers: (*d*) When there has been a separation, a half-brother who becomes reunited gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,—which proves that the original position of the half-brother was inferior to that of the whole." This last proposition seems to be well founded on the authority of the *Dayabhaga*. Sect. 35, which embodies the passage from *Yama*, is referred to and explained in the judgment as follows: "It is to be observed, and I think it is shewn by clause 36 that this is so,—that in the *Dayabhaga* itself this text of *Yama* is introduced only as being connected with the matter under discussion, viz., the succession in cases of separation with or without reunion, &c., and there really is nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in clause 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of section 5." Their Lordships think that this construction reconciles the different parts of the *Dayabhaga*.

The result is that the judgment under appeal cannot be supported, and their Lordships will humbly advise Her Majesty to vary the decree of the High Court by declaring that *Pirthee Singh* is entitled to a sixth, that is to say, two *annas* and eight *pies* share of the estate instead of a six *annas* and eight *gundas* share. Inasmuch as the law had been declared in favour of the Respondent at the time the decree was passed, their Lordships think that it is not a case for costs.

(1) In the case of *Rajkishore Lahoory* v *Govind Chunder Lahoory*, 1 I. L. R., Cal., 27; 24 W. R., 234.

9th and 12th June, 1877.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commission, Central provinces.

RAJAH PARICHAT, (Defendant)* ... } *Appellant,*

versus

ZALIM SINGH, (Plaintiff)... *Respondent.*

Mitakshara—Alienation of ancestral property—Illegitimate son—Maintenance.

Since by the *Hindu* law the illegitimate son of a person belonging to one of the "twice born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate, being in performance of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the *Mitakshara.*

Quære.—Where under the *Mitakshara* law a father who has no child born to him is competent without legal necessity, to alienate the whole or any part of the ancestral estate; or whether the rights of unborn children are so preserved as to render such alienation unlawful?

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an appeal from an order made by the Judicial Commissioner of the Central Provinces whereby he has decreed to the Respondent, the Plaintiff in the suit, who does not appear upon this appeal, the possession of a certain village called *Simeeria.* The facts, so far as it is necessary to mention them, may be very shortly stated. The father of the Appellant, the late *Rajah Bahadur Singh*, was the owner of an estate consisting of five villages, one of which was this village of *Simeeria.* They had been held by his ancestors for a long time, but there seems to have been some doubt to what extent they were rent-free, though enjoyed by him as such. Ultimately, however, the Government of the North-Western Provinces determined to recognise the right of the *Rajah* and his heirs to hold them in perpetuity as rent-free. Before that question (which is not material to the decision of the present appeal) was settled, the *Rajah*, having then no legitimate son, but having an illegitimate son, the Plaintiff, *Zalim Singh*, executed a *sunnud*, which, with the addition of certain names and titles of the parties here omitted, is in these words:—"This *sunnud* is granted by *Rajah Bahadur* in favour of you *Zalim Singh*, pledging to you the possession of *mouzah Simeeria*, which you will hold and enjoy in perpetuity for your personal expenses, food, clothing, *Pan, Masala.* You are to receive as written herein, and to be regular in rendering your service." Delivery of possession of the village seems to have followed upon the grant, and *Zalim Singh* was in possession of it when his father died, and continued to be in possession during the period while the estate was administered for the Appellant, the legitimate son and heir of the *Rajah*, by the Court of Wards. The Appellant, however, on coming of age appears to have ejected *Zalim Singh* from the possession of village. The latter then brought this suit, in which he claimed the possession of the village "as granted to him for his maintenance by the *sunnud*"; and the statement of his pleaders, who were examined in the cause, contains the following passage: "It is true that the proprietary rights of this village with others belonging to the *jaghire* were given at the settlement to *Parichat* (the Appellant) as head of the family; this *Zalim Singh* does not dispute, nor does he claim proprietary rights, but as he belongs to the family, and as his father considered this village sufficient for his support, he claims possession of the same, or a payment in money equal to the profits of the village." And in answer to a direct question by the Court why at the settlement *Zalim Singh* did not claim proprie-

* 4 Cowells I. A., p. 159; 3 I. L. R. Cal., p. 214.

tary rights, they said, "*Zalim Singh* only wished for support, and it would have interfered with the position of the head of the family to have broken up the estate by having the proprietary right bestowed on any other than the head of the family." In those circumstances their Lordships do not deem it necessary on this appeal to consider whether upon the true construction of the *sunnud* it was such a grant in favour of *Zalim Singh* as would enure for the benefit of his children, if he had any, or enable him, upon an alienation of the village, to give a good title to the purchaser. It seems to them that all that is raised on the present record is the right of *Zalim Singh* to the present possession of the village.

The course the litigation took was as follows: The right of *Rajah Bahadur Singh* to make such a grant was contested. That issue was found in favour of the Plaintiff and against the Defendant. The *factum* of the grant was also contested. That issue must be taken to have been conclusively found by the judgment of the Deputy-Commissioner confirmed by that of the Commissioner in favour of the Plaintiff. It came out, however, before the Deputy-Commissioner that after *Zalim Singh* had been ejected from the possession of the village he had executed a mortgage of it in favour of some money lender; and thereupon the Deputy-Commissioner came to the conclusion that the Plaintiff was no longer entitled to hold the village in *khas* possession and to receive the collections; but that having a distinct right to maintenance, and having had this village assigned to him by way of maintenance, he was at all events entitled to receive what may be called the net proceeds of it after the expenses of management, collection, and the like were provided for, such proceeds being estimated at the annual sum of Rs. 680. And he made a decree accordingly, which on the appeal of the Defendant was confirmed by the Commissioner. *Zalim Singh* did not appear in the Commissioner's Court or join in that appeal. It further appears that after the decision of the Commissioner he proceeded to take out execution, and recovered the amount which had been awarded to him by the Deputy-Commissioner. In that state of things the Defendant, the present Appellant, saw fit to carry the case before the Judicial Commissioner by a special appeal, and the two material grounds of that appeal are the first and the fifth. In the first he says: "The Lower Courts are wrong in law in holding that *Rajah Bahadur Singh* had power to alienate ancestral immoveable property in the way he is alleged to have done by the *sunnud* put forward by the Plaintiff." In the fifth he says: "The Lower Courts are wrong in law in decreeing maintenance in Plaintiff's favour, notwithstanding that his plaint was simply for possession of the village of *Simoeria*, and was never amended so as to enable the Courts to give a decree for maintenance." The Judicial Commissioner in dealing with this special appeal yielded to the last ground of appeal, and held that the Lower Courts had gone beyond their proper functions in making a decree for maintenance in money instead of awarding possession of the village; but he assumed that he had a right to make the decree which he thought ought to have been made on the merits of the case, and he accordingly varied the decree of the Courts below by giving a decree for possession. His decree, which is that now appealed from, is: "That the decrees of both the Lower Courts be reversed, and a decree granted for possession of *mouzah Simoeria* to Plaintiff, special Respondent," with costs.

It has been argued that to make this decree upon a special appeal was *extra vires* of the Judicial Commissioner, the Courts below having decided against the Plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships that the Appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judi-

cial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question whether, under the *Mitakshara* law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the *Mitakshara* as to render such an alienation unlawful. When that question does come distinctly before them it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the other. It seems to them that the objection in this case goes only to the particular alienation by the *sunnud*, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes—and the *Rajah* may be assumed to fall within that category—has a right of maintenance. Therefore, in assigning maintenance to *Zalim Singh*, his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the *sunnud*, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the *Mitakshara* law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the *Rajah Bahadur* had power to make it, the concurrent decisions of the three Courts in *India* were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right and ought to be affirmed, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the Respondent has not appeared.

12th, 18th, & 25th July, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DEENDYAL LAL (Defendant)* *Appellant*,

versus

JUGDEEP NARAIN SINGH (Plaintiff) ... } *Respondent.*

Hindu Law—Mitakshara—Execution-sale of interest of one of several Co-sharers in a joint estate.

The right, title, and interest of one Co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally, under the law of the *Mitakshara*, as well in *Bengal* as in *Bombay* and *Madras*.

The purchaser at such a sale acquires merely the right to compel a partition as against the other Co-sharers which the judgment-debtor possessed.

Quære.—Whether, under the law of the *Mitakshara*, in *Bengal*, a voluntary alienation by one Co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid?

25th July, 1877.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The Respondent in this case is the only son of one *Tooffani Singh*, and, the family

* 4 Cowell's 1, A.; p. 247; 3 I. L. R. Cal., p. 193.

being governed by the law of the *Mitakshara*, is joint in estate, in the strict sense of the term, with his father. On the 28th of January, 1863, the father being indebted to the Appellant to the amount of Rs. 5000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent. per annum. The Appellant afterwards put this bond in suit, and on the 30th of May, 1864, obtained a decree against *Toofani Singh* for the sum of Rs. 6,328. 13*a*. 8*p*. He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money, against the property especially hypothecated; but in September, 1870, caused "the rights and proprietary and *mokurrari* title and share of *Toofani Singh*, the judgment-debtor" in the joint family property which is the subject of this suit, to be put up for sale in two lots for the realization of the sum of Rs. 11,144. 6*a*. 4*p*., the amount alleged to be then due on the decree; and himself became the purchaser of those lots for the sums of Rs. 900 and Rs. 10,100. Objections were taken to this sale by the judgment-debtor, which, after going through all the Courts, were finally overruled, and the Appellant obtained the usual certificate title, and in January, 1871, succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February, 1871, the Respondent brought the suit out of which this appeal arises for the recovery of the whole property on the ground that being according to the law of the *Mitakshara* the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been incurred without any necessity recognised by the *Shastras* or the law. The father was joined as a Defendant.

The issues on the merits settled in the cause were—

1. Did *Toofani Singh* borrow money from the Defendant (the Appellant) under a legal necessity or without a legal necessity? and are the auction sales and other proceedings taken in satisfaction of the debt all illegal, and ought they to be set aside or not?

2. Under the *Mitakshara* law, is the Plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much?

3. Was some portion of *mouzah Domawun* personally acquired by the Plaintiff's father, or was it acquired by the ancestral funds and property?

A good deal of evidence was given in the Court of first instance as to the nature of the debt incurred by *Toofani Singh*, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the Plaintiff was directed to shew that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand the Defendant (the Appellant) brought witnesses to prove that part at least of the money, viz. Rs. 1,500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally, that the Plaintiff was cognisant of his father's transactions, and the whole debt one which bound both co-sharers.

The subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon this issue. In one passage of his judgment he says, "The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says, "The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment-debtor, cannot be regarded as including the right of the son of the judgment-debtor which he derived under the *Shastras*; and so far as the Plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he proceeded; for he gave the Plaintiff a decree for one moiety

of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the *Zillah* Judge of *Gyah*, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to *Toofani Singh*, but the whole undivided estate was liable for the debt.

The Respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th of June, 1873, reversed the decree of the Lower Appellate Court, and ordered that the Plaintiff should obtain possession from the Defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

A good deal of the argument at their Lordships' bar was addressed to the question of the nature of the judgment debt, and whether or not there was "legal necessity" for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the *Zillah* Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal; and on that special appeal the High Court could not have disturbed the finding of the Lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the Appellant cannot be taken to have acquired by the execution-sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title, and interest of the father. If any authority be required for this proposition it is sufficient to refer to the cases of *Nogenderchunder Ghose* v. *Srimutty Kaminee Dossee* (1) and *Baijun Doobey* v. *Brij Bhookun Lall Awasti* (2).

The first and principal question, however, that arises on this appeal is, whether the Appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the *Mitakshara* the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In lower *Bengal*, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime, under the law of the *Dayabhaga*, the rights which they have under the law of the *Mitakshara*), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchaser under such an execution stands in the shoes of the judgment-debtor, and acquires the right as against the other co-sharers to compel a partition.

That a similar rule prevails in the south of *India*, though the law there administered is founded on the *Mitakshara*, is shewn by two cases decided by the High Court of *Madras*: *Virásvámi Grámini* v. *Ayyasvami, Grámini* (3), and *Palani Velappa Kaundan* v. *Mannaru Naickan* (4). The latter case was one in which, as here, the coparceners were father and son. And that the law is to the same effect in the Presidency of *Bombay* was ruled in the two cases which are reported at pp. 32 and 182 of the first volume of the *Bombay* High Court Reports.

All these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right

(1) 11 Moore's Ind. Ap. Ca. 241; 2 P. C. J., 275.
(2) Law Rep 2 Ind Ap. 275; *Ante* p. 541.
(3) 1 Madras H. C. R., 471.
(4) 2 Madras H. C. R., 416.

of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his coparceners. This latter proposition is certainly opposed to several decisions of the Courts of *Bengal*.

In 1869 the question was carefully considered by the High Court of *Calcutta*. A Division Bench of that Court referred it to a Full Bench in the case of *Sadabart Persad Sahu* v. *Phoolbash Koer*.

The decision of the Full Bench is reported in the third volume of the *Bengal* Law Reports, Full Bench Rulings, p. 31. The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the *Mitakshara*, as administered in the Presidency of *Fort William*, "*Bhagwan Lall*," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment, which is reported in the Law Rep. 3 Ind. App. p. 7, did not think it necessary or expedient either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships (p. 30) said they "abstained from pronouncing any opinion upon the grave question of *Hindu* law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal."

It is, however, to be observed that even the Full Bench in the case under consideration recognised a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice, at p. 37 of the Report, says:—

"It is unnecessary for us to decide whether, under a decree against *Bhagwan* in his lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in *Stokes'* Reports, it might have been seized, but the case as against *Bhagwan* and that against the survivors are very different. So long as *Bhagwan* lived, he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in *Sadabart's Case* has been followed by, amongst others, that of *Mahabeer Persad* v. *Ramyad Singh* (1), being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bondholder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms (see p. 94) the law as established by the Full Bench ruling in *Sadabart's Case*, and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the pro-

(1) 12 Beng. L. R. 90.

perty, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment-debtor, should be subject to the lien of the judgment-creditor for the money advanced, with interest. In the present case the same Judges have refused to recognise any such equity, proceeding on the ground that the execution was taken out not against the property specially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in *Sadabart's Case*. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872; since here it has been found by the Lower Appellate Court that "legal necessity to borrow the money existed;" whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the Defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision of 1872? It is a clear authority for the proposition that, although by the law as settled in that part of the presidency of *Fort William* which is governed by the *Mitakshara*, a member of a joint family cannot incumber his share in joint property without the consent, express or implied, of his copartners, the purchaser of it at an execution sale nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated and that which has been established at *Madras* and *Bombay*; except that the application of the former may depend upon the view the Judges may take of the equities of the particular case; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution-creditor, and of a purchaser at an execution sale, was expressly left open by the decision in *Sadabart's Case*, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in *Bengal* as that which exists in *Madras*. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's Case* as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided *Hindu* estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the Respondent. But they think that the decree should be varied by adding a declaration that the Appellant, as purchaser at the execution sale, has acquired the share and interest of *Toofani Singh* in that property, and is entitled to take such proceedings as he shall be advised to have that share and

interest ascertained by partition. And they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to *Toofani Singh's* share, since, if a partition takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.

13th June, 1877.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Allahabad.

MOHAMMED EWAZ and another, (Plaintiffs)*... } *Appellants,*

versus

BIRJ LALL and another, (Defendants) ... } *Respondents.*

The Indian Registration Act VIII. of 1871—Construction of s. 35—Non-compliance with provisions of.

The words of s. 35 of the Indian Registration Act, VIII. of 1871, which provide that "If all or any of the persons by whom the document (i. e., the document presented for registration) purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document," taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor, an idiot or a lunatic.

Since such a construction would cause great difficulty and injustice and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned.

The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Registration Act.

Sah Mukhum Lall Panday v. *Sah Koondun Lall.* (1) referred to and approved.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is a suit brought by the Appellants, the sons and heirs of *Shere Mohammed*, the vendee under a deed of sale which on the face of it purports to have been made by three persons, *Mobaruk Jan*, and her two sons, *Hyat Mohammed* and *Salamutoollah*. The sale was of certain shares in two *mouzahs*, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The Respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to *Shere Mohammed*, contend that the last-mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the Respondents who impeach that registration to shew the facts which invalidate it. They have not proved that the shares were held jointly, nor does it appear that that point was made in either of the appeals below.

The subordinate Judge of *Bareilly*, and the Judge of *Bareilly* to whom the case went from the subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so, and a decree was given by the subordinate Judge, which was affirmed by the Judge, in these terms: "That a decree be given to the Plaintiff for the completion of the sale deed dated the 14th of January, 1874, to the extent of the rights of *Hyat Mohammed* and *Salamutoollah*, Defendants, in the shares of *mouzahs Tah* and *Kishanpur Maupur* against

* 4 Cowell's I. A., p. 166; I I. L. R. Allaha., p. 405.

(1) 15 B. L. R., 228; S C., L. R., 2, Ind. Ap. 210; 24 W. R., 75; *Ante* p. 509.

the said Defendants and the vendees, and the claim for possession of the said shares, and for the rights of *Mussumat Mobaruk Jan*, be dismissed." That decree may be taken to be a declaration that the Appellants, as the heirs of the vendee, are entitled to the rights, whatever they were, of *Hyat Mohammed* and *Sallamutoollah* in these *mouzahs*. The decree goes no further, it refuses to decree possession; and, from the reasons given by the Judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration. The High Court came to the conclusion that the registration of the deed of sale to *Shere Mohammed* was null, because the requisites of the *Registration Act* had not been complied with.

It appears that the deed was brought to the registrar on the 15th of January; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, *Mussumat Mobaruk Jan*, by the hand of *Hyat Mohammed*. The sons admitted their own signatures and execution, but stated that their mother had not assented to the sale. The sub-registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on the 15th of January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of ten and eleven was presented for registration in the office of the officiating sub-registrar by *Chotelal*, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons, having attended on the following day, and made the admissions and statement above referred to, the sub-registrar made this endorsement: "*Hyat Mohammed* and *Salamutoollah*, sons of *Amirulla* (sect *Shaikh Punjabi*, occupation *zemindary*), and residents of *Pilibheet*, in the district of *Bareilly*, two of the three vendors named in this sale-deed, were identified," and so on, stating the identity, "and their written depositions were taken down on separate papers, according to the application of the manager of the vendee for the compulsory attendance of the vendors. The said vendors admitted before me, in their written deposition, that they had executed the sale-deed now in the office, including therein the name of their mother, and completed it by having it duly signed and witnessed, but that they had this sale-deed drawn up without consulting their mother, and she was not a consenting party to it; that they had not received any money from this vendee, and they, having received a larger amount of consideration from *Byjnath*, &c., executed a sale-deed in their favour, and had it registered, and that they had no mind to have this sale-deed registered." The last statement, that they had no mind to have the deed registered, appears to have been treated as a refusal on their part to endorse the document; but the Act gives power to the registrar to register, notwithstanding such a refusal, and accordingly the registrar did register the deed in the formal manner required by the Act, and made this formal endorsement of registration upon the instrument: "This document is registered at No. 40, p. 299, vol. xi., Register No. 1, on the 16th of January, 1874."

The deed of sale to the Respondents, which also bears date on the 14th of January, 1874, had been brought to the registry on the 15th; and all the vendors having admitted, either by themselves or their agent, that that deed had been executed, it was registered on that day. Nothing, however, turns upon the priority of the registration of this deed, because by the provisions of the Act a deed operates not from the time of its registration, but from the time when it would have commenced to operate if no registration had been required. If, therefore, a deed is tendered for registration within the time prescribed by the Act, and registered, it

is immaterial that another deed has obtained priority of registration.

These being the facts of the case, the High Court have decided that the execution of the deed not having been admitted by the mother, and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. The decision is founded mainly on the 35th section of the last Registration Act, Act VIII. of 1871. Before coming to that section it will be right to call attention to the scheme of the Act, with a view to see whether the general provisions do not furnish a context by which to construe the language used in the 35th section.

The 17th section describes the documents required to be registered. The 23rd prescribes the times within which deeds are to be presented for registration, viz., a period of four months after their execution; and there is a proviso to that section to which it is material to call attention. It is this: "Provided that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution." It is plain that under that proviso a deed, say, by several vendors, may be registered as to one or two of them when one or two have executed the deed, and may be again registered when others have at a later period executed it. Then come the 34th and 35th sections, which are the most important sections to be considered. The 34th enacts that, "Subject to the provisions contained in this part and in sects. 41, 43, 45, 69, 76, and 86, no document shall be registered under this Act unless the persons executing such document or their representatives, assigns, or agents authorized as aforesaid appear before the registering officer within the time allowed for presentation." There the persons described are the persons executing the document—not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it. Then there is power to enlarge the time, and a provision that the appearances may be simultaneous or at different times. Then "the registering officer shall thereupon inquire whether or not such document was executed by the persons by whom it purports to have been executed," and "satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear."

The 35th section is: "If all the persons executing the document"—again, not "purporting to execute it,"—but "if all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or, in the case of any person appearing by a representative, assign, or agent, if such representative, assign, or agent admits the execution, or if the person executing the document is dead and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sects. 58 to 61 inclusive." Then comes the enactment which occasions the difficulty: "If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document." These words, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed which purports to be executed by several persons if any one of those persons deny the execution. Such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act; their Lordships, therefore, think the words should be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the exe-

cution of the deed, and *quoad* any person who appears to be a minor, an idiot, or a lunatic. There appears to be no reason for extending the clause further than this, so as to destroy the operation of the deed as regards those who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso in the 23rd section to which allusion has already been made, shews that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. Now it would be extremely difficult to give effect to this enactment in the 35th clause in its literal meaning, and at the same time to give effect to the proviso in the 23rd clause. To do so would certainly create an anomaly. Supposing three vendors live in different places, and are called upon at different times to execute the deed of sale, in that case there undoubtedly may be three several registrations. Supposing No. 1 and No. 2 attend the registrar and admit the execution of the deed, and it is registered, but No. 3 afterwards comes and denies the execution of the deed, what is to be the consequence? Is the previous registration of the two to be rendered invalid? If so, effect could not be given to the proviso. And if that registration is not to be invaild, what difference in principle can there be between the case where three vendors appear at different times to admit or deny the execution, and where they appear at the same time to admit or deny the same fact? That which is required of them is precisely the same in both cases, and the admission and denial ought in reason to have the same effect in both.

Their Lordships cannot but think that considerable light is thrown upon the intention of the Legislature by the provision that there may be under the circumstances mentioned a registration and re-registration of the same document.

Again, the registering officer is to refuse to register, not only in the case of persons who deny the execution of the deed, but in the case of persons who appear—that is, who appear to him—to be minors, or idiots, or lunatics. Suppose a deed executed by three persons, two of whom were under no disability, and who admit their execution, but the third had become a lunatic, it would follow, if the construction contended for by the Respondents were to prevail, that that deed could not be registered against the persons who admitted their execution, and who were under no disability. The consequences of such a construction would be so injurious that it cannot be supposed that the Legislature intended to produce them. The consequences of non-registration are pointed out in the 49th section, and are of the most stringent description:—"No document required by section 17 to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." The effect, therefore, in the case which has just been supposed, would be that the deed could not be given in evidence against those who had executed it, and who were under no disability, because some other person interested in the property, and made a party to it, had become lunatic (it may be after the execution), or appeared to the registrar to be lunatic. No injustice is done by admitting a deed to registration, because the effect is no more than to satisfy an onerous condition before the deed can be given in evidence; and when in evidence, it is subject to every objection that can be made to it precisely as if no registration had taken place; whereas when registration is refused, the effect may be to deprive the party altogether of perfectly good rights which he might have under the deed but for the *Registration Act*.

The Act gives little discretion to the sub-registrar. He is bound either to register or not to register when he is satisfied by the admission or denial of the parties that the deed has been executed, and no discretion is given to him to inquire further into the matter. He can only obtain from the parties or their agents the admission or the denial. But provision is made for an appeal from his refusal to register to the District Court, and that Court is empowered to go into evidence,

and if the District Judge is satisfied that the deed was executed by the parties, he is then to order the registration. The power of that Court, however, does not and could not arise in this case, because, in point of fact, the sub-registrar did register the deed.

Their Lordships do not think it necessary to refer specifically to the other sections in the Act. They have referred to those which furnish, in their view, a context to explain and cut down the generality of the words used in the 35th section.

This point will of course dispose of the appeal. But there is another part of the judgment of the High Court which their Lordships think requires consideration. The High Court say, "It has been held by this Court more than once, that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may, in fact, have been improperly admitted to registration" Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed, to contend that there was an improper registration,—that the terms of the *Registration Act* in some substantial respects have not been complied with. Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally, that all Courts, upon the production of a deed which has the registrar's indorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *primâ facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding. The 60th section is, "After such of the provisions of sections 34, 35, 58, and 59, as apply to any documents presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered,' together with the number and page of the book in which the document has been copied. Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59, have occurred as therein mentioned." The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence. Then by the 85th clause, it is enacted, that "Nothing done in good faith pursuant to this Act, or any act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." No doubt, in this case, the fact of the non-admission of the mother's execution appears upon the endorsement made on the deed itself, and did not require to be proved *aliunde;* but the observations in the judgment go beyond the particular case.

This point does not come before their Lordships for the first time. It was a good deal considered in the case to which Mr. *Cowie* has referred: *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1); and although it was not there necessary to decide the point,—indeed the point did not arise, and the appeal was decided upon another ground,—yet the considerations to which their Lordships have just ad-

(1) Law Rep. 2 I. A., p. 210; *Ante*, p. 509.

verted, were discussed in the judgment in this way: "Now, considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21, or 36, or other similar provisions." It may be observed, that section 36 in the former Act is the equivalent of section 35 in the present Act. "It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words, 'defect in procedure,' in section 88 of the Act," —which is the same as section 85 in the present Act—"so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal, under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

It is to be observed, with regard to the inconvenience which it is suggested may arise from a deed being registered, when some only of the parties to it have executed it, that provision is made for disclosing the parties who have really executed the deed. A copy of the deed is to be made in a book, and there are to be indexes, and it is directed that "Index No. 1, shall contain the names and additions of all persons executing, and of all persons claiming under every document copied into or memorandum filed in book No. 1, or book No. 3." So that any one consulting the register would find a copy of this deed, and that the two sons only had executed it, and that the mother had not.

On those grounds, their Lordships think that the decree of the High Court cannot be sustained, and they will humbly advise Her Majesty to reverse it, and to order that the appeal from the decree of the Judge of *Bareilly* to the High Court be dismissed, with costs, and that the last-mentioned decree be affirmed.

The Appellants will have the costs of this appeal.

20th & 21st June; 19th July, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrott Collier.

On Appeal from the Court of the Commissioner, Fyzabad, Oudh.

MAHARAJAH PERTAB NARAIN, SINGH (Plaintiff)* ... ... } *Appellant,*

versus

MAHARANEE SUDHAO KOOER, and others, (Defendants) ... } *Respondents.*

Act I. of 1869, s. 22, cl. 4—Talookdar—Treatment of son of Daughter as a son—Revocation of Hindu will.

Where an *Oudh talookdar*, not having male issue, is shown to have so exceptionally treated the son of a daughter, as to give him in the family the place, consequence, and pre eminence which would naturally belong to a son of his own if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment of the 4th clause of s. 22, Act I. of 1869.

Circumstances affording evidence of such an intention considered.

The will of a *Hindu* may be revoked by parol, and where definite authority is given by him to destroy his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed.

* 4 Cowell's I. A., p. 228; 3 I. L. R., Cal. p. 620.

19th July, 1877.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

The question raised by this appeal is the right of succession to the *taluok* of the late *Maharajah* Sir *Man Singh*, one of the most considerable, if not the most considerable, of the great landholders of *Oudh*, whose status and rights are the subject of Act I. of 1869.

The *Maharajah* died on the 11th of October, 1870. He had no male issue. His nearest surviving relatives were his widow, the *Maharanee Subhao Kooer*, a daughter by a deceased wife, and the Appellant, the son of that daughter. The *Maharajah* had also brothers, and brothers' sons, of whom some survived him. His grandson, the Appellant, was known in the family as "*Dadwa Sahib*," by which name he will be generally designated in this judgment.

The property which is the subject of this litigation belonged to *Man Singh* before the annexation of *Oudh*. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as *talookdar* was duly confirmed by *sunnud*. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from *Buktowar Singh*, the preceding proprietor, to his nephew, *Man Singh*, though the youngest of three brothers. Accordingly, when the lists prescribed by sect. 1 of Act I. of 1869 were made up, the name of *Man Singh*, as *talookdar*, was inserted in the first and second of those lists.

Some years before, the passing of this Act, and on the 22nd of April, 1864, *Man Singh*, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district a document, which is in these words:—

"I, *Maharajah Man Singh*, &c., *talookdar* of *Shahgunge, Gonda*, &c., do hereby declare that as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorized to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and deposited it in a public office, that it may serve as a document, and prove of use when required."

Mr. *Simson*, the then Commissioner, made the following indorsement on the will:—"April 22, 1864. *Maharajah Man Singh* this day in person signed this document in my presence, and then delivered it to me as his last will and testament;" and wrote on the envelope within which it was inclosed, "Within this sealed envelope is *Maharajah Man Singh's* will. I forward the envelope to the Deputy-Commissioner of *Fyzabad*, with instructions to lodge it, sealed as it is, in the Treasury; and each Treasury officer will note it in his receipt on giving or receiving charge. Of course the *Maharajah* may reclaim this on a written application properly authenticated at any time."

After the death of the *Maharajah*, and in November, 1870, this will was opened, and under it the *Maharanee* was put into possession of the *taluok*. She afterwards, by a document dated August 16, 1872, exercised the power which the will gave her of "nominating a successor" in favour of the Respondent *Triloki Nath*, who was a son, then under age, of one of the late *Maharajah's* brothers, and had married her own niece.

Shortly after this transaction the Appellant, *Dadwa Sahib*, instituted this suit, praying for a declaration of his title to the succession to the *Maharajah's* estate, and for the cancellation of the document of the 22nd of April, 1864 (the will), that of the 16th of August, 1872 (the appointment); and the order of the revenue authorities of the 11th of November, whereby the *Maharanee* was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the Appellant can only succeed in his suit by

establishing both the following propositions:—

1. That the testamentary disposition which the *Maharajah* unquestionably had power to make, and did make in April, 1864, was revoked or became inoperative in his lifetime.

2. That the Appellant is entitled to succeed to the *talook* as the son of a daughter of the *Maharajah*, who had "been treated by him in all respects as his own son" within the meaning of the 4th clause of s. 22 of Act I. of 1869, it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the *talook* under the special canon of succession to intestate *talookdars* established by that section of the statute.

The Court of first instance and the Appellate Court in *Oudh* have concurred in determining the first of these issues against the Appellant. The second of them was found in his favour by the Court of first instance, but that decision was reversed by the Appellate Court.

In dealing with this appeal their Lordships propose to consider, in the first instance, whether the Appellant has established that he was treated by the late *Maharajah* "in all respects as his own son," within the meaning of the enactment in question, and is consequently the person entitled to inherit the *talook*, if the *Maharajah* died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in *Oudh* as to the construction to be put upon it. One passage in the Commissioner's (Mr *Capper's*) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the *Hindu* law, involving the legal consequences of such an adoption, as, *e.g.*, the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the Appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindu law. They apprehend that a *Hindu* grandfather could not, in the ordinary and proper sense of the term adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting, in the person of a daughter's son, a "*patricá-puttra*," or son of an *appointed* daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but is not therefore essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the 22nd section, applies to all the *talookdars* whose names are included in the second or third of the lists prepared under the Act, whether they are *Hindus*, Mahomedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe.

It is necessary, then, to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their Lordships are of opinion that wherever it is shewn by sufficient evidence that a *talookdar*, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.

Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the Appellant by the *Maharajah*.

It is unquestionable that the Appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the *Maharajah*. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of *Hindus*.

On the other hand, it must be admitted on the evidence that the *Maharajah* had not, in 1864, formed a clear intention that *Dadwa Sahib*, who was then between seven and eight years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be, the act was a natural one. At that time nothing was definitively fixed as to the course of succession to the newly constituted *talooks*, except that the *talookdars* had an absolute power of disposition over them. The family custom which had previously regulated the succession to the *Maharajah's talook* was one which implied selection. It was, therefore, in every way desirable that the *Maharajah* should make some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what *boy* is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that *Dadwa Sahib* should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex parte paternâ*, it would have been comparatively easy to nominate a brother or a brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the *Shasters*, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own "*gotra*." And if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsibility of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the *Maharajah* when he made his will appears in some measure from the evidence of *Anunt Ram*, his *dewan*, whom the Deputy-Commissioner considered to be a trustworthy witness.

In 1867 the ceremony of the *janeo*, or investiture of the Appellant with the *Brahminical* thread, took place. That this was done with considerable pomp in the *Maharajah's* house, that the *Maharajah* took that part in the ceremony which in the ordinary course of things would be assumed by the boy's natural father, seems to be established. That what was done operated either in law or in fact as a transfer of the boy from his own into the *Maharajah's gotra*, their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. *Capper*, are unable to affirm.

The next important event in *Dadwa Sahib's* history was his marriage in 1868 to the daughter of *Darogha Ramdan*. It seems to be clearly established that on that occasion the *Maharajah* wrote the two following letters to the father of the bride. The first is in these words:—

"*Lallah Tulsiram* came to me and verbally mentioned to me all the facts. I have, in my former letter, already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this

affair. In short, when I have candidly declared *Dadwa* to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

"The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel *Barrow*, which you should consider quite correct; you should be quite satisfied."

The other letter is as follows:—

"I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of *Dadwa*, but you know very well that I have declared no one to be my heir except *Dadwa*, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? *Dadwa* has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my wife, so you should be satisfied, and make preparations for the marriage."

These letters no doubt are no legal revocation of the will. They seem rather to recognise the continued existence of a will. But they are pregnant evidence to shew that the *Maharajah's* inclinations in favour of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the *Maharajah* at that time either thought that he had named *Dadwa Sahib* in the will as his successor, or had instructed his wife to exercise her power of appointment in *Dadwa's* favour. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should succeed him; or intended to leave to the *Maharanee* a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of this correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the *Maharajah's* character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the *Maharajah* to the late *Nowring Singh*, and contains the words:—"Do not regard this as a customary invitation. *Dadwa Sahib* is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reasons to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the *Maharajah's* letter-book.

The documentary evidence which has just been considered is far more important, as direct evidence of this intention of the *Maharajah*, than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the Plaintiff's witnesses on this point, when that is in conflict with the testimony adduced by the Defendants.

There is, again, some conflict of evidence as to the fact whether the Appellant bore the title of *Kowar*. There is, however, some evidence that the title was often conceded to him, though he is not uniformly so designated in the *Maharajah's* own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important occasions sat on the *Gudder* with the *Maharajah*; of his having been introduced by the *Maharajah's* desire to European officers high in authority; of his having been taken to the *durbar* of the Governor-General and put prominently forward there; and it cannot be doubted that the effect of the *Maharajah's* treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the *Maharajah*, as one of the leading members of the

British Indian Association of *talookdars*, went down to *Calcutta* in order to take part in the discussions and negotiations which resulted in the passing of Act I. of 1869. This must have been in the latter half of 1868.

Imtiaz Ali, the *vakil* concerned in the drafting and preparation of this Act on the part of the *talookdars*, has sworn that clause 4 of the 22nd section originated with the *Maharajah*; that it was opposed by some of the *talookdars*, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the bill, and passed into law. He also says that he was told by the *Maharajah* that his object in pressing this clause was to provide for the *Dadwa Sahib*.

There is some contradictory evidence on this point on the part of the Defendants. One of their witnesses, however, *Chowdree Niamut Khan* seems to admit that the *Maharajah* was the author of the clause in question, though he represents that it was inserted for the benefit of *Mahomedan* rather than for that of the *Hindu talookdars*. He says, "I asked *Maharajah Man Singh* what the object was of the clause in question, and he informed me that in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindu law, but under the Mahomedan law they have; and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindu law might not be contravened." It is not easy to see why the *Maharajah* should have been thus anxious to originate a clause that was to enure only for the benefit of *Mussulman talookdars*.

The scale, however, is conclusively turned in favour of the testimony of *Imtiaz Ali* on this point by the evidence of Mr. *Carnegy*.

Mr. *Carnegy*, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the *Maharajah* in January, 1870, and that in the course of that conversation the *Maharajah* did make a statement to the effect that he had had a clause inserted in Act I. of 1869 to suit the identical case of the *Dadwa*. That statement is very material, inasmuch as it shews that the *Maharajah* considered that he had treated his grandson in all respects as a son.

The Deputy-Commissioner (Mr. *King*), speaking possibly in some measure from personal knowledge, says:—"It is not saying too much the Court believes to say that if the Plaintiff had not existed, the clause as it stands would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain it may be when the notion of making the *Dadwa Sahib* his successor was first conceived, or when that notion first became a fixed intention, it is established that the *Maharajah* had that intention as early as the date of the *Dadwa Sahib's* marriage; that, with that intention, he continually treated his grandson, in fact, as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the statute.

They are further satisfied that the treatment, in point of fact, was such as the words of the clause, upon the true construction of it must be held to contemplate; and that, in the events that have happened, the Appellant was the statutory heir to the *talook*, if the *Maharajah* is to be held to have died intestate.

They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the *Maharajah*, from the time of his return from *Calcutta*, would presumably have, with regard to his will, the *animus revocandi*. It is unreasonable to suppose that, having been at so much pains to make *Dadwa Sahib* his heir *ab intestato*, he would wish to leave that arrangement liable to be defeated at the will and by the act of the *Maharanee*.

Moreover, his conduct and what we are told of his character make it probable that, even if he thought the succession of *Dadwa* was secured either by the terms of the will or by further instructions given to the *Maharanee*, he would now desire it to be effected by operation of law rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the *Maharanee*, for it provided for the substitution of a male successor in her place. The *Maharajah* had since made up his mind who that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. *Carnegy* has deposed did pass between him and the *Maharajah*. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. *Carnegy's* deposition are the following:—

"He spoke to me about having it (the will) withdrawn from the Treasury on the eve of my departure on tour across the *Gogra* (Mr. *Sparks'* evidence fixes the date of this as some time in January, 1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the *Maharanee* to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the *Dadwa Sahib*; that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family; and that if on examination of the document I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the *Dadwa* should succeed him; and he had had a special clause inserted in Act I. of 1869 to suit the identical case of the *Dadwa*, so his wishes would be fully met by the document being destroyed and the law being allowed to take its course. Next morning I crossed the *Gogra* on tour, and was absent several weeks. I wrote demi-officially to Mr. *Sparks*, the Deputy-Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. *Davies*, who I remember said that if the will was sealed up and deposited by the Commissioner, I, as officiating Commissioner, might open it; but if sealed and deposited under orders of the Chief Commissioner, I had better not open it myself. Mr. *Sparks* unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to *Fyzabad* I found the *Maharajah's* health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869-70."

And in cross-examination he said: "The *Maharajah* wished his will to be destroyed that the *Dadwa Sahib* might get the benefit of the 22nd section of Act I. of 1869. He said there was no need of the document as the clause secured his wishes."

The first objection to Mr. *Carnegy's* evidence is that it is not corroborated by that of Mr. *Sparks*, which is also given in the cause. He says, touching this point, "To the best of my recollection, Mr. *Carnegy* never wrote to me to send him the will. Mr. *Carnegy*, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the Treasury Office to get out the will and see by whom it was deposited, which copy I dispatched to Mr. *Carnegy*. I did not receive any letter, official or demi-official, to return the will to the *Maharajah*. I did not receive any letter from Mr. *Carnegy* asking me to return the will, nor did

I receive any *khutt* from the *Maharajah*. I don't remember receiving any."

Upon this testimony, it is to be remarked, that it confirms that of Mr. *Carnegy* as to the fact that at the time in question he made some communication to Mr. *Sparks* touching the *Maharajah's* will, though there is a material discrepancy between the two depositions as to the precise terms and nature of that communication. To that extent then it corroborates Mr. *Carnegy's* general statement that he had had a conversation with, and some instructions from, the *Maharajah* about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. *Carnegy* was examined on the 19th of April, 1873, when on the eve of his departure for *Europe*. Mr. *Sparks* was examined on the 2nd of the following July, and there was no opportunity of recalling Mr. *Carnegy*, and getting him to explain, if he could, the before-mentioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. *Carnegy*, after the discussion with Mr. *Davies* to which he deposes may have written to Mr. *Sparks* to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written to the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. *Carnegy*, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. *Davies*. He has, therefore, vouched that gentleman, who might have been called to contradict him, and the discussion, if it took place, presupposes that Mr. *Carnegy* had some instructions from the *Maharajah* concerning the will.

Other objections to the testimony of Mr. *Carnegy* are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after his return from his official tour, he did not even inform the *Maharajah* (who lived until the following October, and notwithstanding frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and, above all, why, after the death of the *Maharajah*, he allowed the widow to be put into possession of the *talook*, under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. *Carnegy* whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the dispatch of the document; that after his return he found the *Maharajah* on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. *Carnegy* is confirmed by Mr. *Sparks*. Mr. *Carnegy* seems then to have jumped to the conclusion that the *Maharajah's* health, physical and mental, was such as to make it inexpedient to take further action in the matter. If this were Mr. *Carnegy's* sincere conviction, it may well account for his not acting after his return on the antecedent authority by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act, if assured that it would be confirmed, if necessary, by a person in the full possession of his faculties, would naturally abstain from doing it if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the *Maharajah's* continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject or to inform the *Maharajah* that the will was still in existence. His conduct after the *Maharajah's* death seems to be explicable only on the assumption that he may have thought the actual destruction of the instrument was essential to its legal revocation; and that, if he objected to the

Maharanee's title on the ground of what had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the *Dadwa Sahib*, whose interests he may have supposed, in common with other officials, and many of the dependents of the family, would be secured by the *Maharanee's* exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory. But the question which they have to determine is not whether Mr. *Carnegy's* conduct can be completely explained, but whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy-Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. *Carnegy's* recollections of the conversation with the *Maharajah*. The other Judge says expressly "that the conversation, such as related by *Carnegy*, passed between him and the *Maharajah* I have no doubt." Reviewing, however, Mr. *Carnegy's* subsequent conduct, he came to the conclusion that "*Man Singh* only expressed an intention that the *Dadwa Sahib* should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expressed a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. *Carnegy* be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. *Sparks;* but mere imperfection of memory can hardly account for his imagining that the *Maharajah* gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. *Carnegy's* statement of what passed between him and the *Maharajah* may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. It cannot, they think, be doubted that the will of a *Hindu* may be revoked by parol. The cases cited at the bar shew that this was the law of *England* before the *Statute of Frauds* was passed. Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in *India* in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some hesitation, not because they are not prefectly satisfied that the *Maharajah* had the *animus revocandi*, but because the testimony of Mr. *Carnegy* is open to the objections which have been considered. It was hardly disputed at the bar that, if definitive authority to destroy the will was given to him by the *Maharajah*, that would be sufficient in law to constitute a revocation, although the instrument was not in fact destroyed. In truth, the case would then be almost on all fours with that of *Walcott* v. *Ochterlony* (1), the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the *Statute of Frauds*. In that case, as in this, the authority was not exercised by the actual destruction of the will.

Their Lordships see no grounds for not accepting that part of Mr. *Carnegy's* testimony which says that the *Maharajah* gave him authority to destroy the

(1) 1. Curt. 580.

will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction. And they are disposed to think that even if the direction to destroy were not, as, upon the whole, they think it is, satisfactorily established, the declaration made by the *Maharajah* to the principal officer of the district in whose custody the will was, of his desire and intention that the *Dadwa Sahib* should succeed him by virtue of the newly-passed statute and in supersession of the will, would have been in law a sufficient parol revocation.

Upon the whole, then, their Lordships are of opinion that the *Maharajah* died, as he intended to die, intestate; that the Appellant is the person who, under clause 4 of sect. 22 of Act I. of 1869, was entitled to succeed to the *talook*; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the *talook* and what passes with it. If the *Maharajah* had personal or other property not properly parcel of the *talookdary* estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of *Fyzabad*, dated the 24th of December, 1873, and that of the Deputy-Commissioner of *Fyzabad*, dated the 28th of July, 1873; and to declare that the will of the late *Maharajah Man Singh* of the 22nd of April, 1864, was duly revoked by him in his lifetime; and that the Plaintiff, *Maharajah Pertab Narain Singh, alias Dadwa Sahib*, was and is entitled, under clause 4, sect. 22 of Act I. of 1869, to succeed, as *ab intestato*, to the *talookdary* estate of the late *Maharajah*, including whatever is descendible according to the provisions of the said statute. Their Lordships are of opinion that, under the peculiar circumstances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the *talookdary* estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

27th and 28th June, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ASHGAR ALI and others, (Plaintiffs)* ... } *Appellants*,

versus

DELROOS BANOO BEGUM, (Defendant) ... } *Respondent*.

Purdah Woman—Execution of Documents.

A Court, when dealing with the disposition of her property by a *Purdah* woman, ought to be satisfied that the transaction was explained to her, and that she knew what she was doing; especially in a case where, without legal assistance, for no consideration, and without any equivalent, she has executed a document, written in a language she does not understand, which deprives her of all her property. In the case of a *purdahnashin* woman, who has no legal assistance, the ordinary presumption, that if a person of competent capacity signs a deed he understands the instrument to which he has affixed his name, does not arise.

The decision of the High Court that the endowment created by the document was not of such a public character as would sustain a suit under Act XX. of 1863, not dissented from.

THEIR Lordships' judgment, affirming the decision of the High Court, was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was instituted under Act XX.

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* 3 I. L. R. Cal., p. 324.

of 1863, against the Respondent, as the *mutawalli* of a Mahomedan religious endowment, for malversation in wasting and misappropriating the estate. The Plaintiffs (Appellants) sought to obtain an account, the removal of the Respondent from the office of *mutawalli*, and the appointment of two of the Plaintiffs, who are her nephews and next heirs, in her place. The allegation in the plaint, which is the foundation of the Plaintiff's case, is as follows: "That the Defendant has, by a registered *waqfnamah* of the 25th *Zikad*, 1268, *Hijri*," answering to the 10th September, 1852, "endowed the entire estate held and owned by her to the *Imambara* for religious purposes." The Judge of the Court of the 24-*Pergunnahs* made a decree in favour of the Plaintiffs, establishing the validity of the endowment, and granting the relief prayed. This decree was reversed by the High Court, on the ground that the allegation in the plaint, which has just been cited, was not established. It was also held that the endowment, if established, was not of such a public nature as would sustain a suit under Act XX. of 1863.

The Respondent inherited a large estate from her mother, *Nigarara Begum*, having survived two brothers, who died in their mother's lifetime. Two of the Plaintiffs are the sons of one of these brothers; the other three Plaintiffs are persons in no way connected with the family, but who claim the benefit of the endowment. The mother, *Nigarara*, died in 1850; and about two years afterwards the *tauliatnamah* relied on was executed. The family are *Mahomedans* of the *Sheah* sect. The *tauliatnamah* is dated the 10th September, 1852, and the material parts of it are these: "I make a trustworthy declaration and a legal acknowledgment, and give in writing to the effect that I consider it indispensable and incumbent upon me to continue and perpetuate the ceremonies for pious uses of such description as '*fatiha*' (offering prayers for the dead) '*hazrat*,' on whom be the benedictions, &c., which is the fixed and settled usage of my family. I have no lawful children or grand-children who may be my legal heirs, therefore *talook* of *Chitpore*," describing certain property, "and all the compensation money, &c., the price of which at present is estimated at one *lakh* of Rs. (1,00,000) which I hold in my possession, without any one having any share therein, and without there being any other co-partner, as my legal hereditary right, having received the same from my ancestors in accordance with what is laid down in separate documents, the same for special pious purposes I have made *waqf* in perpetuity, with all inherent adventitious rights and interests, large and small, lying therein attached thereto, and arising therefrom, with all appurtenances particularly of pious uses. As long as I live, the wife of my brother of blessed memory, *Mussumat Jigri Khanum*, the daughter of the late *Moonshi Hidayat Ali*, shall remain *mutawalli* of the afore-mentioned *waqf*. If I, the endower, die before the aforesaid lady, then the affairs connected with *tauliat* shall, in a perfect form, revert to the afore-mentioned lady. Should the afore-mentioned lady die before me, I, the bequeather, alone will act as a *mutawalli* of the *waqf* endowed property. The one of us two who may survive the other shall, either at the time of death or previous to it, appoint whomsoever she finds most worthy and befitting as a trustee (*mutawalli*) to the endowment." Then the deed goes on, "The specification of the expenses is this:—All the income derived from the afore-mentioned endowment has, after the payment of the government revenue, been divided into 28 parts. Of these, 15 parts are to be applied to the expenses of the *fatiha* of the Lord of the Universe, the last of the prophets (*Mahomed*) and the *Imams*, the blessing and peace of God be with them all, and the expenses of the ten days of *Mahurrum* and all the holy days, the repairs of *Imambari* and tombs; seven parts thereof shall be received by all the *amlahs* and servants, whose names are inserted at the foot of this or other documents bearing the seal and signature of me, the declarant, which they may have in their possession, some from generation to generation, and others as long as they retain the service, as detailed in separate documents; and six parts thereof will be received by

us, the *mutawallis*, in equal shares." Now, the effect of this instrument is to devote all the property which this lady possessed to religious uses, to destroy her rights as proprietor, and to constitute her one only of the *mutawallis* for the management of the endowment, giving her three-twenty-eighths parts of the income of the whole property only, for her management. The deed was written in Persian, a language the *Begum* did not understand. Her case is, that although she executed the instrument, its contents were not explained to her, and that she was ignorant that its effect would be that which has just been described.

Their Lordships are of opinion, agreeing with the High Court, that it is not established that the *Begum* understood the full import and effect of the document she executed. It is incumbent on the Court, when dealing with the disposition of her property by a *purdahnashin* woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and specially so in a case like the present, where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property.

A mutation of names from her own alone, to her own and *Jigri Khanum's* as *mutawallis* was effected; but the *mukhtearnamah* was not proved. Undoubtedly, also, the estates were afterwards described in several documents as *waqf mehals*, and she herself was described in many transactions relating to the estates as *mutawalli*. Receipts for rents were given first in her own and *Jigri's* name as *mutawallis*, and, after *Jigri's* death, which happened about two years after the deed, in her own name as *mutawalli*. *Pottahs* were granted in which she is so described. Suits were also brought in which she is Plaintiff with a similar description. On the other hand, for more than twenty years, notwithstanding she was nominally described in the transactions to which I have referred as *mutawalli*, she actually dealt with the property as her own. She granted *maurusi* leases, sold parts, and mortgaged other parts, and in every way treated the property as her own, and as if it were not subject to a religious trust. Those acts, which extended over the whole time from the execution of the deed to the commencement of the suit, are very strong to show her own consciousness, that while she was described as *mutawalli* she really believed herself to be the proprietor and owner of the property, and had no idea that she had reduced herself to the estate of a mere manager of it, entitled only to three-twenty-eighths parts of the income for her maintenance.

Her own evidence, with reference to the deed, is given in an apparently candid manner. She admits its execution, and that she intended to create some trust for religious purposes; but she denies that she knew what was the full extent and import of the deed. She says: "I executed the *tauliatnamah* when I was residing in this house. I have been, prior to the execution of the *tauliatnamah*, residing and am still residing in this house since my mother's death. When my mother died I was then at *Moorshedabad*. A year after my mother's death I came here, but on the way my nephews *Nawab Ashgar Ali* and *Nawab Amed Ali*, the Plaintiffs in this suit, stopped my boat. I was detained for twenty days near *Roushenabad*, and then I applied to the Magistrate and got my boat released. After this I came here. Two or three years after I came here, I executed this *tauliatnamah*. I myself do not know how to read and write. I told *Ali Zamir*, my servant, to draw out a will, or some such writing, as will after my death be able to keep up the religious ceremonies of my mother. Then he brought to me a writing which he read to me." She says in another place that it was read in Persian: "He also told me that, after my death, who ever will be the *mutawalli* will perpetuate the works (*i. e.*, the religious affairs) of my mother. I do not understand Persian." Then there is a note by the Commissioner. "A portion of the document marked 'A' was read to the witness, and she says, I do not understand it. That portion being translated into *Urdu* by *Abdool Aziz*, she says: I now understand it. My object in making the *tauliatnamah* was not what is stated in the

part marked A." This part of the deed is not identified, but no doubt it was a material part. Then there is this question, "Whether for the purpose of perpetuating the ceremonies observed in your family from ancient time, you executed the *tauliatnamah?* Answer, *Moonshi Ali Zamen* brought to me a writing saying that I shall have absolute power over the properties during my lifetime." If the deed was thus represented to her, then it did not carry out her intentions. It was a deed which not only did not carry them into effect, but was entirely and absolutely opposed to them. She intended and desired to retain the estate for her own life, and to create an endowment by way of testamentary disposition of it after her death. The person who prepared the *tauliatnamah* may have been aware that she could not effect her purpose by such a disposition, and having prepared this deed may have led her to suppose that it did carry out her purpose, without explaining to her that it would deprive her of her property and leave her in the state of a mere manager of it, liable to be deprived of that management if she broke any of the trusts of the deed. It is impossible to suppose that she could have been conscious of the tenor and effect of the deed, when immediately after, and ever after, she wholly disregarded the trusts of it by the mode in which she dealt with the property.

There are eight witnesses to the deed; one only has been called, and he does not prove that the deed was read over and explained. This witness does not say that he was present when it was read over to her in Persian. Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has affixed his name; but in the case of a *purdahnashin* woman, who had, as in this case, no legal assistance, the ordinary presumption does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she has put her name. This seems to have been the view of the High Court, which it has expressed in two passages of the judgment. The Court says: "It is clear that she had no professional assistance at the time. *Ali Zamen* is described as an old and trustworthy servant, but not a lawyer,"—(it may be observed, the Respondent says that this is the only deed that he ever drew as far as she knows,)—"and none of the witnesses examined for the Plaintiffs prove that the *Begum*, in creating the *waqf*, was in any way cognizant of the effect of her act. It has been generally held in this country that *purdahnashin* ladies have a claim to special consideration, particularly in cases where they deny on oath an effectual knowledge of documents which they are said to have made." And again, the Court says: "In this case we have an illiterate and prejudiced woman, with no professional assistance, executing a deed written in a language which she did not understand, and which, as she swears, was not explained to her, by which she completely divests herself of the whole of a large property, and then immediately sets to work to do a series of acts which would have the effect of turning her out of the *mutawaliship* she had created for herself, and of throwing her upon the world absolutely penniless. Before we come to such a conclusion we ought to have very distinct proof that the real purport of the *waqf* deed was properly explained to *Dilrus Banoo Begum*, and that she knew what she was about, and that it is not too much to say that no such proof has been attempted to be given by the Plaintiffs."

Their Lordships having come to this conclusion upon the main facts of the case, it is not necessary for them to determine the other point which the High Court decided,—namely, that this endowment was not of such a public character as would sustain a suit under Act XX. of 1863, but their Lordships desire to say that they see no reason for disagreeing with that part of the judgment.

In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal, with costs.

30th June; and 3rd July, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

On Appeal from the High Court at Madras.

SRI GAJAPATHI NILAMANI PATTA MAHA DEVI GARU, ... } *Petitioner,*

versus

SRI GAJAPATHI RADHAMANI PATTA MAHA DEVI GARU, ... } *Counter-Petitioner.*

Hindu Law of Succession—Co-Widows.

According to the *Hindu* law of inheritance the separate property of a person dying without male issue, and leaving more than one widow, is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship.

The view that, according to the custom prevailing in Southern *India*, the senior widow by date of marriage succeeds in the first instance, the others inheriting in their turn as they survive, but being only entitled in the meantime to be maintained by the first, is not supported by the decisions of the Courts, nor by the sanction of any text writer of paramount authority in the *Madras* Presidency.

Widows who take a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the estate between themselves. But where, from the conduct of one or more of their numbers, separate possession of a portion of the inheritance is the only likely means to secure for each peaceful enjoyment of an equal share of the benefits of the estate, an order for separate possession and enjoyment may be made.

Jijoyiamba Bayi Saiba v. Kamachi Bayi Saiba (1), referred to and approved.

The 13th July, 1877.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an unfortunate case, inasmuch as, though reduced to a question of the interest of two *Hindu* widows in that which seems to be an inconsiderable estate, it now comes for the third time before this tribunal.

It is not necessary to go at any length into the earlier history of the case. It is sufficient to say that the litigation arose out of the construction to be given to the document constituting a certain family arrangement by which *Gopinadha* and *Krishna*, the two sons of one *Padmanabha*, had held the *talook Tekkali*. Each of these sons appears to have questioned at one time the legitimacy of the other, but ultimately their disputes were settled by this family arrangement, and after the death of the surviving brother, *Gopinadha*, his widow took exclusive possession of the whole *talook*. The question then arose whether she was entitled to hold that possession, one of the widows of *Krishna* claiming his share, and certain illegitimate sons of the two brothers also claiming to share in the estate. The construction of the document came before the Courts in *India*, and the High Court of *Madras*, dealing chiefly with this clause of it, "If the legal widows of both of them should have no male issue, and if there be any sons born out of wedlock, the *talook* shall be devided in equal shares," declared that on the true construction of the agreement the estate was to be equally devided between the wives and the sons born in concubinage, and remanded the suit to be treated as a suit for the administration of an estate, directing the Civil Judge to inquire who were the parties "entitled on the construction aforesaid, and to make the parties to the present suit, and to Regular Appeal 26 of 1862, and all other claimants, parties to that inquiry."

The case went down upon that remand, and the present Respondent having come in and claimed to be a widow of the younger son, *Krishna*, the Civil Court found that the estate was to be divided into five equal portions, one of which was to be given to the possession of each claimant, those claimants being the two illegitimate sons, the two widows who had been parties to the previous litigation, and the widow *Radhamani*, who had come in in order to establish her title upon the inquiry.

* 4 Cowell's I. A., p. 212; 1 I. L. R., *Mad.* 290.
(1) 3 Mad. H. C. Rep. 424.

Immediately after the passing of that order the appeal to Her Majesty in Council appears to have been allowed, and it came on in due course in the year 1870, and this Committee, putting a different construction upon the family arrangement, and in particular on the clause which has been read, ordered that the decree of the High Court should be reversed and "a decree made declaring that, according to the true construction of the agreements of the 26th of November, 1838, and the 29th of July, 1844, the widow of *Gopinadha*, the Appellant, and the Respondent, the widow of *Krishna*, upon the deaths of *Gopinadha* and *Krishna* without male issue, became entitled from and after the death of *Gopinadha* as *Hindu* widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the Respondent, *Nilamani Patti*, but without costs." In the course of that judgment, which was delivered by Lord *Cairns*, it was observed, "The result of this inquiry," that is, the inquiry directed by the High Court, "has been that two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively." The inaccuracy in this statement may be accounted for by the fact that the order of the Civil Judge, which was all that appeared on one of the records, does not specify who the five claimants were. It is true that in another of the records, there being altogether three, it appeared more distinctly from the judgment of the Civil Judge, upon which his order was made, that he had found there were not three illegitimate sons and two widows, but three widows and two illegitimate sons. The Committee, however, was not set right at the time by the counsel on the appeal, who were probably equally deceived, and thought that the effect of the Judge's order was correctly stated.

In that state of things the first order of Her Majesty went out to *India* to be executed. Difficulties then arose, and the execution of part of the order was suspended until the widow *Radhamani*, who may be called the junior widow of *Krishna*, should have applied to this Board in order to have any misapprehension concerning the effect of the first order of Her Majesty corrected. That application was opposed by the other widow, *Nilamani*. The rights of the widow of *Gopinadha* had been finally determined, and she had disappeared from the litigation. Their Lordships' report to Her Majesty on this application was in these terms: "Their Lordships being of opinion that the Respondent *Nilamani Maha Devi* represented in these appeals not only her own interest but also the interest of all the lawfull *Hindu* widows (if more than one) of *Krishna*, and that the order of Your Majesty of the 9th August, 1870, declaring the title of *Nilamani* as *Hindu* widow to the moiety of the estate, was an order enuring to the benefit of any other (if there should be found to be any other) such lawful widow, and that the High Court, executing the said order, ought to have taken and ought now to take all necessary steps to give to the Petitioner (if one of such lawful widows of *Krishna*) such share, interest, or other benefit as under the law applicable to the case she would have been entitled to as such widow, along with *Nilamani*, of, in, or out of the one moiety of the said estate and the profits thereof, do not think fit to advise Your Majesty to make any further order in the present petition." This report was confirmed by an Order in Council of the 3rd of March, 1873; and the case then went back, and the High Court having to execute the original order of Her Majesty, as explained by this subsequent order, made the order of the 11th March, 1874, which is the subject of the present appeal.

Before considering the particular terms of that order it may be desirable to see what are the objections that were taken to it in *India*, and at their Lordships' bar. It was contended that the High Court was in error in treating as an ascertained fact that *Radhamani* was a widow, in the proper sense of the term, of *Krishna*, and that it ought to have directed an issue in order to ascertain whether she was the lawful widow of *Krishna* or whether her connection with

him was only by means of a *Gandharva* marriage, which would not be a valid marriage according to *Hindu* law. The other point was, that assuming her to be a widow she was only a junior widow, and therefore, under the Hindu law, was only entitled to maintenance. Hence the two points raised in the Court below, and the two principal points now raised before their Lordships, concern, first, the status of *Radhamani* as a widow, and secondly, her rights, if a lawful widow of *Krishna*.

Their Lordships are of opinion that as far as the status of *Radhamani* is concerned the finding of the Court below is correct, and that it was not bound to direct any further inquiry upon that point. It appears to their Lordships that there was a sufficient *contestatio litis* between the two parties upon the inquiry which was directed to the Civil Court, to make the finding of that Court binding on both widows. It follows that their having been no appeal, it would have been conclusively found between those two persons, but for the effect of any order of the Crown that has since been made, that *Radhamani* was a joint widow with *Nilamani*. It is contended, however, that the effect of that finding has been swept away by the first order of Her Majesty in Council. That argument appears to their Lordships to be erroneous. The judgment on which the Order in Council was founded, although it recognised the proceedings which had taken place before the Civil Judge, did not in terms recommend the reversal of his finding. The order reversed no doubt the decree of the Court which made the remand, and substituted a new decree for it, but by that new decree it directed the High Court to "take all necessary steps to undo what may have been done under the decree reversed inconsistent with the rights thus declared." It therefore by implication assumed that things might have been done under the decree which were not inconsistent with the rights declared, and that what had been so done was to remain; and if the decision ascertaining the *status* of the *widow* was to remain, it would have been a very idle proceeding on the part of the High Court to institute a new inquiry in order to retry that question. It is however contended that at least the second order of Her Majesty in Council has made it imperative upon the High Court to take the course which the Appellants argue ought to have been taken. That order simply confirmed the report, which is more in the nature of an expression of opinion than of an order; is very cautiously expressed; and seems to avoid the decision of any question in the cause. It certainly did not order the High Court to institute any inquiry which would otherwise be unnecessary. It declared that the former order was to enure for the benefit of all the widows, if more than one, of *Krishna*, "and that the High Court executing the said order ought to have taken and ought now to take all necessary steps to give to the Petitioner (if one of such lawful widows of *Krishna*), such share, interest, or other benefit as under the law applicable to the case she would have been entitled to." This assumes that the Court ought to have taken proceedings in order to ascertain the number of *Krishna's* widows; and if it had in fact done so by means of the inquiry directed by the original decree, it can hardly be said to have been afterwards in error in treating as conclusive evidence of the status of *Radhamani* the finding of the Civil Court which stood unreversed. Their Lordships desire to add that they would have been extremely sorry to find themselves compelled to give way to any technical objection founded upon the mere words of the Order in Council, since from the other earlier proceedings, which have been put in by the Appellant for another purpose, it appears clearly that as early as the year 1856 or 1857 there were disputes between these ladies about a certificate and other matters; that in the proceedings arising out of those disputes there was no serious contest as to the status of *Radhamani* as the junior widow of *Krishna*; and that the suggestion that she was not lawfully married to her husband seems to have been an afterthought.

Having disposed of this first objection, it now becomes necessary to consider what are the legal rights of *Radhamani*; whether she has a right to share, as one of the

widows, jointly and upon the same footing with the other widow in the enjoyment of her husband's estate; or whether, as she is junior widow, her right is limited to maintenance. Their Lordships have already, in the course of the argument, intimated that this question was perfectly open to the Appellant; and was in no degree concluded by the order Mr. *Morris*, the Civil Judge, which has been already alluded to, because his finding that the estate was to be divided into fifths, though consistent with the construction put upon the family arrangement by the High Court, which divided the estate among the members of a certain class *per capita*, was inconsistent with the order of Her Majesty in Council, which divided the estate into moieties, giving the share of each brother to the widow or widows of that brother. This point of law has now been ably and fully argued before their Lordships, and in their opinion the law of *Madras* must be taken to be in accordance with the decision in the third *Madras* High Court Reports, in what may be called the *Tanjore Case* (1). That there had been a notion that the law of Southern *India* on this point differed from the law of *Hindustan*, it is impossible to deny; but that notion seems to have been mainly founded upon the passages which have been cited from the work—a work of very high authority—of Sir *Thomas Strange*. Those passages are open to the observations that have been made upon them, namely, that even Sir *Thomas Strange* seems by his note on the first passage to have thought that the proposition was in some degree questionable; and that although the doctrine is repeated in the subsequent passage without qualification, it is not consistent with one of the cases, which are set forth in the second volume, viz., the *Salem Case*, at p. 91, or with the opinion of the *pundits* and the opinion of Mr. *Colebrooke* there stated.

There are, however, two decisions which are relied upon as having been made consistently with the doctrine laid down by Sir *Thomas Strange*, and which it is argued settled up to a certain time the law of *Madras*. It appears, however, to their Lordships, that although the learned Chief Justice in his elaborate judgment in the *Tanjore Case* (1) accepts those cases as decisions in point, and as confirmatory of the doctrine laid down by Sir *Thomas Strange*, they really are not authorities of that character. The first of them is clearly a case in which the question was which of several widows was to succeed to an impartible *zemindary* which could only be held by one. It appears upon the face of the report that that *zemindary* had been held by two brothers in succession, and therefore there can be no doubt that the subject of the litigation was an impartible *zemindary*. That was the last of the decisions, and was passed in 1835. In the other decision, which is of as early date as 1824, the subject of litigation would seem to have been also a *zemindary*; but the contest there was not between several widows, and did not relate to their rights *inter se*. A person claiming as nearest male heir had obtained possession of the *zemindary*, and had been ejected by the eldest widow of the *Zemindar*. At her death this male claimant appears to have regained possession, and the question was whether the right of the elder widow had not survived to the second widow. It was held that it had so survived, and therefore the decisions merely affirmed the proposition of law, that where there are two or more widows there is a right of survivorship between them. On the other hand, their Lordships find that in that portion of *India* which is emphatically governed by the *Mitakshara*, namely, *Benares*, it is settled law that the widows take jointly. This view of the law is also consistent with Mr. *Colebrooke's* own opinion as expressed in the *Salem Case* (2). In order to support the Appellants' contention it ought, in their Lordships' opinion, to be shewn either by a course of decision, by custom, or by reason of some treatise which is of authority in *Madras* and not in the north of *India*, the law of *Madras* is different from what it is in the north of *India*. Their Lordships have dealt

(1) 3 Madras H. C. R., 424.

(1) 3 Madras H. C. R., 424.
(2) Strange's Hindu Law, vol. ii. p. 90.

with the only two decisions cited; so far as treatises go, the *Smriti Chandrika*, which is of authority in *Madras*, seems to show the contrary; and although the authority of the translation of that treatise has been impugned by Mr. *Leith*, his argument at most would shew that the *Smriti Chandrika* is not a conclusive authority against him; it certainly would not shew that that treatise is an authority in his favour. It seems to their Lordships by no means impossible that, as has been argued by Mr. *Mayne*, the *dictum* of Sir *Thomas Strange* was founded upon a misapprehension of the law that prevails in *Bengal* as laid down by *Jimutá Váhána*. The proposition is not confirmed by the *Mitakshara* [or by any treatise of paramount authority in the presidency of *Madras*, and it is to be observed that in Mr. *Strange's* Manual, published as early as 1856, and in other works, the accuracy of the law as laid down by Sir *Thomas Strange* appears to have been questioned. It is, therefore, incorrect to say that the settled law of *Madras* was first changed by the decision of the *Tanjore Case* (1) in 1867.

Their Lordships think that in this state of the authorities they would not be justified in treating the *Tanjore Case* (1) as improperly decided, or in dissenting from the proposition which the learned Chief Justice finally expressed in these words: "On this review of the authorities we come satisfactorily to the conclusion that the sound rule of inheritance is that two or more lawfully married wives *(patnis)* take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment." As to the mode of enjoyment, it has no doubt been decided both in the *Tanjore Case* (1) and in the case reported of *Bhugwandeen Doobey* v. *Myna Baee* (2), that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them. But in the *Tanjore Case* (1), after affirming this proposition, the learned Chief Justice said: "But we are at the same time of opinion that a case may be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance. We have no doubt that such relief can and ought to be granted when from the nature or situation of the property and the conduct of the co-widows or co-widow it appears to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate." It also appears that in the case in the 11th *Moore*, the widows had made what was called a partition; that they had separately enjoyed their respective shares of the estate during their joint lives; and that it was not until the death of one of them that the question arose whether she had a right to dispose of her share, and whether if she had no right to dispose of it, it did not pass by survivorship to the other widow. It was held there that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; although the widows nevertheless remained coparceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other. Their Lordships make these observations in order to meet the objection which, though not raised by the petition of appeal, and apparently never raised in the Court below, has been taken to the form of the decree. They think it sufficiently appears that in this case the state of things contemplated by the *Tanjore Case* (1) exists; that these widows could not go on peaceably in the joint enjoyment of the property; and that they have acted as if they had agreed that they are separately to enjoy, in the manner above indicated, their respective shares. Therefore their Lordships, guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of

(1) 3 Madras, H. C. R., 424.
(2) 11 Moore's Ind. Ap. Ca., 487.

(1) 3 Madras, H. C. R., 424.

the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected.

The only other point that was taken is that which relates to the costs of the former litigation, and their Lordships upon that are of opinion that whatever equity the widow who conducted the litigation might originally have had to recover a portion of the costs from the younger widow, that equity cannot be said any longer to exist in this case, in which the elder widow, who if considered to have sued as a trustee for the younger widow, has long and persistently repudiated any such trust; and by resisting the claim of the younger widow has occasioned all the costs of the litigation that has since taken place.

Upon the whole, then, their Lordships are of opinion that it will be their duty to advise Her Majesty to affirm the order under appeal, and to dismiss the appeal, with costs.

6th July, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On appeal from the High Court of Judicature at Fort William in Bengal.

BABU LEKHRAJ ROY and others, (Plaintiffs)* ... } *Appellants,*

versus

KUNHYA SINGH and others, (Defendants)* .. } *Respondents.*

Construction, Rules of—Grant for an Indefinite Period.

The rule of construction, that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grant or himself has in the property, and which the grant purports to convey.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was brought by the present Appellants to obtain possession of an eight-*annas* share of *mouzah Tooe*, and the plaint also prays for the annulment of the *mokurary* tenure which the Respondents claimed to have in the *mouzah* under a *pottah* granted by one *Choonee Lall*. The Appellants are the purchasers under a decree obtained against some persons who had become possessed of part of the interest of *Choonee Lall* in the eight *annas* share of the *mouzah*. The Respondents are the heirs of *Nirput Singh*, who was the grantee under the *pottah*. The single question in this appeal is whether, upon the true construction of this *pottah*, and upon the evidence in the case, the grant was one to endure for the life of *Nirput Singh* only, or whether it was to endure so long as the interest of *Choonee Lall* existed. That involves also an inquiry into what the interest of *Choonee Lall* was.

The lease or *pottah* in question is dated in April, 1808, and the material parts of it are in these terms: "The engagements and agreements of the *pottah* on the *kabulyat* of *Nirput Singh*, lessee of *mouzah Tooe*, *Pergunnah Malda*, *Zillah Behar*, are as follows: Whereas I have let the entire rents of the *mouzah* aforesaid,"—describing what he had let,—"at an annual uniform *jummah* of *Sicca* Rs. 606, without any condition as to calamities, from the beginning of 1215 *Fúlli* to the period of the continuance of my *mokurary*." That is the term fixed in the *pottah*. It is a term "from the beginning of 1215 *Fúsli* to the period of the continuance of my *mokurary*." Then it is required that the lessee should cultivate, "and pay into my treasury the sum of *Sicca* Rs. 606, the rent of

* 4 Cowell's I. A., p. 223; 3 I. L. R., Calc. p. 210.

the *mouzah* aforesaid, for the period aforementioned, according to the instalments year after year." Then there is this provision, "If hereafter the authorities desire to make a settlement of the property at that time, he shall pay the *jummah* thereof separately according to the Government settlement." It concludes, "Hence these few words are written and given as a *pottah* to continue during the term of the *mokurary*, that it may be of use when required. The annual *jummah malguzari*, including the *malikana*, Rs. 606."

To ascertain what is the term granted by this *pottah*, we must see, in the first place, what is the interest which the grantor *Choonee Lall* had. He calls it a *mokurary* interest; but whether it be a true *mokurary* interest or not, it was evidently the intention of the parties that the grant should endure during the term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs unless there are some words shewing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Now it appears that as early as 1788 the Government granted what has been called a *mokurary* lease to *Mahomed Buksh*, and that lease after various intermediate assignments was ultimately purchased by *Choonee Lall*, the grantor of the *pottah* in question. *Choonee Lall* is said to have purchased it in 1807 or 1808. It is also said that he had purchased the proprietary interest in two *annas* of the *mouzah*. From the document which has been produced from the Collector's office, other persons appear to have been proprietors of the remaining *annas*, but nothing is heard of them in this suit. However that may be, it does not really affect the present question, because the interest pointed at in the *pottah* in question is a *mokurary* interest. The *kabulyat* of the lease of 1788, signed by *Mahomed Buksh*, is as follows:—"Whereas I have obtained a lease of *mouzah Toee, Zillah Kusra, pergunnah Malda*, the area whereof, by estimation, is 709 *bighas* 10 *cottahs*, from 1196 (one thousand one hundred and ninety-six) *Fusli*, at a *jummah* of *Sicca* Rs. 400"—with certain exceptions—"I do acknowledge and give in writing that I shall continue to pay the rent of the *mouzah* aforesaid at the said *jummah*, year after year, according to the *kabulyat* and the *kistbundi*. If any one establish his *zemindary* (proprietary) right in respect of the said *mouzah* in his own name before the authorities, I shall continue to pay, year after year, to him or his heirs, the '*malikana*' (proprietary allowance) thereof at the rate of Rs. 10 per cent. on the *jummah* aforesaid, in addition to the Government revenue." The lessee is to pay a *jummah* of Rs. 400, and a *malikana* of 10 per cent. on the *jummah*. Of course, if Mr. *Leith* is right, that *Choonee Lall* became the owner of the proprietary interest, the *malikana* would go into his own pocket. Then at the end there is this clause, which has given occasion to considerable discussion: "If the present officers of the British Government, or any authority who may come hereafter, do not accept my *mokurary* lease to be hereditary, I acknowledge that this *kabulyat* is only for one year, thereafter it shall be cancelled." That undoubtedly acknowledged a power in the Government to put an end to this lease, which is called a *mokurary* lease, at the end of one year. But it appears that the Government have not done so. It may be that it was contemplated that the Government would settle in the ordinary way with the proprietors for the revenue, and in that case would put an end to this *mokurary*. But it appears that no settlement has been made, and that this lease has been allowed to go on without being put an end to; and although it is not perhaps properly a *mokurary*, inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it goes on, as an hereditary lease, a *mourussy pottah*. This being the interest of *Choonee Lall* (he having become the purchaser of this *pottah*), he

grants this lease to *Nirput Singh* to endure during the continuance of it. That interest, which continues, and has not been determined by the British Government, being an hereditary interest, there seems to be no reason why, upon the construction of the *pottah* in question, it should be held to be limited to the life of *Nirput Singh*. As already observed, the duration of the term is capable of being definitely ascertained by reference to the interest which the grantor himself has in the property.

Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained, because for twelve years after *Nirput Singh's* death his heirs were allowed to remain in possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

7th, 10th, 11th & 12th July, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THE ADMINISTRATOR-GENERAL OF BENGAL, (Plaintiff) ... *Appellant*,

versus

JUGGESWAR ROY and others, (Defendants) *Respondents*.

Inadequacy of Consideration—Suit to set aside deed,

A party seeking to set aside a transaction on the ground of inadequacy of consideration, must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition.

THE history of the case and the issues raised will be understood from their Lordships' judgment, which was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was instituted by Mr. *Robert John Jackson*, who upon his death has been succeeded on the record by the present Plaintiff, for the purpose of setting aside certain conveyances by him to the three first Defendants of his interest in *mouzah Luchipore*, in the district of *Ranigunge*, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the Defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. *Robert John Jackson* was the adopted

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8 I. L. R., Cal., p. 102.

son of a Mr. *Robert Gwynne Jackson* (who will be called Mr. *Gwynne Jackson*), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the Plaintiff alleging the adoption to have been about the year 1855, and the Defendants, as far back as 1850. Mr. *Gwynne Jackson* appears to have resided a great number of years in the neighbourhood, and to have been well acquainted with coal mining. He in 1860 was the manager of the coal mines of Messrs. *Apcar* and Company, who, it may be observed by the way, entered into an agreement with *Jackson* the Plaintiff to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr. *Gwynne Jackson* left the employment of Messrs. *Apcar* and Company in 1860 on account of their being dissatisfied with him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. *Gwynne Jackson* bought certain *patani* and *darpatani* rights, including the coals in *mouzah Luchipore*, partly from the Defendants. It is not disputed that by a deed bearing date the 20th September, 1860, he, being such *patanidar* and *darpatanidar*, granted certain subtenures by way of *darpatani* and *sepatani*, reserving the minerals, to three of the Defendants; but one question in the cause has been, whether that deed was executed at the time it bears date, or at a later date, not very clearly indicated on the part of the Plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1858, leaving all his property to his son. Subsequently, in 1863, he executed a *hibba*, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself all of his property, if that *hibba* is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the Plaintiff confirms the *darpatani* and *sepatani* rights, which were dealt with by the deed bearing date the 20th September, 1860; the other class of deeds, which bear date in 1871, and one of them as late as June, 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance bearing date the 20th day of September, 1860, was executed then or at a subsequent date, their Lordships have intimated, in the course of the argument, that, on the whole, they concur with the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the *hibba*, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the Defendants no greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the Plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first Defendants (for it should be stated that the two last Defendants are the sub-lessees under them) were in a fiduciary capacity or character to the

Plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that *Haradhun Misser*, the father of *Juggeswar Misser*, and the two *Roy* Defendants, were at times employed in collieries in which *Gwynne Jackson* had a share; and their is also some evidence of the latter having acted as his *gomastas* with respect to the property comprised in the deed of 1860, but the decision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that at the time of the execution of these documents by the Plaintiff they were in any fiduciary character *quoad* him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the Defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him; further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the Plaintiff himself, and that evidence is described as untrustworthy by the learned Judge of the inferior Court, who found in the Plaintiff's favour. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent* v. *Tennents* (1), in which Lord *Westbury* very shortly and clearly stated the law upon this subject. He says: "The transaction having been clearly a real one, it is impugned by the Appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the Plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father, Mr. *Gwynne Jackson*, was at hand, and their Lordships concur with the view of the High Court, that Mr. *Gwynne Jackson* by the *hibba* of 1863, did not intend to denude himself of all his property in favour of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeating existing or possibly future creditors. *Gwynne Jackson* himself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and their is evidence that he continued to act as if he were the owner of the property. *Gwynne Jackson* was very conversant with coal mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs or to give competent advice to his son until the year 1872, in the early part of which he was admitted to an hospital with an incurable disease of which he died in about the middle of that year. He had granted his property to his son by a *hibba*, intending, nevertheless, to keep in his hands the control of it through his life, but very probably intending it to operate after his death in favour of his son. His son, no doubt, had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by

(1) L. R., 2 Scot. Ap., 6.

the father and the son. Their Lordships cannot, therefore regard the son at those dates as altogether in the position of a minor without any one to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships think, be said that the purchase-money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the Plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase; and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the Defendants they let a portion of this property on mining leases at a considerable rental, or more properly speaking royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

It has been suggested that the Defendants must have known that there was coal under the land, and that they concealed their knowledge from the Plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would not be enough to vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that *Gwynne Jackson* himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails.

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the Plaintiff's suit; and they will, therefore, humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed with costs.

13th, 14th, 17th, 18th and 19th July; and 20th November, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Montague Edward Smith.

On Appeal from the Court of the Commissioner of Rai Bareili, and from the Court of the Judicial Commissioner, Oudh.

BRIJ INDAR BAHADUR SINGH, (Plaintiff)* ... } *Appellant,*

versus

RENEE JANKI KOER, (Defendant) ... } *Respondent;*

and

LAL SHUNKUR BUX, (Plaintiff) ... } *Appellant,*

versus

RANEE JANKI KOER, (Defendant) ... } *Respondent;*

and

LAL SEETLA BUX, (Plaintiff ... ... } *Appellant,*

versus

RANEE JANKI KOER, (Defendant) ... } *Respondent.*

Act I. of 1869—Talook in Oudh created by a Sunnud after confiscation—Right of succession to the same.

A *talook* in *Oudh* having been confiscated by

* 5 Cowell's I. A., p. 1.

Government by Lord *Canning's* Proclamation, was granted to the widow of the last owner, a *Hindu* by a *sunnud*, with right of alienation, and of succession to her male heirs.

Held that after the death of the widow, her heirs, and not the heir of her husband should succeed.

As regards succession, the limitation in the *sunnud* was wholly superseded by Act I. of 1869, sec. 23.

Under cl. 11 of that section, the inheritance would devolve on her daughter whose right is preferred to that of the son of a rival widow's daughter.

20th November, 1877.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK :—

These three appeals were argued together. In each of them the Appellant was Plaintiff in a separate suit instituted by him against the Respondent in the Court of the Deputy-Commissioner of *Pertabghur* to recover possession of *talook Pawanai*, in *pergunnah Dingwas*, in the province of *Oudh*. In each case the Plaintiff claimed to have become entitled to the *talook* by right of inheritance upon the death of *Thakurain Kablas Koer*, the mother of the Defendant.

The property in dispute was formerly part of the estate of *Rai Chein Singh*, the great-grandfather of *Mypal Singh*. *Mypal Singh* held it under the Native Government down to the time of his death in 1260 *Fuslee*, corresponding with the year 1852-53.

Upon his death he left two widows; the first married was *Mussumat Subhao Koer*, and the second the above-mentioned *Thakurain Kablas Koer*. By his first wife, *Subhao Koer*, he had two daughters, of whom the elder, *Jaganath Koer*, was the mother of the Appellant, *Brij Indar Bahadur Singh*. The other died without issue. By his second wife, *Thakurain Kablas Koer*, he had one daughter, *Ranee Janki Koer*, who married *Rai Bajai Bahadur Singh*, and is the Defendant in the suits, and the Respondent in each of the three appeals.

At the time of the annexation of *Oudh* the estate was in the possession of the aforesaid *Kablas Koer*, to whom it had descended as the surviving widow of her deceased husband, *Mypal Singh*.

In 1858 the estate was confiscated by the British Government by virtue of Lord *Canning's* Proclamation of the 15th of March in that year.

The summary settlement for 1858-59 was made with *Kablas Koer*. In the *kabulyat* dated the 20th of April, 1858, executed on her behalf on that occasion, she was described as the widow of *Lal Mypal Singh*, and it appears from an administration paper put in evidence in *Brij Indar's* case that *Kablas Koer* admitted that in virtue of the ancestral right of her husband the regular settlement had been made with her.

A *sunnud* was afterwards granted to her by Government, by which the full proprietary right, title, and possession of the estate was conferred upon her and her heirs for ever, subject to certain conditions, which are not material with reference to the present case. It was also declared to be another condition of the grant that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture, but that she and all her successors should have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever she should please. It was also further declared that as long as the obligations imposed by the grant should be observed by her and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietor of the estate.

It is extraordinary that this *sunnud* is without date, at least it so appears in the copy put in evidence in each of the three suits; but it must have been subsequent to the date of the letter from Major *Mac-Andrew*, the Deputy-Commissioner, of the 4th of February, 1861, for he there states that if *Kablas* would file a deed of will in the terms of the proposal therein contained, she would receive a *sunnud* for the estate from Government. It must also have been after the date of her petition in answer, dated the 15th of March, 1861, in which she asks to have a *sunnud*

for life granted to her. It is exceedingly inconvenient, but it often happens in records sent up from the Courts in *Oudh*, that documents are without dates. Their Lordships mention this that the attention of the Judicial Commissioner may be drawn to the subject.

The letter from Colonel *MacAndrew*, to which reference has just been made, and the petition of *Kablas* in answer to it, were relied upon in the argument on the part of the Appellants, in order to shew that under the grant to her and her heirs the heirs of her husband must have been intended. They appear, however, to their Lordships strongly to support the view that the grant to *Kablas* and her heirs was not made through inadvertence, and that her heirs were intended.

In the letter Colonel *MacAndrew* says, "Among the *thakoors* of *Dingwas* there is no one next of kin to the husband of the *Thakurain* who may be declared as heir, and according to the circular orders she has power, after the receipt of the *sunnud*, to alienate her estate by will to anyone." He gives reasons why she should make a will in favour of *Seetla*, and concludes by saying, "if you file a deed of will in terms of the above proposal, you will receive a *sunnud* for the estate from the Government." In her petition in answer, after pointing out her objection to execute a will in favour of *Seetla Bux*, she concludes, "I myself am at a look out, and as soon as I get a person of high family, good character, and condescending manners, such as will answer my choice, I will let your Honour know. Meanwhile it will be an act of grace on your part to confer a *sunnud* on me for life. On no account am I willing to adopt *Seetla Bux* and *Shunkur Bux*. I therefore pray that, on receipt of the report from *Pertabghur* District, my objections herein laid down may be fully taken into consideration."

The Government after this, and after having had time for considering the expediency of granting to *Seetla Bux* the succession to the estate upon the death of *Kablas*, conferred the estate upon her and her heirs male, according to the law of primogeniture, without even mentioning the status of *Kablas* as a widow, either in the operative words or in describing her. If, therefore, the letter and petition could properly be taken into consideration in construing the *sunnud*, with a view to ascertain the intentions of Government, they would operate more against than in favour of the claims of *Seetla* and *Shunkur*.

Upon the death of *Kablas*, in August, 1872, the Appellant, *Brij Indar*, claimed to inherit as the son of *Jaganath Koer*, the daughter of *Subkao*, the first wife of *Mypal* and the rival wife of *Kablas*.

Lal Shunkur Bux and *Lal Seetla Bux* each claimed as a distant collateral relative of *Mypal*, the deceased husband of *Kablas*. Each was a son of *Raganath Singh*, who was a great-grandson in the male line of *Rai Chein Singh*, who was the great-grandfather of *Mypal Singh*.

Seetla was the son of the first wife of *Raganath*, and *Shunkur*, who was born before *Seetla*, was the son of the second wife. Each claimed to be male heir according to the law of primogeniture.

The Deputy-Commissioner dismissed the suit of *Brij Indar*, and also that of *Shunkur Bux*, and his decrees in those suits were affirmed by the Commissioner. There was, therefore, no appeal to the Judicial Commissioner in either of those cases, and in each of them the appeal to Her Majesty in Council is from the judgment of the Commissioner. In the case of *Seetla Bux* the Deputy-Commissioner decreed for the Plaintiff. The Commissioner, upon appeal, reversed that decree, and decreed the *talook* to the Defendant *Janki Koer*, and upon appeal to the Judicial Commissioner he affirmed the decree of the Commissioner. The appeal of *Seetla Bux* to Her Majesty in Council is, therefore, from the decree of the Judicial Commissioner.

The case is an important one, and was very ably argued on behalf of each of the parties, and their Lordships have very carefully considered all the arguments which were urged, and the authorities which were cited in support of the claims of the several Appellants.

The first question to be considered is whether the estate, in the event of the in-

testacy of *Kablas*, descended to her heirs or to the heirs of her husband. Upon this point their Lordships entertain no doubt.

They consider that the *sunnud* conferred, and was intended to confer, a full proprietary and transferable right in the estate upon *Kablas* and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life, with full power of alienation, and with remainder to the male heirs of her husband, in the event of her dying intestate without having alienated it in her lifetime.

If the interest which *Kablas*, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord *Canning's* Proclamation, by which it was declared that "the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." In disposing of that right by the *sunnud*, the Government granted to *Kablas* and her heirs male, according to the law of primogeniture, the full proprietary right and title to the estate.

The title, however, does not depend entirely upon the *sunnud*, for in 1769, Act No. I. of that year was passed to prevent, as appears from the preamble, doubts as to the nature of the rights of certain *talookdars* and others in the estates which had been conferred upon them by the British Government, and as to the course of succession thereto.

By sect. 2 the word "*talookdar*" was defined, and it was declared to mean "any person whose name is entered in the first of the lists mentioned in sect. 8."

The name of *Thakurain Kablas Koer* was entered in the first of such lists. It was also entered in the second of the lists mentioned in sect. 8 as one whose estate, according to the custom of the family on and before the 13th of February, 1850, ordinarily descended to a single heir.

By sect. 10 of the Act, list No. 1 is conclusive evidence that *Kablas* was a *talookdar* within the meaning of the Act, and there can be no doubt that the estate in dispute is one of the estates referred to by the Act, and that by virtue of sect. 3, *Kablas Koer* must be deemed to have acquired by the *sunnud* a permanent heritable and transferable right in the estate in dispute.

It was contended by counsel that a trust was created, and that *Kablas* took the estate upon trust for those who would have been entitled to it if it had not been confiscated. To hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift, or bequest, was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships are of opinion that no trust was created by the *sunnud* or by the Act of 1869; and there is no evidence that a trust was created in any other manner.

As regards the succession, their Lordships are of opinion that the limitation in the *sunnud* was wholly superseded by Act I. of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of sect. 22 of that Act. By that section it was enacted that if any *talookdar* whose name should be inserted in the second, third, or fifth of the lists mentioned in sect. 8, or his heir or legatee, should die intestate, such estate should descend in manner therein described.

Their Lordships do not consider that the positive limitations in that section are in any way controlled by the provision in the 3rd section of the Act, to the effect that the right acquired by virtue of the *talookdary sunnud* should be subject to all the conditions affecting the *talookdar* contained in the *sunnud* under which the estate is held. They understand the conditions referred to in clause 4 of that section to be the conditions of loyalty and good service mentioned in the letter of the 19th of October, 1859, republished in the first schedule of the Act, and to the other

conditions of a similar nature, such as those of surrendering arms, destroying forts, &c., contained in the *sunnud*.

It was contended in the lower Court, on the part of *Brij Indar*, that he being the son of a daughter of a rival wife, and having been treated by *Kablas* in all respects as her own son, came within the meaning of clause 4 of sect. 22; but it was found by both the Lower Courts that there was no proof that he had been so treated, and their Lordships entirely agree in that finding. It is unnecessary, therefore, to express any opinion as to whether he was the son of a daughter of *Kablas Koer*, the *talookdar*, within the meaning of the clause.

It having been decided that *Brij Indar* did not come under clause 4 of sect. 22, neither of the Plaintiffs is within the description contained in clauses 1 to 10, both inclusive.

The case is therefore to be governed by clause 11, which is as follows:—

"Or in default of any such descendant, then to such persons as would have been entitled to succeed to the same under the ordinary law to which persons of the religion and tribe of such *talookdar* or grantee are subject."

In the absence of any special custom applicable to the particular tribe or family to which *Kablas* belonged (as to which advertence will be made hereafter), the ordinary law applicable to persons of her religion and tribe is the *Mitakshara*.

Chap. 2, sect. 11, treats of the separate property of a woman, and of the distribution of it. In par. 1 of that section it is said "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property."

It was stated in the course of the argument by the learned counsel for *Shunkur Bux*, that in the original of par. 1, ch. 2, s. 11, of the *Mitakshara*, and of par. 12, c. 4, s. 1, of the *Dayabhaga*, the words translated as "separate acquisition," are not used, and that the proper translation is "and the like," or "and such like." It does not appear to their Lordships to be important whether this is so or not. The learned counsel may be correct. But the words "and the like" or "in such like" would shew that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to.

At par. 4, ch. 2, s. 11, of the *Mitakshara*, it is said "The enumeration of six sorts of woman's property by *Menu*, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the sixfold property of a woman' (*Menu* 9, 194), is intended, not as a restriction of a greater number, but as a denial of a less."

The *Dayabhaga* is to the same effect. Par. 18, ch. 4, s. 1, is as follows:—

"Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number six as specified by *Menu* and others is not definitely meant. But the text of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.*"

Again, in the *Mitakshara*, par. 2, ch. 2, s. 11, it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by *Menu* and the rest "woman's property."

Again, par. 3, "The term 'woman's property' conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptation is improper."

There is a note to par. 2, above quoted, with reference to property obtained by inheritance, and their Lordships' attention was called to it by the learned counsel for *Shunkur Bux*, but as the estate in dispute did not come to *Kablas* by inheritance, it is unnecessary to determine whether immoveable property acquired by a woman by inheritance is "woman's pro-

perty." It has been decided that a woman cannot, even according to the *Mitakshara*, alienate immoveable property inherited from her husband, and that upon her death it descends to the heirs of her husband, and not to her heirs: *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (1).

The question does not arise in this case whether if the grant had been made to *Kablas* in her husband's lifetime the property would have been her peculiar property, over which her husband would have had no dominion or control; see *Dayabhaga*, c. 4, s. 1, pars. 20 and 23; for the property was granted to *Kablas* after her husband's death. The *talook* must, in their Lordships' opinion, be considered to have been the property of *Kablas* at the time of her death.

A woman's property having been described in the first eight paragraphs of the section, the distribution of it is then propounded—"her kinsmen take it if she die without issue;" but it is only in the event of her dying without issue that her kinsmen succeed.

Par. 9 goes on: "If a woman die 'without issue'—that is leaving no progeny—in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith described."

Par. 10. "The kinsmen have been declared generally to be competent to succeed to a woman's property." The author now distinguishes different heirs, according to the diversity of the marriage ceremonies. The property of a *childless* woman married in the form denominated *Brahma*, or in any of the four unblamed modes of marriage, goes to her husband; but if she leave progeny it will go to her daughter's daughters. In other forms of marriage, as the *Asura*, &c., it goes to her father and mother on failure of her own issue."

The words "daughter's daughter" are made clear by par. 15, "On failure of all daughters, the grand-daughters in the female line take the succession, under the text, 'if she leave progeny it goes to her daughter's daughter.'" And, again, by par. 12, "In all forms of marriage, if the woman leaves progeny, that is, if she have issue, her property devolves on her daughters." In this place, by daughters, grand-daughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage: "The daughters share the residue of their mother's property after payment of her debts."

Par. 13. "Hence, if the mother be dead, daughters take her property in the first instance."

Par. 16 deals with the case of a multitude of grand-daughters, and is not applicable to the present case.

A custom of the tribe was set up and relied upon to the effect that the property of a *Bissein* could be inherited only by a *Bissein*, and that it descended to collateral male heirs in preference to a daughter.

The Commissioner in his judgment said that the custom among *Chattris* that collaterals are preferred to daughters is no doubt true, but it cannot be said to be specially proved in the case of *Bissein Chattris*. The Judicial Commissioner, however, was of opinion that the Plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession.

Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman. Their Lordships are, therefore, of opinion that, under clause 11, sect. 22, the estate descended to the Defendant (Respondent) as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject; and being of that opinion, it is not necessary to consider whether, if *Kablas* had died without issue, either of the Plaintiffs would have been entitled to succeed to the estate.

The Judicial Commissioner held that the persons entitled to succeed must be sought amongst the heirs of the husband, and not of the widow.

(1) 11 Moore's I. A. C. 175; 2 P. C. J., p. 231.

In this view of the case their Lordships, for the reasons above stated, cannot concur. The decree of the Judicial Commissioner was notwithsanding correct; for he, holding that the Defendant was heir to her father, *Mypal*, dismissed the appeal against the decree in her favour.

Their Lordships hold that that appeal was properly dismissed upon the ground that the *talook* descended to her as heir to her mother, who at the time of her death was the *talookdar*, and had a permanent heritable right in the estate.

Their Lordships will therefore humbly recommend Her Majesty to affirm the decrees of the Commissioner in the respective cases of *Brij Indar* and of *Shunkur Bux*, and to affirm the decree of the Judicial Commissioner in the case of *Seetla Bux*.

The Appellants in each of the appeals must pay the Respondent's costs in that Appeal.

10th November, 1877.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of the Rai Bareilli Division of Oudh.

THAKOOR SHEEE BAHADUR SINGH, (Plaintiff)* ... } *Appellant,*

versus

THAKURAIN DARIAO KOER, (Defendant) ... } *Respondent.*

Estate in Oudh—Title under Sunnud from Government—Trust.

Although a *sunnud* granted by the Government of *India* subsequent to the proclamation of March 1858, of an estate in *Oudh*, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party.

Where the lower Courts, on the ground that the Defendant's title under a *sunnud* was absolute, declined to consider evidence which the Plaintiff relied on as showing that the Defendant really held for him as a trustee, the case was remanded by the Judicial Committee in order that such evidence might be received and considered.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This case has not been tried in a manner altogether satisfactory. Without, however, referring to the previous proceedings, their Lordships think it enough to advert to the final judgment appealed against. The learned Commissioner gave his judgment in these terms:—"*Basant Singh* died during the Rebellion of 1857, and the alleged adoption of the Plaintiff is said to have taken place in April 1858. Before this the general confiscation of the land of *Oudh* had been declared by the British Government, and it was only in May 1858 that a summary settlement was made with the Defendant. At the time, therefore, of the alleged adoption, the title to the estate vested neither in the deceased *Basant Singh* nor in the Plaintiff, nor in the Defendant, but in the British Government. Even if it be allowed that there was adoption of Plaintiff, and that this, in accordance with Hindu law, conferred upon him all the right of a posthumous son of *Basant Singh*, still neither he, nor *Basant Singh* himself, if he were to rise from the dead, can assail the title under which the Defendant holds." So far their Lordships agree with the learned Commissioner, but they are not able to agree with him in the view which he expresses in the second paragraph of his judgment. The learned Commissioner appears not to have been sufficiently acquainted with the tenor of some recent decisions, whereby, although undoubtedly the doctrine is affirmed that the title conferred by the Government is absolute and overrides all other titles, nevertheless it has been held that the grantee under the Government may, by an express declara-

* 3 I. L. R. Cal. p. 635.

tion of trust, or by an agreement to hold in trust, constitute himself a trustee. The learned Commissioner proceeds in these terms:—"It has, however, been held by the Courts on various occasions that a free gift was made by the Government, and I am entirely of this opinion. The adoption of two letters, said to have been written by the Defendant, both of which are set forth in the plaint, place, it is contended, the Defendant in the position of trustee. One letter addressed to the Plaintiff implies nothing more than a promise to put him in possession of the estate on his becoming of age. The second letter, addressed to *Babu Umrez Singh*, between whose daughter and Plaintiff a marriage was arranged, is to the same effect as the letter addressed to the Plaintiff. I can see nothing in these letters to place the Plaintiff and Defendant in the position respectively of beneficiary or *cestui que* trust and trustee."

Their Lordships are of opinion that the letters here referred to, if proved (and, as far as they are at present informed, they do not seem to have been proved or disproved), may, coupled with surrounding circumstances, constitute sufficient evidence on which the Court would be justified in holding that the Defendant had declared herself or had agreed to be a trustee on behalf of the Plaintiff. They think it desirable, therefore, that the suit should be sent back to the Courts in *Oudh* for the purpose of determining this question. Those Courts will inquire, in the first place, whether the letters are genuine; in the next place, as to the date on which they were written; and, thirdly, as to the circumstances under which they were written and other surrounding circumstances; and among those circumstances undoubtedly will be the question of the adoption or non-adoption by the Defendant of the Plaintiff under the will of her husband;—this question being, as before explained, material only as a circumstance bearing upon the question of whether or not she has agreed to be or declared herself to be a trustee, but not in itself constituting any title on the part of the Plaintiff.

Their Lordships, in the imperfect acquaintance which they have at present with the facts of the case, think it more convenient to remand the case in these general terms than to settle issues themselves. Either party will be at liberty to propose for the consideration of the Court any issues which they may think material to raise the questions which have been just indicated, and the Court will doubtless raise the proper issues, and determine the questions according to the law as now laid down.

Their Lordships think it right to add that the delay of the Plaintiff in not having brought the action until ten years had passed after he had become of age, and his laches in this respect will not entitle him to an account for a period before the commencement of this suit.

Their Lordships will therefore humbly recommend Her Majesty to discharge the decree and orders appealed from, and to remand the suit to the Court of the Commissioner of *Rai Bareilli* for him to re-try and determine the same, each party being at liberty to propose such issues as they may think material to be settled for trial by the Commissioner.

The Costs of both parties of the appeal will be taxed, and a certificate sent with a direction to the Court below to deal with them as costs in the cause.

21st and 22nd November, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NORENDER NARAIN SINGH, (Plaintiff)* ... } *Appellant,*

versus

DWARKA LAL MUNDUR and others, (Defendants) } *Respondents.*

Mortgage—Foreclosure—Notification—Regulation XVII. of 1806, s. 8.

The condition of foreclosure required by s. 8, Regulation XVII. of 1806, is, that the mortgagor should be furnished with a copy of the petition referred to in the section, and should have a notification from the Judge in order that he may, within a year from the time of such notice, redeem the property.

In an action brought to recover possession as upon a foreclosure, it is essential for the Plaintiff to satisfy the Court that the above condition has been complied with.

In such a case, the service of the notice must be established by evidence. The mere return of the *Nazir* on the back of the Judge's *perwannah* to the effect that the mortgagor had been duly served, is not legal evidence of service.

The functions of the Judge under s 8 are merely ministerial; see *Forbes* v. *Ameeroonissa Beyum* (1).

The year during which the mortgagor may redeem, runs not from the date of the *perwannah*, or the issuing of it by the Judge, but from the time of service.

Mohesh Chunder Sein v. *Musumat Tarinee* (2) approved.

Where there are several mortgagors, and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt, and one entire right against all, service of the notice upon some only of the mortgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it.

QUERY:—Whether there may not be cases of mortgages of separate shares, in which by proceedings properly framed foreclosure may take place in respect of some of such shares only?

The mortgagee when he seeks to foreclose must discover and serve notice on those who are the then owners of the estate.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is an appeal in a suit brought by the heirs of *Rajah Tek Narain Singh* against certain parties, who may be described as the family of *Dass*, forming one set of Defendants, and persons called *Mundur*, who formed another set, the latter being purchasers of the property in question from the *Dasses*. The suit was brought for possession and for registration of names, (as stated in the plaint,) "with respect to 3 *annas* 7 *gundas* 3 *cowries* 1 *krant* out of 5 *annas* 3 *gundas* 1 *cowrie* 1 *krant*, of *moujah Doaram Mudehpoor 'usli'* with '*dakhily' pergunnah Nesinpore Koora*, the property referred to in the deed of conditional sale, after deducting 1 *anna* 15 *gundas* 2 *cowries*, the right and interest of *Sree Narain Dass*, *Bachee Lal Dass*, *Rajah Ram Dass*, *Muhtab Dass*, alias *Laljee Dass*, and *Chunchal Kishore Dass*, purchased by your petitioner's ancestor, and the right and interest of *Shunkur Batti* purchased at auction on the 10th of January, 1868, subsequent to acquiring the deed of conditional purchase, at an execution sale by your Petitioner." The conclusion of the plaint is: "Since the principal and interest of the mortgage was neither deposited nor paid by the vendors pursuant to the terms of the mortgage bond, the foreclosure in accordance with the Reg. XVII. of 1806, was formally effected in the Judge's Court at *Bhaugulpore*, by a proceeding dated the 23rd of June, 1867, and the period of one year fixed by the above law expired on the 27th February, 1868, and within that period the amount entered in the bond and interest were not paid, and the conditional sale aforesaid became absolute on the 27th of February, 1868, corresponding with the

* 5 Cowells I. A., p. 18; 3 I. L. R., Cal p 397.
(1) 10 Moore's I. A. C., 340, 350; 2 P. C. J., p 153.
(2) 10 W. R., F. B., 27.

19th *Falgoon* 1275 F. S., and the cause of action for possession and mesne profit arose from the same date."

This action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th of November, 1858; it is from numerous members of the family of *Dass*, in all 19; the deed states that they had "sold and transferred all and every the 5 *annas* 3 *gundas* 1 *cowrie* 1 *krant* of the entire 16 *annas* original with dependencies in *mouzah Dorum Mudehpoor*," in lieu of Rs. 5,000, which had been advanced by *Rajah Tek Narain Singh*. The further statement is, "We have received the consideration money in full in one lump sum in cash from the said vendee, and brought the same into our possession and enjoyment. We execute this deed of conditional sale for two years in lieu of the said consideration, and delivering it to the vendee hereby declare and give in writing that the said vendee shall enter into possession and occupancy of the property sold by right of purchase as proprietor. We promise that in the space of two years from the date of this deed of sale we shall pay the consideration money in question in cash in one lump sum to the vendee aforesaid, and take this deed of sale back. In case we do not repay the consideration in question the vendee shall, after the expiration of the time, be at liberty to foreclose and complete the sale under the provisions of Reg. XVII. of 1806, A. D., and enter into possession and occupancy of the property sold, and to have his own name registered in the Government Records in the column of proprietor."

It seems that the *Rajah* did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the *Rajah's* death by the present Plaintiff to foreclose the property, under the 8th section of Reg. XVII. of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favour of the Defendants) is whether the directions in that section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the Defendants of the petition of the Plaintiffs claiming foreclosure, and, that being the question, it will be right to look at the terms of the 8th clause. The enactment is, "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized *vakeels* of the Court to the Judge of the *zillah* or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor of his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a *perwannah*, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The condition of foreclosure required by that section is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the Plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the Appellant that it is within the province of the Judge of the *zillah* Court to determine whether the notice has been duly served or not, and, although it has not been urged, or only very faintly urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of

the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *primâ facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under sect. 8 are purely ministerial: *Forbes* v. *Ameeroonissa Begum* (1).

Their Lordships, considering that the duties of the *zillah* Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The preceedings of the Judge are *ex parte*, and even if the Judge examined the *nazir* or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *primâ facie* evidence, which should shift the *onus* of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shews that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service is made, that nothing more occurred than this, that the *nazir* having received the *perwannah*, made a return, as it is called, on the back of it stating what he had done with it. The substance of the return is stated in the proceedings of the Judge. After recording that "notices and copies of the petition for foreclosure of mortgage addressed to the opposite party, dated the 27th of February, 1866, A. D., were delivered to the *nazir* under a *perwannah* to serve on the opposite party," it goes on, "thereupon the *nazir* submitted a return on the back of the *perwannah* to the effect that he could not meet the opposite party, and that he stuck up a copy of the notice and of the petition to the houses of each of the opposite party, along with two receipts in the Hindi character severally dated 13th and 14th *Cheyt* 1273 F. S., written by *Bonsi Chowkidar* and *Bochal Chamar* '*Poneas*,' inhabitants of *mouzah Bhawanipore Ruhla*, and *Choonni Chowkidar* and *Numoge Chamar* '*Poneas*,' inhabitants of *mouzah Khoksisyam*, *pergunnah Nesingpore Koora*, which were annexed on the record." Then it goes on, "To-day the record of the case was brought up, and on a reference to the return submitted by the *nazir* it appeared that the notice had been duly served." Therefore we have on the face of this document what the Judge considered to be proof of the notice, namely, the return of the *nazir*, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the *nazir* by the Judge.

Upon the trial no proof whatever was given by the Plaintiffs of the service of the notification. They appear to have relied on the recorded return of the *nazir*. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the *Dasses*. One is a petition signed by five, and the other by six. They were originally nineteen in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a notice under Reg. XVII. of 1806 to be issued on the 27th February, 1866, clandestinely served without the knowledge and information of your Petitioners. Now your Petitioners having come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds." This petition appears to have been presented a short time only before the end of the year of grace, and contains no admission of the time, or

(1) 10 Moore's I. A. C., 340-50; 2 P. C. J., p. 153.

sufficiency of the service. Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition no doubt does contain an admission. There is this statement in it: "The petitioners have under a deed of conditional sale, dated the 9th *Aughan*, 1266, F. S., for Rs. 5,000, had notice under Regulation XVII. of 1806, in respect of 5 *annas* 3 *gundas* 1 *cowrie* 1 *krant* of *mouzah Dorum Mudehpoor, pergunnah Nesingpore Koora, zillah Bhagulpore*, issued to us. Therefore we beg to submit our objections." It is true they do not in terms admit the time at which they had notice, but with regard to those petitioners a Judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the nineteen mortgagors.

The importance of requiring proof of the service of the notice and not trusting to a bare statement that notice had been duly served is enhanced by the consideration that it has been held by a decision of the Full Bench of the High Court of *Bengal* that the year during which the mortgagor may redeem his property runs, not from the date of the *perwannah* or the issuing of it by the Judge, but from the time of service: *Mohesh Chunder Sein* v. *Mussumat Turinee* (1). This decision overruled some cases in the late *Sudder* Courts, in which it had been held that the year was to run from the date of the notification. Their Lordships are quite prepared to adopt the decision of the High Court. It is obvious that if the year is to run from the date of the *perwannah*, the negligence of the *nazir*, or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would lose the benefit of the full time which it was intended by the Regulation to give him.

The necessity of proving service of the notice has recently been decided by two Courts in *India*, one a Division Court of the High Court of *Bengal*, and another a Division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure: *Syud Eusuf Ali Khan* v. *Mussumat Azumtoonissa* (1). The case in the North-Western Provinces is in the third High Court Reports of that Province, p. 325.

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the Appellants, but for the fact, to which allusion has already been made, of the admission by some of the Defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that in the circumstances of this case service upon those only of the mortgagors, whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five *annas* and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed because those who have been served have omitted to redeem. It is impossible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then with respect to the mortgagors who have admitted notice, it is to be observed that it was not sought to foreclose the

(1) I B L.R., F B., 14; S C., 10 W. R., F.B., 27.

(1) Suth. W. R. (1864) 49.

individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

Further, the *Mundurs*, the Defendants of the second class, purchased some share of some of the *Dasses* before the foreclosure proceedings took place. It appears that in February, 1861, two or three years after the conditional sale, and before the notice of foreclosure, two *gundas* and two *cowries* were sold to the *Mundurs*. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchased shares, and notice of foreclosure ought to have been served upon them. Mr. *Doyne* has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of *Mohun Lall Sookool* v. *Goluck Chunder Dutt* (1). Their Lordships say upon it, "It is quite clear upon the authorities, that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and in the circumstances above stated their Lordships conceive that it ought to have been served upon the decree holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heirs of the original mortgagor."

There are subsequent cases in *India* which shew that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the Defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bonâ fide* instrument.

It seems that *Rajah Tek Narain* was a patron of the family of the *Dasses*. They were involved in debt, and he probably advanced money to them from time to time. But with regard to this particular instrument there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by *Rajah Tek Narain*. The deed is dated the 30th of November, 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the *Rajah* should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However this may be, possession was not taken. No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the payment of the money expired on the 30th of November, 1860. The petition to foreclose was not filed until the 2nd of January, 1866, and up to this date it is plain that the *Rajah* had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 14th of September, 1867. The note of the Judge that the foreclosure was "sanctioned" cannot indeed be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th of September, 1867. Again no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st of October, 1872, nearly fourteen years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the *Rajah* himself in a manner which seems

(10). Moore's Ind Ap. Ca., 14; 2 P. C. J., p 49.

quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the *Dasses* to the *Rajah* (in the name of his servant *Bijoy Dass*) of six *annas* and certain fractions of *annas* of the same *mouzah*. Those *annas* must have included the whole of the shares which had been mortgaged—it appears to have included more; it is an ordinary lease, and part of the rent was to be deducted on account of a former *zurpeshgi*. Again in 1867, after the *Rajah's* death, his sons obtained decrees against the *Dasses*, and the right and interest of the *Dasses* in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place the *Dasses* sold their shares to the *Mundurs*, who alone appear here as Respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment-debt. Those circumstances are not referred to to shew that the conditional sale did not exist, but they are inconsistent with its existence as a document which was intended to be acted upon. Throughout the above transaction there is no trace that it was referred to, or that any notice was given of it, or that anybody know anything of it. Again, the *Rajah*, after the conditional sale, as admitted in the plaint, purchased some of the shares of the *Dasses* which had been mortgaged. They are sales as if the *Dasses* had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bonâ fides* of the conditional sale. They do not desire to impute fraud to either the *Rajah* or the *Dasses*. The *Rajah* had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bonâ fide* conveyance as against *bonâ fide* purchasers, which the Defendants, the *Mundurs*, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.

23rd, 24th, 27th, 28th & 29th November, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RADHA PERSHAD SINGH, (Plaintiff)* ... } *Appellant,*

versus

RAM COOMAR SINGH and others, (Defendants)... } *Respondents;*

and

RADHA PERSHAD SINGH, (Plaintiff) ... } *Appellant,*

versus

THE COLLECTOR OF SHAHABAD, (Defendant)... } *Respondent.*

Diluviated Lands—Adverse Possession—Doctrine in Lopes's Case.

The doctrine in *Lopes's Case* (1) that diluviated lands, re-forming on their old site, remain the property of their original owner, does not apply to lands in which after their re-formation an indefeasible title has been acquired by long adverse possession, or otherwise.

Where a Plaintiff relies on an alleged adverse possession of lands for more than twelve years after their re-formation, the question to be decided is whether he has had such possession for twelve years.

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* 3 I. L. R., Cal., p. 796.

(1) *Lopes* v. *Muddun Mohun Thakoor*, 13, Moo. I.A., 467; S. C., 5 B. L. R., 521; 2 P. C. J., p. 591.

THEIR Lordships' judgment, was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

The appeals of which their Lordships have now to dispose are those which the Appellant has preferred in two out of seven suits instituted by him in order to recover a large quantity of alluvial land lying now to the south of the Ganges, and accordingly transferred by order of the Government from the *zillah* of *Ghazeepore* to that of *Shahabad*. Notwithstanding the great volume of the record, and the number of the proceedings contained in it, the facts essential to the determination of these appeals may be brought within a narrow compass. It appears that, at the time of the perpetual settlement, the river Ganges was not only the boundary, as it is still, between the two *zillahs* of *Ghazeepore* and *Shahabad*, but also the boundary between the *mouzah Nowrunga*, belonging to the Plaintiff's ancestor on the left or northern, and a number of *mouzahs* on the right or southern, bank of the then channel of the river, which were settled with other proprietors. Immediately on the southern or *Shahabad* side of the river, and included in those *mouzahs*, was an area of low soft land, some six miles wide, favourable to the erratic habits of the Ganges, but bounded on the south by higher or harder land, which opposed itself to the further progress or invasion of the stream in that direction. The precise changes in the course of the river have been proved with greater clearness than is usual in cases of this kind, and are delineated in what has been called the *Ameen's* map No. 7. 2. From this and from the evidence it appears that in the year 1839 the river occupied a position considerably to the south of that which it occupied at the date of the settlement, and now occupies; that in 1844 it had travelled to an ascertained channel still further to the south, and in 1857 had for some years reached its southernmost limit, viz., the high or hard bank which has been referred to. It is, moreover, clearly shown that, towards the end of the rains of 1857, the river, when subsiding into its coldweather channel, made a sudden change of that channel, intersecting the land to the north of its former course, and occupying the position designated upon the *Ameen's* map as "*Bhagur* 2." Its course, however, in that channel was not permanent; for, either by sudden change or by gradual recession, it travelled still further to the north until it returned to the bed from which it is supposed to have started at some time after the date of the perpetual settlement, being that which it occupied when the decrees under appeal were made.

Upon the sudden change of 1857-58, different persons, claiming to be the owners of some of the villages which had before been diluviated, seem to have taken possession of the land re-formed upon the sites of their old villages, so far as it was then south of the new channel of the Ganges. And when the river went further back, their Lordships presume that other persons similarly claimed and took possession of the additional land that had then become south of the Ganges. The result was that, after some discussion between the authorities of the two *zillahs*, a *thakbust* was made by the revenue officers of *Shahabad* in 1864, which apportioned the whole of this disputed land, as re-formation on the sites of the ancient villages, among the representatives of the persons with whom those villages had originally been settled; and confirmed their possession of the plots allotted to them. Between 1858 and this *thakbust* of 1864 there had been various proceedings before the revenue officers of *zillah Ghazeepore*, at the instance of the Plaintiff as owner of *Nowrunga*, under Act I. of 1847; but to these it is now unnecessary to advert. After the *thakbust* of 1864, the Plaintiff brought one suit against all the claimants of the disputed land. That was dismissed as improperly framed. He then instituted the different suits, with two of which their Lordships have now to deal. These it will be convenient to call suit No. 2 and suit No. 6; distinguishing them by the numbers whereby the lots claimed in them respectively are described on map No. 7.2.

rather than by the numbers which the suits themselves bore in the Indian Court (1). It lies of course upon the Plaintiff to prove in each a superior title in order to dispossess the Defendants.

Neither party originally put his case precisely in the form in which, after the decision in *Lopez's Case* (2), and the second remand of the suits by the High Court, it assumed.

Their Lordships propose to treat that second remand as a new departure, and the commencement of the litigation upon which they have to form a judgment. And they may at once state that they cannot concur in the final judgment of the High Court in so far as that casts any doubt upon the propriety of dismissing the third and fourth of the issues for the trial of which the suits were remanded. The doctrine in *Lopez's Case* (2) was doubtless in favor of the Defendants in both suits; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the *thakbust* proceedings of 1864 as within the boundaries of their original *mouzahs*, which would *primâ facie* override a title founded on the principle of the aquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's Case* (2) cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. In the present suits the Plaintiff relies on an alleged adverse possession for more than twelve years of the lands after their re-formation; and therefore the real point to be decided in the suits was whether a title had been thus acquired by the Plaintiff, the proprietor of *mouzah Nowrunga*.

(1) Suit No. 2 was that in which *Ram Coomar Singh* and others were the Respondents, and corresponds with Appeal No. 50 of 1874. Suit No. 6 was that in which the Collector of *Shahabad* was Respondent, and corresponds with Appeal No. 57 of 1874. In suit No. 2 the Plaintiff sought possession of the lands *Pursownda* and *Sohia*. In suit No. 6 he sought possession of the *mouzah Sreepore*.

(2) *Lopez* v. *Mudden Mohun Thakoor*, 13 Moore's I. A. C., 467; S. C., 5 B. L. R., 521; 2 P. C. J., p. 594.

Now, for the purpose of considering this, which seems to be the only material issue, it will be convenient to travel, as the river originally did, from the north to the south. Their Lordships consider that the point to be determined is whether in 1857 such a new title existed as to all or any of the lands in dispute, because they think it is clearly proved that the change of the river in 1857-58 was a sudden change, which left the rights of the parties as they then existed unaffected thereby. The nature of the change in 1861 is perhaps not so clearly proved. The *zillah* Judge certainly found that to have been also a sudden change; for he says that the river began to leave the channel in which it had gone from 1858, in 1267 F. or 1860, and in 1268 F. was found in the place in which it now is; a state of things which implies suddenness of change. Moreover, the evidence on the whole preponderates in favor of this last change having been also a sudden change. Their Lordships, however, do not think it very material to find one way or the other upon that point, because even if the river had receded from the channel, marked as *Bhagur* 2, gradually to the place which it now occupies,—if it had passed, for instance, over *mouzah Sreepore*, submerging that *mouzah* again; the sub-mergence and re-appearanc of the land both taking place within the three years, —if that were so, and the question was, who was entitled to the re-formation of the *mouzah* upon that site of *Sreepore*, upon this second re-appearance, their Lordships conceive that, according to the strict doctrine in *Lopez's Case* (1), if the Plaintiff had previously to 1857 acquired the proprietorship of that land, it would be he and not the original owner of *Sreepore* who would be entitled to claim the benefit of that doctrine.

Then going back to the application of the principle which has been already laid down to the lands in dispute in this case, their Lordships have to consider first whether the Plaintiff had or had not in 1857 acquired such a title as has been

(1) *Lopez* v. *Mudden Mohun Thakoor*, 13 Moore's I. A. C., 467; S. C., 5 B. L. R., 521; 2 P. C. J., p. 594.

described to the land north of the river as it ran in the year 1839; and they think that upon the evidence there can be no doubt he had such a title. They rely mainly upon the *thakbust* proceedings of that year. It appears to them clear upon those proceedings and the maps embodied in them, that the land down to the north part of the river as it existed in 1839 was then measured as belonging to *Nowrunga*, and in possession of the Plaintiff's ancestor; that the greater part of that land was laid out field by field as land which had been gained by accretion at that time; and that although there was a small portion which is described in the *thakbust* maps as "registran or sand," that too was measured into *mouzah Nowrunga* and the *zillah* of *Ghazeepore*. No objection or claim seems then to have been preferred on the part of any proprietor on the *Shahabad* side of the river. And it is clear that the Plaintiff and his ancestors were afterwards, and up to 1857 or 1858, in possession of this land; that is, for a period of about eighteen years.

The whole of the land in dispute in suit No. 6 falls within the boundaries of *Nowrunga* as thus defined in 1839. In that suit it has been attempted at the bar to raise some contention on the supposed effect of the confiscation of *Koer Singh's* estate, of which *mouzah Sreepore* once formed part. But that is a point that never seems to have been raised in the Court below; and, so far as their Lordships can see, there can be no ground for the contention. It seems to them that the whole of this lot must have been diluviated, and that, when left dry as the river receded still further, it was assumed to have become by accretion part of *Nowrunga*. It was measured as such in 1839; and if the second change of the river in 1861 was a sudden change, that land has ever since 1839 been dry land, and was up to 1861 in the possession of the Plaintiff. Again, if the changes in the course of the river between 1858 and 1861 were not sudden, but gradual, the subsequent diluviation and re-appearance of the land could not, as has already been stated, defeat the title to the site which the Plaintiff had gained before 1858. These considerations suffice to dispose of the appeal in suit No. 6.

With respect to the appeal first heard, that in the suit No. 2, the case is different. In order to substantiate the whole of the Plaintiff's claim, it would be necessary to show that in 1858 he had been in possession of this land almost up to the extreme southern boundary for more than twelve years. Now their Lordships have felt no hesitation in concurring with both the Courts in so far as they have found that no such title was established to land beyond the course of the river in 1844. There is no clear evidence how, or in what particular year, that land accreted; and it is impossible to say that there has been a possession for twelve years, or any possession that would be sufficient to defeat what is *primâ facie* the superior title of the Defendants. Their Lordships have had more doubt as to the land lying between what was the northern bank of the river in 1839 and that which was its northern bank in 1844; but even if they had been disposed to agree with the *zillah* Judge in respect of this land, they could not have concurred in his judgment in so far as it gives to the Plaintiff the bed of the river as it existed in 1844, and carries his boundary up to what was then the southern bank of the river. Although in the case of a wandering and navigable stream like this, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground; and it clearly appears on the face of the *thakbust* map of *mouzah Sohia*, which was made in the course of the survey of 1844, (and these proceedings are the strongest evidence, such as it is, which the Plaintiff has given of his possession of the land now in question,) that some land which had once formed part of that *mouzah* was then on the northern bank of the river, and consequently that the ground over which the river then ran had also been part of *Sohia*; and if this be so, when the bed of the river became dry, the right of the Defendants to the new formation on that site would attach, and there is no proof of a length of possession of that re-formation which would defeat their title.

The point upon which their Lordships have felt greater difficulty is whether there was not sufficient proof of possession for twelve years on the part of the Plaintiff of the land up to the northern bank of the river as it ran in 1844. It has been argued that the *thakbust* proceedings of 1844-45 were as strong to prove the possession of the Plaintiff or his ancestor of the land north of the river as it then ran, as were those of 1839 to prove his possession of the land within the boundary then laid down, up to the line of the river in 1839. Their Lordships, however, do not think that this is so. The later *thakbust* proceedings related to *mouzah Sohia*, and were made in *Shahabad*, and the river was then the boundary not only of the *zillah* of *Shahabad*, but also of two provinces under distinct Governments, viz., the North-West Provinces and the Lower Provinces of *Bengal*. The authorities of *Shahabad* presumably had no authority to carry their *thakbust* beyond the southern bank of the river as it then ran. Again, upon the face of the *thakbust* map is the statement already referred to, wherein, after mentioning that the entire area of *Sohia* had been 2,451 *bighas*, but that out of that only 400 *bighas* existed which were under cultivation, (that being, as their Lordships understand, the portion of *Sohia* that was then on the south side of the river,) it is stated: "The remaining land."—that is, 2,051 *bighas*—"was washed away by the Ganges, and has now accreted on the north side of the river Ganges in a small quantity, and consists of sand." Therefore that which was out of the bed of the river on the northern bank seems to have then been, according to this statement, waste uncultivated land, over which no acts of ownership had been exercised, and in which the possession or the right of the Plaintiff had been positively affirmed by no measurement on the other side of the river. The doubt their Lordships have had is whether there was not other evidence from which it might be properly inferred that cultivation had afterwards been extended and acts of ownership exercised over this land by the Plaintiff between 1845 and 1857, without question, so as to establish an adverse possession of it as against the Defendants for twelve years. But upon the whole, looking to the uncertainty of the general evidence as to this strip of land; to the not very clear finding of the *zillah* Judge regarding it; and to the fact that much better evidence as to payment of the rent and the like might have been given than was given, they have come to the conclusion that they have not sufficient grounds before them for disturbing the finding of the High Court upon this part of the case. The Plaintiff, therefore, must be taken to have failed to have made out a sufficient title to any land which was not north of the river as it ran in 1839.

The result is, that in suit No. 6, in which all the land claimed lies above the line of 1839, their Lordships must humbly advise Her Majesty to reverse the decision of the High Court in that suit, and to affirm the decision of the *zillah* Judge, with the costs of the appeal in the High Court. When they delivered judgment they proposed to advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court in suit No. 2, inasmuch as they then understood that all the land claimed in that suit lay below the line of 1839. It having, however, been brought to their notice, before the report was drawn up, that, notwithstanding the statement of the *zillah* Judge to the effect that no part of the land north of that line was in question in the suit, the maps which are in evidence in the cause, and particularly the *Ameen's* map No. 7. 2, afford ground for believing that a small portion of the land claimed, being part of that in the possession of the Defendants as their *mouzah Pursowonda*, is, in fact, above the line of 1839, the order which their Lordships will recommend Her Majesty to make in this suit is, "that the decree of the High Court be varied, by declaring that the Plaintiff is entitled to recover, and ordering that he do recover, so much (if any) of the land claimed by him in this suit as lies to the north of the line delineated in the *Ameen's* map No. 7. 2, as the northern bank of the river Ganges in the year 1839; the amount (if any) of such land to be ascertained, in case of dispute, by proceedings in execution; but

that in all other respects the decree of the High Court be confirmed." This order seems to their Lordships calculated to assure to the Plaintiff, with the least risk of future litigation, that to which he may be entitled upon the principle laid down by them in their judgment. But, considering the manner in which the question concerning this, at most inconsiderable, portion of the land in dispute has been brought before them, they do not think it would be right to make any order touching the mesne profits of what may be recovered, or to vary the decree of the High Court as to the costs of the litigation. They think also that the Plaintiff ought to pay the costs of the appeal to Her Majesty in this suit. The Respondents in suit No. 6 must pay the costs of the appeal in that suit.

6th and 7th December, 1877.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

BANNOO and others, (Defendants)* ... } *Appellants,*

versus

KASHEE RAM, (Plaintiff) *Respondent.*

Hindu Law—Joint Family—Joint Estate—Presumption.

In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that every thing in the possession of any one member of the family belongs to the common stock. The *onus* of establishing the contrary rests on him who alleges separate property.

But this presumption does not arise where it appears that there has been a division of the family property, and a separation in the family, all the members of which are living separately.

THEIR Lordships' judgment reversing the judgments of the Court below, was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is a suit brought in the Court of the Civil Judge of *Lucknow*, by *Kashee Ram*, a nephew of *Ram Dyal*, who died in the year 1873, against *Mussumat Bannoo* and *Mussumat Munna*, the widows of *Ram Dyal*, and *Munna Lall* his grandson, the son of his daughter. The claim is for an eight *annas* share, or one-half, of all the property in possession of *Ram Dyal* at the time of his death. The property consists principally of moveable property, but the claim includes a *pucca* house and shop.

The claim is based on the foundation that *Ram Dyal*, at the time of his death, was a member of a joint family, consisting of himself and of the Plaintiff *Kashee Ram* and his brother *Kasho Ram*,—those two being the sons of *Ram Buksh*, a brother of *Ram Dyal*. *Kasho Ram* did not join in this suit. The state of the family was this: *Ram Gholam* left four sons, *Sheo Buksh*, *Ram Bilas*, *Ram Buksh*, and *Ram Dyal*. *Sheo Buksh* and *Ram Bilas* are dead; one dying without a widow or children, and the other leaving a widow only. *Ram Buksh* had two sons, *Kashee Ram*, the Plaintiff, and *Kasho Ram*. *Ram Dyal* had no son. The Plaintiff admits in his plaint that his grand-father *Ram Gholam* divided the ancestral property amongst his four sons, though, according to his statement, the four sons did not take separately, but *Sheo Buksh* and *Ram Bilas* took one-half jointly, and so formed a separate family, and the other half was allotted to *Ram Buksh* and *Ram Dyal*. He contends that *Ram Buksh* and *Ram Dyal* remained a joint family. On the part of the present Appellants, the Defendants, it is stated, that the division by *Ram Gholam* was not into two parts,

* 3 I. L. R., Cal., p. 315.

as *Kashee Ram* contends, but that each of the sons took a separate share.

There is no distinct proof, one way or the other, as to the nature of that division, but undoubtedly a division was made, and it may be taken as against the Plaintiff that at all events the family was divided into two groups at that time. It further appears that, in the lifetime of *Ram Dyal*, *Kashee Ram*, the Plaintiff and his brother *Kasho Ram*, as between themselves, separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by *Ram Gholam*, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that all that any one member of the family is founded in possession of, belongs to the common stock. That is the ordinary presumption, and the *onus* of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the Plaintiff's case, and therefore, as he seeks to recover property which was in the possession of *Ram Dyal* and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, viz., that the property was joint property to which he and his brother *Kasho Ram*, as surviving members, were entitled. It may be stated that the issue in the case, which is the only one material to be decided, raises distinctly that question. The issue is, "Was the Plaintiff joint with *Ram Dyal* at his death?" The evidence is extremely scanty, and what there is of it is very unsatisfactory. That remark was made by the commissioner upon the appeal from the Civil Judge, and was also made by the Judicial commissioner when the question came before him on the right of appeal.

(Thier Lordships, after analysing the evidence relied on by the Plaintiff, and commenting on the judgments of the lower Courts, concluded by advising Her Majesty to reverse these judgments and to dismiss the Plaintiff's suit with costs in the Courts below, and they allowed the Appellant the costs of the appeal.)

15th, 16th, & 19th January, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HURROPERSHAD ROY CHOWDHRY and another, (Plaintiffs)* ... } *Appellants,*

versus

SHAMAPERSHAD ROY CHOWDHRY and others, (Defendants) ... } *Respondents.*

Interest on Mesne Profits—Act XXXII. of 1839.

By the law and practice in *India*, independently of the provisions of Act XXXII. of 1839, a decree might award interest, as of course, on mesne profits from the date of the institution of the suit in which they were claimed. Such interest is not forbidden by the terms of the Act referred to.

THE judgment of their Lordships' was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

The transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed a continuous stream of litigation, not in all respects creditable to the earlier tribunals of *India*, down to the present day. A history of that litigation, given shortly and clearly, will be found in a report in the 8th volume of

* 5 Cowell's I. A., p. 81; 5 I. L. R., Cal., p. 654

Moore's Indian Appeals, of a judgment of this Committee, which was delivered on the occasion to be hereafter mentioned. Their Lordships deem it enough to refer to that case without recapitulating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

To brothers, *Doorgapershad Chowdhry* and *Tarapershad Chowdhry*, of whom *Doorga* was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th of April, 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten-sixteenths of the ancestral property, and the younger brother six-sixteenths. *Tara*, the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court, on the 2nd of September, 1829. *Tara* appealed from that decision to the Court of *Sudder Dewanny Adawlut*, and the Court of *Sudder Dewanny Adawlut* affirmed the decision of the Provincial Court and directed possession to be given to *Tara* of his portion of the property. *Tara* accepted this decision and endeavoured to obtain his rights under it, and his first step for that purpose was to apply to Mr. *Ross*, one of the Judges of the Court of *Sudder Dewanny Adawlut*, who, in concurrence with Mr. *Walpole*, each sitting alone, had given the judgment affirming the decree of the provincial Court, to order *wasilat* to be given him. The decree had only decreed possession. The application was made under a circular order which empowered the Court in such cases to award *wasilat* to be recovered by proceedings in execution; and it claimed *wasilat* from the date of the decision of the Provincial Court. Mr. *Ross* so far complied with this request as to order *wasilat*, not from the date when it was claimed, but from the 4th of July, 1832, the date at which the decision of the *Sudder Dewanny Adawlut* Court had been given.

The history of the litigation during the next twenty years may be thus summarised. *Tara* pursued every legal means in his power to obtain his rights under that decree; that is to say, to obtain possession of the property and *wasilat* of the mesne profits for the period during which possession of it had been withheld. The elder brother *Doorga* endeavoured to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. *Tara* succeeded in obtaining from time to time possession of certain portions of the property, but he never appears to have succeeded in obtaining any *wasilat*. It may be enough, however, to pass on to the year 1853, when *Tara* obtained an order from Mr. *Money* for a sum of Rs. 40,000 *wasilat*, and a considerable amount of interest. *Doorga* appealed against that order on the ground, which he appears to have rasied then for the first time, that Mr. *Ross*, who made the original order in respect of the *wasilat* in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr. *Walpole*, and the Court of *Sudder Dewanny Adawlut* gave effect to this objection. So that the Court of *Sudder Dewanny Adawlat* in effect ruled that all the litigation which had gone on for twenty years was absolutely fruitless

Under those circumstances, *Tara* instituted the present suit in December, 1853. *Tara* and *Doorga* have long since died, and this appeal is now prosecuted and defended on behalf of their representatives.

The suit came on to be heard before the Principal *Sudder Ameen* of the day, and he decided that the *Statute of Limitations* was a bar to the claim of *Tara* to *wasilat* for more than twelve years before the commencement of the suit. But for those twelve years he gave him *wasilat*, calculated upon the footing of certain *hustabood* papers which were put in by the Plaintiff. The Plaintiff contended that he was entitled to avail himself of those *hustabood* papers on this ground: he said "the *hustabood* is my rent-roll of a certain portion of lands which have been made over to me by my brother. This is some evidence in the absence of contradictory evidence of what the rent was be-

fore it was handed over, and therefore of the *wasilat* or mesne profits to which I am entitled." These *hustabood* papers had been received in the abortive proceedings which have been referred to, and were received in this case by the Principal *Sudder Ameen*. There were cross appeals from this judgment, and the case came before the then *Sudder Dewanny Adawlut* in the year 1857, whereupon that Court reversed the decision of the Principal *Sudder Ameen*, holding that the *Statute of Limitations* was not a bar to any portion of the claim, and remanded the case to be retried *ab initio*, as they expressed it. This judgment of the *Sudder Dewanny Adawlut* was on appeal affirmed by this Board in the judgment before referred to; their Lordships holding that the *Statute of Limitations* did not apply to *Tara's* demand, because he had instituted *boná fide* though ineffectual proceedings, for the purpose of obtaining his rights,—not, as they expressed it, under the agreement alone but under the judgment enforcing it.

The case was then tried on the remand by another Principal *Sudder Ameen*. He found that the Plaintiff was entitled to *wasilat* from the date of the first judicial decision, in September, 1829, of the Provincial Court. On the question of the amount of *wasilat* he rejected the *hustabood* papers, and valued the land at 1 rupee per *bigha*. With reference to the question of interest, he decreed interest to the Plaintiff from the date of the decree, holding that the claim of *wasilat* must be considered as then for the first time settled and liquidated.

From that decree there was an appeal to the High Court, which varied the decision of the Principal *Sudder Ameen* as to the time from which the right of the Plaintiff to *wasilat* commenced, decreeing that it commenced not from the decision of the Provincial Court in 1829, but from the decision of the *Sudder Dewanny Adawlut* Court in 1832; they affirmed the decree in other respects. From that judgment of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to *wasilat* commenced; secondly, what should be the amount of *wasilat*; and, thirdly, what the amount of interest, if any, upon the *wasilat*. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found seperately) in the judgment of the Court of *Sudder Dewanny Adawlut* in these terms: "It is ordered that the deed of compromise and release be admitted, that the case be struk off the file of this Court, and that the parties conform to these stipulations. The Court on becoming acquainted with it shall enforce the observance of the same on the refusing party."

Now one of the stipulations was that *Doorga*, the elder brother, who was in possession of the property, should relinquish to his younger brother six-sixteenths. It therefore appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that *Tara* should be put in possession of that property. This decision was confirmed in these terms by the Court of *Sudder Dewanny Adawlut*: "Therefore, in concurrence with the aforesaid gentleman"—that is the Judge of the previous Court—"Ordered that the appeal preferred by the Appellant be dismissed, and that the decision passed in the Provincial Court of Appeal, dated the 2nd of September, 1829, be affirmed; that should the Appellant, agreeably to the deeds of compromise, not have received possession of his share, he be put in possession of the same on the execution of the decree." It appears to their Lordships that this decree of the *Sudder Dewanny Adawlut* must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation for it is nothing more, the former decree. The rights of the parties, therefore depend upon the former decree, and it is the former decree which is effective, and which had to be executed. It appears to their Lordships, therefore, that *Doorga* after the first decree, receiving as he did all the rents and profits of the property,

received the rent of six-sixteenths of it for the use of his brother, and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal *Sudder Ameen* upon this question, and disagree with that taken by the High Court.

The second question is as to the amount of *wasilat*. It has been contended that the Principal *Sudder Ameen* was bound to accept those *hustabood* papers as fixing the rate of *wasilat*, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the privious *Sudder Ameen*, and by the Courts in former proceedings. But their Lordships do not concur in this view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched. "As this judgment re-opens the question of *wasilat* from the date of the deeds of adjustment, the whole evidence on that matter will require reconsideration. We therefore remand the case, that the whole question of *wasilat* may be taken up and considered *ab initio*."

If the Court had expressed themselves satisfied with the award of *wasilat* within the last twelve years, and only directed an inquiry as to the additional *wasilat* accruing before that time, they might have so expressed themselves, but their Lordships think it probable that they expressed themselves as they have because there was a cross appeal, in which the validity of these *hustabood* papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal *Sudder Ameen*. The Principal *Sudder Ameen* expressed himself as dissatisfied with those *hustabood* papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the Plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the *wasilat* claimed had accrued. He also observes that he directed, for the benefit of the Plaintiff, an inquiry before an *Ameen* as to the value, which the Plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per *bigha*. It may be that, under the circumstances, the Principal *Sudder Ameen* might have been justified in accepting and acting upon these *hustabood* papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these *hustabood* papers, and the actual value of the land, and that decision having been affirmed by the High Court they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact, come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the statute, Act XXXII. of 1839, very much in accordance with the statute of 3 & 4 Will. 4, c. 42, s. 28, in this country, which has given rise to a great number of decisions, all of which are not easily reconcilable. The words of the section are: "It is therefore hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." If the statute had stopped here it might be that the Principal *Sudder Ameen* and the Court were right in saying that there was no actual ascertained or liquidated demand until the

wasilat was determined by the decree. But these words follow: "Provided that interest shall be payable in all cases in which it is now payable by law." And that refers their Lordships to the state of the law and the practice in *India* independently of the statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case, which is to be found reported in *Carrau's* cases in the Presidency *Sudder* Court of the date of 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this: "Interest on mesne profits may be awarded as of course from date of suit in a decree; when, however, interest is awarded from an earlier or from a later date than of suit special reasons should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases, indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circumstances of this case, and among them may be stated the very great delay, which has not been thoroughly explained, in the prosecution of this appeal, their Lordships think it enough that the Plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commencement of the suits up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal *Sudder Ameen* be affirmed as to the amount decreed to the Plaintiff for mesne profits, and reversed as to the residue, and that it be ordered that the Defendant pay to the Plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 18th of February, 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the Defendant do pay interest at the rate of 12 per cent. per annum upon the total amount to be decreed by the decree so to be amended as aforesaid, from the date of the decree of the 18th of February, 1861, to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be amended as aforesaid. And it will be ordered that the Respondents do pay the costs of this appeal.

17th and 18th January; and 5th February, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SREEMUTTY UMA DEVI, (Plaintiff,)* ... } *Appellant,*

versus

GOKOOLANUND DAS MAHAPATRA, (Defendant) } *Respondent.*

Hindu Law—Benares School—Succession—Priority of Indigent Daughter—Barren Daughter—Adoption—Dwyamushyana—Son of Brother—"Factum valet."

In the case of inheritance by daughters on default of nearer heirs, no preference is awarded by the authorities recognised by the *Benares* school of Hindu law in Upper *India* to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

Passages in the *Dattak Mimamsa* and the *Dattak Chandrika*, which prescribe that a *Hindu* wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although

* 5 Cowell's I. A., p. 40; 3 I. L. R. Cal., p. 587.

binding upon the conscience of pious *Hindus* as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

The maxim *quod fieri non debuit factum valet* is recognised to some extent by other schools of law in *India* besides that of *Bengal*.

Semble.—Under the law of the *Benares* school a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy.

5th February, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The general question raised by this appeal is who was entitled to succeed to the estate of one *Hullodhur Dass Mahapatra*, an *Oorya Brahman*, who died in December, 1870. He left by his wife *Jumoona*, who predeceased him some four years before that date, two daughters—*Uma Deyi*, the Plaintiff in the cause, and *Perbutti Deyi*. Both had been married, but *Uma Deyi* was a childless widow, dependent upon and living with her father at the time of his death, whilst *Perbutti* was and is living with her husband, a man of some substance, by whom she had had children, still living. He also left the Defendant, *Gokoolanund Dass*, who claimed to be his son by adoption.

In January, 1871, the last-named person applied to the Judge of *Cuttack* for a certificate under Act XXVII. of 1860. His claim was resisted by *Parbutti*, who disputed the adoption, and also by *Hurrihur Pershad Dass*, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an objector; and as between *Parbutti* and *Gokoolanund*, decided that the latter and *primâ facie* established his title as the adopted son of the deceased, and granted the certificate to him.

Uma Deyi was no party to this proceeding, of which the effect was at most to confirm or put *Gokoolanund* in the possession of the property as the heir of *Hullodhur*, until displaced by a decree in a regular suit.

In June, 1872, *Uma Deyi* instituted the present suit against *Gokoolanund* and *Parbutti*, seeking, as between herself and the latter, to be declared the preferential heir of their father, and, impugning the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the *Benares* school.

That law, in so far as it supports the claim of the Plaintiff to succeed to her father's estate in default of a son, natural or adopted, is thus laid down by Sir *William Macnaghten*, Principles and Precedents of Hindu Law, p. 22. After stating the rule of the *Bengal* school, he says, "But there is a difference in the law as it obtains in *Benares* on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit; *but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.*" Nothing addressed to their Lordships at the Bar induces them to think that this is an incorrect exposition of the law. Mr. *Arathoon*, indeed, in support of his contention that the Plaintiff had lost whatever right to inherit her father's estate she would otherwise have possessed by reason of her being a childless widow, relied upon some passages in the *Smriti Chandrika*, ch. xi. sect. 21, paragraphs 21, 28, in which the author of that treatise adopts and affirms the rule of the *Bengal* school in respect of the disqualification of a barren daughter. But on these it is sufficient to observe that, according to Mr. *Colebrooke* and other high authorities, the *Smriti Chandrika* contains only an authoritative exposition of the law as it prevails in the south of *India*, and consequently that the passages in question are of no weight when set against the propositions which Sir *William Macnaghten* has deduced from the text of the *Mitakshara*, and other authorities recognised by the *Benares* school. That

the Plaintiff, as compared with her sister, is an indigent, or, in the words of the *Mitakshara*, "an unprovided daughter," seems to be clear. Their Lordships, therefore, though in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will assume that she has shewn a sufficient title to maintain this suit against the Defendant *Gokoolanund*, and to put him to proof of his alleged adoption.

Two distinct issues have been raised touching this adoption:—1. Whether it was ever made in fact; 2. Whether, if so made, it is good in law. And as to the first issue it is to be remarked that the Plaintiff has not been content to rely on any deficiency in the proof of the Defendant's case. She has set up, and undertaken to prove, a substantive case of her own.

The case of the Defendant is, that he was by birth the second son of *Nath Dass*, a distant kinsman of *Hullodhur Dass*; that at a very tender age he was taken into the house of *Hullodhur* with a view to his being adopted; that when about five years old, and in the year 1837, he was formally given by his natural, and received by his adoptive father, in adoption with the requisite ceremonies; that he was brought up and educated by *Hullodhur* as his adopted son, receiving from him at the proper age the investiture of the *Brahminical* thread, and being on a subsequent occasion given in marriage by him; that after he reached man's estate he continued to be recognised in the family as the adopted son, and took part in the management of its affairs; and that in the character of adopted son he performed the funeral ceremonies of *Jumoona*, and afterwards of *Hullodhur* himself.

On the other hand, the case of the Plaintiff is that the Defendant is not the son of *Nath Dass*, that he was by birth a *Kanouj Brahman*, or other native of the North-Western Provinces; that when young he was brought by other pilgrims to *Juggunnath*, and left at first in a sort of hospice attached to the temple which belonged to the elder brother of *Hullodhar*; that he afterwards lived in the house of one *Hira*, who is stated to have been a concubine of *Hullodhur*; that he was never on terms of commensality with *Hullodhur*; that he never was, and being the son of an unknown father, never could have been adopted by *Hullodhur*; that it was only as a *gomasta* or *dewan* that he ever took part in the management of *Hullodhur's* affairs; that *Hullodhur*, some years after the alleged adoption, really adopted one *Radhakrishna*, a son of one *Bhika Dass*, who subsequently died; and that *Hullodhur's* funeral rites were performed by the Plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might feel it difficult to pronounce with confidence for themselves which of these conflicting statements, supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. And their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the Plaintiff's statement, whilst the other Court had pronounced in favour of the Defendant. But that is not the way in which the case comes before them. The subordinate Judge, though he decided against the fact of the adoption, did not affirm that the original *status* and subsequent history of the Defendant were what the Plaintiff's witnesses represented them to have been; he did not find that *Radhakrishna* (as to whose adoption the evidence is of the most loose and general character) was ever adopted by *Hullodhur*; he did not find that the Plaintiff, and not the Defendant, performed the funeral rites of *Hullodhur*. It cannot therefore be said that the Judge before whom they were examined has pronounced the Plaintiff's witnesses to be worthy, and the Defendant's witnesses to be unworthy, of credit. On the contrary (giving, perhaps, a little more weight to some supposed admissions by two of the Plaintiff's witnesses than their words warrant), he expressed his belief "that the Defendant *Gokoolanund* had for years lived with, and been brought up, and treated as a

son, and married by *Hullodhur*." He held "it also to be clear from the evidence tendered for the defence that the Defendant had frequently been acknowledged by others as the adopted son of *Hullodhur*, and was even so styled by *Hullodhur* himself in a written statement filed by him in an Act IV. of 1841 Case before the Magistrate of *Balasore*." We have, therefore, the Judge of first instance affirming, contrary to the general evidence on the part of the Plaintiff, facts most material to the Defendant's case, and the genuineness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 *Hullodhur*, who might reasonably hope to beget, would adopt a son; upon the discrepancy between certain of the Defendant's witnesses as to the presence of *Nath Dass* at the ceremony; and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the Appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favour of the fact of adoption to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the Defendant's witnesses rather than to those of the Plaintiff, who have deposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the subordinate Judge himself admits, by the documents to which he has given credit; and it seems to their Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event.

Against a case so proved, the *primâ facie* improbability of the adoption on which the subordinate Judge so strongly relies cannot, in their Lordships' opinion, weigh very heavily. It must be recollected that it is met not merely by the story of the inference drawn by a *pundit* from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that *Hullodhur* and *Jumoona* had lived together as man and wife for a good many years before the final adoption without having issue.

Their Lordships must, therefore, deal with this case on the assumption that the fact of the Defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities cited upon this point that their Lordships reserved their judgment.

The objection to the adoption is that it was one of a very distant relation, not even within the class of *Hullodhur's sapindas*, made in violation of the preferential right of *Dinobundhoo*, the only son of *Juggunnath*, who was *Hullodhur's* brother by the whole blood, to be adopted.

The Plaintiff relies mainly upon certain texts of the *Dattak Mimamsa* and the *Dattak Chandrika*, of which the former is considered by the *Benares* school to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st, and the 67th *slokas* or paragraphs of the second section of the *Dattak Mimamsa;* and the 20th, the 21st, the 22nd, the 27th, and the 28th paragraphs of the first section of the *Dattak Chandrika*.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a *Hindu* wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a *dwyámushyána*, or son of two fathers.

The grave question, however, that arises in this case is whether the injunctions just referred to are merely binding upon the consciences of pious *Hindus* as defin-

ing what they ought to do, or are so imperative as to have the force of laws, the violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two propositions just stated, or at least the last of them, may well be qualified by the incontestable fact that *Hullodhur* was separate in estate from his brother *Juggunnath*. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators, with what logical sequence it is unnecessary to consider, from a text of *Menu*, which says:—"If one among brothers of the whole blood be possessed of male issue, *Menu* pronounces that they all are fathers of the same by means of that son." The direct consequence of this might well be that in an undivided family (the normal state of a Hindu family) the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his coparceners by survivorship. But in the case of a separated *Hindu*, the right of performing his obsequies, with the consequent right of succession, is in the absence of male issue in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a *dwyámushyóna* there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir *William Macnaghten* at p. 71 of his Principles and Precedents. And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession,—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to shew, and it is unreasonable to presume, that *Hullodhur* would have been content to receive, or *Juggunnath* would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents which describe the Defendant as the adopted son of *Hullodhur*, is some evidence that *Juggunnath* recognised that adoption as valid. Moreover, for aught that appears in the cause, *Dinobundhoo* may at the date of the adoption have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt* v. *Kunhia Singh* (1). That case arose in a district governed by the *Mithila* law. The Plaintiff claimed, under an adoption by his maternal grandfather, not in the *Dattak*, but in the *Kritrima* form, which is recognised by the *Mithila* law, to dispossess the nephew and heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the *Sudder* Court to another, who consulted different *pundits* and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note, no doubt, says, "According to the Hindoo law, while a brother's son exists, the adoption of any other individual as a son, either in the *Dattak* or *Kritrima* form of adoption, is illegal." But the force of this note is very much weakened by the fact that Sir *William Macnaghten*, who, being the editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the passage which will be presently cited. The decision itself was merely on an alleged

(1) 3 S. D. A. (Select Rep.,) p. 144.

adoption in the *Kritrima* form, which, in its inception and consequences, is very distinguishable from one in which the natural father parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the *Kritrima* form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir *Thomas Strange*, Mr. *Colebrooke*, and other text writers of eminence.

Sir *Thomas Strange*, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the Plaintiff relies, says: "But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred." And by his references to the cases collected in the second volume he shews that Mr. *Colebrooke*, and, more strongly, Mr. *Ellis*, were of this opinion.

Again, Sir *William Macnaghten*, just after referring to the case of *Ooman Dutt*, deals with the question thus: "It would appear, however, that according to the law of *Bengal* and elsewhere where the doctrine of the *Dattak Chandrika* is chiefly followed, and where the doctrine of '*factum valet*' exists, a brother's son may be superseded in favour of a stranger; and even in *Benares*, and in the places where the *Mimamsa* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own *sapinda* (a brother's son is the first), and failing them to adopt out of one's own *gotra*, is not essential so as to invalidate the adoption in the event of a departure from the rule." (Prin. and Proedt. of Hindu Law, p. 68.)

It may be further observed that even Mr. *Sutherland*, in his Synopsis (see *Stokes'* Codes, p. 656), says: "But though *Nanda Pandit* extends this principle (*i. e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote when a near kinsman, or of a stranger when a relative, may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the *Dattak Mimamsa* enjoins is to be taken as imperative and having the force of law, the language of the 74th Article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim "*Quod fieri non debuit factum valet*," though adopted by the *Bengal* school, is not recognised by other schools, and notably by that of *Benares*. That it is not recognised by those schools in the same degree as in *Bengal* is undoubtedly true. But that it receives no application except in *Lower Bengal* is a proposition which is contradicted not only by the passage already cited from Sir *William Macnaghten's* work, but by decided cases. The High Court of *Madras* in *Chinna Gaundan* v. *Kumara Gaundan* (1), and the High Court of *Bombay*, in *Rája Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav bin M. Ranadive* (2), acted upon it; and did so in reference to the adoption of an only son of his natural father, on which the High Court of *Calcutta* in *Rajah Opendur Lall Roy* v. *Ranee Bromo Moyee* (3) has refused to

(1) 1 Madras H. C. Rep., p. 54.
(2) 4 Bombay H. C. R. A. C. 191.
(3) 10 Suth. W. R., 347.

give effect to it, considering that particular prohibition to be imperative.

Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of *India* in this matter to a rule more stringent than that enunciated by such text writers as Sir *William Macnaghten* and Sir *Thomas Strange*. Their treatises have long been treated as of high authority by the Courts of *India*, and to overrule the propositions in question might distrub many titles.

Upon a careful review of the authorities their Lordships cannot find any which would constrain them to invalidate the adoption of the Defendant, even if it were more clearly proved than it is that *Hullodhur Dass* could have adopted *Dinobundhoo*, the only son of his brother. They will, therefore, humbly advise her Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

5th February, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SREEMUTTY NITTOKISSORY DASSEE, (Defendant)* ... ... } *Appellant,*

versus

JOGENDRO NATH MULLICK, (Plaintiff) ... } *Respondent.*

Hindu Widow—Amount of Maintenance.

Plaintiff sued as adopted son of *Choytun Churn*. Defendant is the widow of the said *Choytun Churn*. Plaintiff's adoption was proved.

Held that in determining the amount of maintenance to which the Defendant is entitled, the elements to be considered are, the position and status of the deceased husband and of the widow, the value of the estate, and the ordinary expenses of living, as well as other expenses required for her religious and other duties incident to the status in life which she might occupy.

Held further that the amount of maintenance ought not to be reduced as a punishment for her having unjustly defended the suit on the question of adoption.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is an appeal from a judgment of the High Court of *Bengal* sitting in its ordinary original jurisdiction. The action is brought by *Jogendro Nath Mullick*, claiming to be the adopted son of *Choytun Churn Mullick*; and the Defendant in the suit (the Appellant) is *Nittokissoree Dassee*, the widow of *Choytun Churn*, and his heir in default of his leaving a natural or adopted son. The principal question in the suit was whether the Plaintiff had been adopted by *Choytun Churn* or not. A great deal of evidence was gone into upon both sides upon the issue so raised. It is unnecessary for their Lordships to advert to that evidence, inasmuch as the learned counsel for the Appellant, upon his opening at their Lordships' Bar, expressed his inability to overturn the judgment on that issue by any argument that he could raise before us upon the evidence. Their Lordships think that in taking that course he exercised a wise discretion, and in no way injured the interests of his client. They have read the judgment of the High Court, and it appears to them that the case was very carefully tried. The judgment contains a lucid and elaborate analysis of the evidence, and assuming that analysis to be accurate, their Lordships can have no doubt that the Court arrived at a sound conclusion in declaring that the adoption had taken place.

Another question arises however in the suit, namely, the maintenance to which the Defendant is entitled as a widow,

* 5 Cowell's I. A., p. 55.

upon the assumption that the Plaintiff was the adopted son of her husband. Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a Master attached to the Court, for the Court to refer to the Master the question of maintenance, and to consider the proper amount upon hearing the report. In this case, the Court did not apparently make any separate inquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them, upon the general case. An ordinary form of reference appears to have been this: "Refer it to the Master to settle the amount, regard being had to the value of the estate." Their Lordships think that another element to be considered is the position and *status* of the deceased husband and of the widow. The main subject of inquiry would be the value of the estate; and the question for the Master, and ultimately for the Court, to consider would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy.

In this case, independently of the value of the property which has been disputed at their Lordship' bar, there were circumstances which the Court took into consideration, and which their Lordships think may properly be taken into consideration, not as conclusive upon the amount which ought to be awarded, but as affording some guide to the proper amount, if not a measure of it. It seems that the husband, *Choytun Churn*, about two years before his death, had given instructions for his will. That will was never executed, but the papers connected with it were given in evidence by the Plaintiff, and were relied upon as affording strong corroboration of his adoption. *Choytun Churn* himself gave instructions for his will to a solicitor of the name of *Sreenauth Chunder*, who happened to be the brother of *Jogendro*, the Plaintiff, and who was a partner in the firm of *Swinhoe, Law, & Co.* It seems that the testator in his first instructions desired that the interest of a *lakh* of rupees, in Government paper, should be given to his widow, and, in addition thereto, that she should live in the family house, and be maintained out of his general estate, as she had been in his lifetime. It seems that a draft was made in conformity with these instructions, which was copied; and after receiving the copy *Choytun Churn* had another interview with *Sreenauth*, and in that interview he altered the instructions which he had previously given, and instead of bequeathing the interest of one *lakh* of rupees to his widow for life, he desired that the *lakh* should be given to her absolutely. An engrossment was made of the will containing that bequest. Upon this question of maintenance the Court say, at the end of their judgment, after they had disposed of the principal issue that arose upon the adoption, "Under these circumstances, if it had been left to the Court to determine the sum which should be awarded to the Defendant in the future for her maintenance we should only have given her the most moderate provision which, having regard to her husband's property and position, the law would allow." The circumstances to which the learned Judges allude are those contained in their summary of the case which appears in the previous paragraph of their judgment, and there, after stating the main positions which they find in favour of the Plaintiff and of the adoption, they add, "That the fact of the Plaintiff being *Choytun Churn's* adopted son was perfectly well known to the Defendant and to all the members of the family." The Court therefore seem to have thought that she was not justified in defending the claim of the Plaintiff as she had done, and that opinion does appear to have influenced their judgment in awarding the maintenance which they thought sufficient to be allowed to her. They say, "We

should only have given her the most moderate provision under those circumstances." One cannot read that passage without perceiving that the Court reduced as low as they could, upon the principle upon which they proceeded, the maintenance which they allowed, as a kind of punishment to her for having defended a suit which they thought she must have known was properly brought against her. That the Court, being under this influence, should have allowed its judgment to be affected by it, their Lordships think was a departure from the strict principles which ought alone to have guided it. That influence operating on the minds of the Judges, they proceed to consider what they would allow; and in coming to that conclusion they bear in mind the bequest of the *lakh* of rupees intended to be made to her absolutely, and they refer to an offer which had been made by the Plaintiff. This is what they say:—"But the Plaintiff himself has relieved us of what might otherwise have been an unpleasant duty. He has intimated to us through his counsel that he desires the Defendant to have the same provision as she would have had if her husband's will had been duly executed." This they state to have been the desire of the Plaintiff. "And although, having regard to the Plaintiff being an infant, we do not consider it right to hand over to the Defendant absolutely a *lakh* of rupees out of the Plaintiff's property, we think we may without impropriety award her as maintenance the annual sum of Rs. 4000 payable monthly." If the objection was to handing over the *corpus* of a *lakh* of rupees, that might have been obviated by turning the value of the *lakh* of rupees into an annuity for the life of the widow, which would have produced a much larger sum than the interest merely at 4 per cent. upon the capital. Their Lordships do not say that the Judges were bound to do this; but on the principle on which they would apparently have acted but for the influence on their minds arising from the conduct of the Defendant in the suit, it seems not improbable that that is a conclusion at which they might have arrived. However, what they did was to award a sum of Rs. 4000. Their Lordships wish to guard themselves against its being supposed that they consider the Plaintiff bound by his offer, or that the widow is entitled to the *lakh* of rupees because it was intended to be given to her by the will. They think both those circumstances can be regarded only as elements which may properly be considered in determining a suitable amount of maintenance; and inasmuch as the Plaintiff at one time, through his guardian as it must have been, was willing to settle the matter amicably and to give the widow, and—as the Judges expressed it—desired that she should have the *lakh* of rupees, their Lordships entertain hope that when the matter is brought before him—if it should be brought before him in *India*—now he is of full age, he may be disposed to renew that offer, and if not to give the *corpus* of the *lakh* of rupees, to give an annuity which such a sum would produce. Their Lordships feel that they can do no more than send the case back with that intimation of their hope, and with this further intimation to the counsel here that, judging, as they do, from what they have seen in the Record and what they have heard from the learned counsel, they think that it would not be unfair to either of the parties if they could agree upon raising this sum of Rs. 4000 a year to Rs. 6000. Their Lordships feel that they cannot impose this arrangement upon the parties, but they throw it out as well worthy of their consideration to prevent any further litigation. If that sum is agreed to, then their Lordships would amend the decree here, by consent, by increasing the sum to Rs. 6000. If that is not assented to, their Lordships will have no other course but humbly to advise Her Majesty to remit the suit to the High Court of *Bengal* to determine, with reference to the considerations that they have thrown out, the proper amount of maintenance to be allowed to the widow.

On the 12th of February it was intimated to their Lordships by counsel on both sides that the parties in *India* adopted the suggestion made by their Lordships in the foregoing judgment, and their Lordships therefore agreed humbly

to report to Her Majesty that, the parties having consented thereto, the decree of the High Court of Judicature ought to be varied by raising the allowance to the widow for maintenance from Rs. 4000 to Rs. 6000 a year, and further that in other respects the decree ought to be affirmed, each party paying their own costs of this appeal.

8th, 9th and 12th, February, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

PERIASAMI and another, (Defendants)* ... } *Appellants,*

versus

PERIASAMI and others, Sons of SALUGAI TEVAR, (Plaintiffs) ... } *Respondents;*

and

RAMASAMI CHETTI and others, (Defendants)... } *Appellants,*

versus

PERIASAMI and others, Sons of SALUGAI TEVAR, (Plaintiffs) ... } *Respondents;*

and

KOSALARAMA PILLAI and another, (Defendants) } *Appellants,*

versus

PERIASAMI and others, Sons of SALUGAI TEVAR, (Plaintiffs) ... } *Respondents.*

Impartible zemindary—Renunciation—Separation of interests—Succession.

P, an impartible *zemindary* descendible by inheritance according to the custom of primogeniture, passed, on the death of their father, to V, the eldest of three undivided Hindu brothers. In 1829 V executed an instrument appointing M, his second brother, to be *Zemindar* of P. This instrument recited that by the death of R, his uncle, without male issue, V had become entitled to succeed to his estates, unless R's widow, then pregnant, should be delivered of a son. The instrument then provided that in the event of the said widow giving birth to a son V should retain the *zemindary* P, but that if she gave birth to a daughter, V and his offspring should have no interest in the said *zemindary*, of which M, should be sole *Zemindar*, allowing maintenance to O, the third brother. R's widow gave birth to a daughter. V entered on possession of R's estates, and M took over the *zemindary* P. O died without issue. M died in 1835 and was succeeded by his only son D, who died in 1861, leaving a widow but no son.

In a suit instituted in 1873 by S, a son of V, to recover certain villages belonging to the *zemindary* P, from Defendants in possession and claiming as purchasers for value from D, *Held* by the Judicial Committee, reversing the judgments of the Courts below, that the instrument of 1829 was a renunciation by V for himself and his descendants of all interest in P, either as the head, or as a junior member of the joint family, and that its effect was to make P, with its incidents of impartibility and peculiar course of succession, the property of the brothers M and O, as effectually as if in the case of an ordinary partition between the elder brother on the one hand, and the two younger brothers on the other, a particular property had been assigned to the latter; and that consequently as between D and the descendants of V, the *zemindary* was the separate property of the former, whose rights, if he left any undisposed of, passed on his death to his widow, notwithstanding the undivided status of the family, in accordance with the rule of succession affirmed in the *Shivagunga* case.

12th February, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The question common to the three suits which have been consolidated in the appeal before their Lordships is whether the Plaintiff, one *Salugai Tevar*, was entitled to recover from the Defendants in possession, all of whom claimed to be purchasers for value from the late proprietor *Dhorai Pandian* under different titles, seven villages, being in fact all that remained of the ancient *palayapat* of *Padamattur*, which seems to have consisted originally of ten villages.

The various questions which were raised and determined in the three causes, in all of which there was judgment for the

* 5 Cowell's I. A., p. 61.

Plaintiff, were substantially the same. Of these some are no longer contested, and of those that are contested, the only one that has been argued before their Lordships is whether *Salugai Tevar* had established a sufficient title to maintain the suits. It is upon this question alone that their Lordships have now to express their opinion.

Before doing so, however, they wish to make some observations upon the manner in which the Courts in *India* dealt with this question, as appears from the following passage in the judgment of the High Court. The learned Judges say, "The Defendants not only denied the legitimacy of the Plaintiff, but also asserted that *Dhorai Pandian*, the last proprietor, having left a widow, *Vellai Nachiar*, who is still alive, the right of suit is with her and not with the Plaintiff. The subordinate Judge, regarding the suit not as raising any question between contending heirs, but as a suit brought to recover from strangers family property unlawfully alienated by a member, held that the Plaintiff might sue, subject to any question between himself and others concerning the right to the inheritance. It appears to us that the right of *Dhorai Pandian's* widow, which was the only right urged in the Court below as prior to the Plaintiffs, cannot be maintained, for the estate of *Dhoria Pandian* was not a separate acquisition by him, following the course of succession prescribed for separate estate, but an ancestral estate of the character already mentioned, the right to which would vest on his death without issue in the next collateral male heir of the undivided family in preference to the widow. In this Court the Defendants have urged a new ground of objection to the Plaintiff's competency to sue, which is said to arise on the Plaintiff's deposition given in the suit. It is urged here that 'there are preferential heirs to the estate, who are descendants of an elder branch of the family.' We find that the Plaintiff, in his cross-examination, after mention of *Muttu Ramalinga Shervai*, the son of the *istimirar Zemindar*, whose legitimacy was questioned in the suit of 1823, says that his, the Deponent's, elder brother had two sons (by a kept mistress), and that there are three grandsons of his still living. The inquiry was not, so far as is shewn, fully pursued, nor was the Court asked to decide upon the matter, and the issue already noticed respecting the prior title of *Dhorai Pandian's* widow was alone tried and disposed of. A decision unfavourable to the Defendants having been given, they now seek in appeal to bring forward for the first time an objection to the Plaintiff's right to sue, which they declined to urge in the Court below. We think they cannot fairly be permitted in this stage of the case to defeat the suit by such an objection. If there are other and nearer heirs, their rights will remain unaffected, and any decree to be now given may make reservation of such rights. The Plaintiff for the purposes of the present suit may be regarded as entitled to the succession, and it is unnecessary to consider the arguments which were addressed to us on the subject of the course of descent of this property on the assumption that there were in existence descendants of his elder brother."

Their Lordships are of opinion that there is nothing to take these cases out of the general rule relating to actions in the nature of actions of ejectment, namely, the well-known rule that the Plaintiff must recover by force of his own title. They think that it would be in the highest degree unjust to allow the Defendants, who had been for nearly the whole time of prescription in possession of villages of which they claimed to be purchasers for value, to be turned out of possession by any person other than one who had established a clear title to present possession. To allow this on the ground that if there should turn out to be other persons with a higher title than the Plaintiff those persons might recover over against him, is obviously to deprive the Defendants of their undoubted right to defend their possession by setting up the *jus tertii*, and it is further to be remarked that those persons might possibly have been unable themselves to recover from the Defendants by reason of having by lapse of time or acts of confirmation or acquiescence lost the right to question their title.

With these observations their Lordships will pass to the consideration of the question before them, with reference to which it will be sufficient to confine their observations to the proceedings in the first and principal suit.

The particulars of the claim, as stated in the plaint, are that the *palayapat* of *Padamattur* was an impartible and ancient *zemindary* descendible by inheritance, according to the custom governing other similar *zemindaries* and to the Hindu law; that it was last ruled by a person with many aliases, being the *Dhorai Pandian* mentioned in the pedigree;* and that he held the right of ruling it till the 7th of November, 1861, when he died at *Padamattur*, without issue. The title of the Plaintiff to succeed to him is thus stated: "The Plaintiff being the son of the deceased *Muttu Vaduganadha Tevar*, who was the undivided brother of the said *Gouri Vallabha Tevar, alias Muttu Sami*, and of the deceased *Bodhaguru Tevar*, is the only son's son now surviving of *Oiya Tevar*," who was the common ancestor. The plaint therefore asserts a title in the Plaintiff to succeed to the *palayapat* on the death of *Dhorai Pandian*, and consequently the right to impeach the alienation of the villages made by him. The nature and impartibility of the estate have been found by the High Court confirming the decision of the Lower Court in these words: "We conclude that *Padamattur* is shewn to be (apparently like other similar groups of villages in the *Shivagunga zemindary*) a *palayapat* impartible, and therefore held by one member of the family and descending on a single heir." The question remains whether, on the death of *Dhorai Pandian* in 1861, the Plaintiff of right became the *polygar*. The facts stated in the plaint relating to his descent from the common ancestor are consistent with the pedigree set out above,* and may be taken as proved. And it may be true that upon those facts he would have been, according to the ordinary course of the Hindu law of succession, the next heir to *Dhorai Pandian* in the collateral line of succession if that person had left no widow, or if the widow were from the nature of her husband's estate incapable of inheriting it. It may, however, be a question whether, putting the widow's possible right out of question, he would be entitled to succeed to the *palayapat*. Nothing has been found by either Court in *India* as to the rule which governed the abnormal descent of *Padamattur* to a single heir. There is some evidence that up to the date of the transactions to be next considered it was governed in the course of direct descent from father to son, by the rule of primogeniture; but as to the rule in the case of collateral succession there is no evidence.

It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. *Oiya Tevar*, the then *Zemindar* of *Padamattur*, died in 1815. He was succeeded by his eldest son, *Muttu Vaduga*. That person had two brothers, and therefore, whether *Oiya Tevar* were previously joint with his brother *Gouri Vallabha*, the *istimirar Zemindar* of *Shivagunga*, in respect of *Padamattur* or not, the latter estate must be taken to have descended to *Muttu Vaduga*, as ancestral estate. He would therefore necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a *raj* or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers. In 1829, however, the uncle of the three brothers, who was *Zemindar* of the great impartible *zemindary* of *Shivagunga*, died. *Padamattur* appears to have been a subtenure of that estate, paying rent to the *Zemindar*, and it was supposed that if *Gouri Vallabha, deceased Zemindar*, left no male issue, that large estate would go, according to the *Mitakshara* law of succession in the case of joint family property, to his eldest

* See the table end of this case.

nephew, *Muttu Vaduga*, the then *polygar* of *Padamattur*. In consequence of this the family arrangement embodied in the document of 1829 set out above took place. The true construction and effect of that document will be afterwards considered. At present it is sufficient to say that the effect of it was to transfer the *palayaput* of *Padamattur* to the next brother, *Muttu Sami*, on whose death it descended to his only son *Dhorai Pandian*, who enjoyed it till his death in 1861. In the meantime the great estate of *Shivagunga* was enjoyed, first by *Muttu Vaduga*, next by his eldest son and second son in succession, and lastly, by his eldest grandson by that second son. During all that time, however, the litigation concerning the title to *Shivagunga*, of which the history will be found in the 9th volume of *Moore's* Indian Appeals, at page 539, was going on. That was finally determined in 1863, by the judgment of this Committee, which ruled that, though the *Zemindar* of *Shivagunga*, who died in 1829, had continued to be generally undivided in estate with the family of his brother *Oiya Tevar*, the former *polygar* of *Padamattur*, the *zemindary* of *Shivagunga* was his self-acquired property, and, therefore, descendible to his widows, and failing his widows, his daughter in preference to his nephew. The result of that decision was that *Shivagunga* passed from the line of *Muttu Vaduga*, who in 1829 had transferred the *polygarship* of *Padamattur* to his next younger brother *Muttu Sami*.

In the present case the Defendants, relying in some degree upon the final decision in the *Shivagunga* case, by their written statement insisted that the title of the widow of *Dhorai Pandian* to succeed to *Padamattur* on the death of her husband was preferable to that of the Plaintiff. They founded this contention upon the transaction of 1829, whereby, as they alleged, *Muttu Vaduga* absolutely abandoned and renounced all his right to *Padamattur* in favour of *Muttu Sami*. They also alleged that for some time prior to 1829 and since, the three brothers were divided in estate and interest, and were living as divided members of a Hindu family. This part of the defence led to the settlement of the 2nd, 3rd, 8th, and 9th issues in the suit. The 2nd and 3rd are, "Whether *Muttu Vaduga* relinquished his interest in the estate sued for; and if so, what is the effect of such relinquishment upon the Plaintiff's title."

The 8th issue is, "If the Plaintiff be found son of *Muttu Vaduga*, whether *Muttu Vaduga* and the last owner of *Padamattur* were divided or undivided." The 9th issue is "Whether the Plaintiff was entitled to bring this suit during the lifetime of the last owner's widow." Those issues of course involved two distinct questions, namely, first, whether *Muttu Vaduga* was for all purposes separated from his brothers; and secondly, whether he had not at least so parted with all interest in *Padamattur* as to make that particular property as between his descendants and *Dhorai Pandian* the separate estate of the latter and so subject to the rule of succession affirmed by the decision of this Committee in the *Shivagunga* case. In the course of the trial a further objection was raised to the Plaintiff's case on facts which came out in the course of his cross-examination. That objection was briefly to this effect, that though he was the only surviving son of *Muttu Sami*, there were sons and grandsons of one of his elder brothers who, as the Defendants contended, would have a preferential title to *Padamattur* even on the assumption that *Padamattur* was to pass as joint property. That question, although no issue in the suit had been settled with respect to it, was distinctly raised by the grounds of appeal. The High Court nevertheless declined to adjudicate upon it, for the reasons stated in the passage of their judgment which has been already read. Their Lordships think that if there were not sufficient materials before the Court to enable the learned Judges to decide the question thus raised, they ought to have directed an issue in order that the facts essential to such determination should be ascertained.

Their Lordships will consider in the first instance the first of the two objections which have been thus taken to the Plaintiff's title, viz., the preferential title of the widow. In doing this they will

assume that the Indian Courts have correctly found that after 1829 the status of the family, consisting of *Muttu Vaduga*, his two brothers, and their children, continued to be joint and undivided; and, consequently, that the only question is whether by reason of the transaction in 1829 the particular property of *Padamattur* ceased to be the joint property of the three brothers, and so upon the death of *Dhorai Pandian* became subject to the rule of succession already referred to, as affirmed by this Committee in the *Shivagunga* case. That question, of course, depends on the construction to be put on the instrument of 1829.

Now, various constructions have been put upon it. The first was that of the subordinate Judge. He says, "Although the relinquishment (taking it to be true) was thus rendered absolute,"—he is referring to the birth of the daughter of the deceased *Zemindar* of *Shivagunga*,—"and kept *Muttu Vaduganadha* and his offspring out of the *Padamuttur* estate for a time, yet, as they were judicially pronounced to come into the *Shivagunga* estate as usurpers, and were ousted from it, *Muttu Vaduganadha's* heir or heirs are entitled to revert to the *Padamuttur* estate." This construction, their Lordships think, cannot be maintained. There are no words which import a right of reversion. The true construction of the document cannot be affected by what happened subsequently. The grant, whatever its effect, was not necessarily avoided because subsequent events disappointed the expectation in which it was made, namely, that the estate of *Shivagunga* would remain in the line of *Muttu Vaduga*. One consequence of that construction and of the adoption of the doctrine of reverter might be to give force to the Defendant's second objection, because it would assume—if indeed such an assumption could be made consistently with what was ruled here in the *Tagore Case*—that a certain reversion remained in *Muttu Vaduga*; in which case it would be a grave question whether that reversion did not descend to his descendants in the direct line according to the law of primogeniture. Another construction was put upon the instrument by the High Court. Dealing with this part of the defence, the learned Judges say: "The Appellants' contention on this part of the case we understand to be that the instrument of relinquishment precludes all claims on the part of *Muttu Vaduganadha's* descendants that the family can no longer be regarded, as they admittedly were originally, as a joint and undivided Hindu family, and that under the terms of the *Limitation Act* XIV. of 1859, the Plaintiff's claim is barred, because *Muttu Vaduganadha* and his descendants are not shewn to have participated in the income or profits of *Padamattur* since the year 1829. Although the fact of the division of the family in or before the year 1829 was alleged by the Defendants in their written statement, no evidence of this was adduced, and it is only from the mode of enjoyment of the property and from the effect attributed to the instrument of relinquishment that this is inferred. We think it clear that the family must still be regarded as a joint Hindu family, and that *Muttu Vaduganadha's* renunciation of his right in 1829, whatever its operation on himself and his descendants in possession of the *zemindary* of *Shivagunga*, cannot operate further, and that, upon the death of *Dhorai Pandian* without issue, the right of succession, which then opened to the members of this joint family, was not affected by such renunciation. The words 'We and our offspring shall have no interest in the said *palayapat* but you alone shall be the *Zemindar*, and rule and enjoy the same,' must be construed with due regard to person using them, and the occasion when they were used. They refer to the estate and rights of the new so-called *Zemindar* of *Padamattur*, and amount to a declaration that the *palayapat* shall be enjoyed by him exclusively, the *Shivagunga Zemindar* disclaiming any joint interest. They are not a release by the latter for himself and his heirs of all future rights of succession, which might accrue to them as members of an undivided family." The last two sentences do not appear to their Lordships to be quite consistent. If the *Shivagunga Zemindar* had disclaimed any joint in-

terest, his words of renunciation taken alone would seem to imply that he had given up whatever interest he had, as a member of the joint family, in that estate. Their Lordships agree that such a renunciation would not deprive the descendants of *Muttu Vaduga* of such future rights of succession as they might afterwards have to that property, treating it as separate property *quoad* them,—such a right of succession, for instance, as might accrue to them in the present case upon the death of the widow. But it does seem to be inconsistent with the retention by them, "of all future rights of succession which might accrue to them as members of an undivided family." The construction of the instrument for which Mr. *Cowie* argued at the bar does not substantially differ from that of the High Court. He contended, as their Lordships understood, that the only effect of the transaction was to transfer the ostensible headship of the family, as regarded *Padamattur*, to the second brother and his direct descendants, and so virtually to reduce the position of *Muttu Vaduga* and his heirs to that of a junior line. This, however, is not the construction which, after some doubt, their Lordships think must be put upon the document. The heading of it is in these words: "Agreement passed on" such a day "by me, *Oiya Tevar's* son, *Muttu Vedugandha Tevar*, of *Padamattur*, in favour of my brother, *Gouri Vallabha Tevar*." It proceeds thus: "My junior paternal uncle, *Mutta Vijaya Raghunadha Gauri Vellabha Peria Udaya Tevar*, *Zemindar* of *Shivagunga*, having departed this life, leaving no male issue, I have become entitled to the said *zemindary*, and you, as my next younger brother, are appointed *Zemindar* of the *palayapat* of the said *Padamattur*." It then refers to the pregnancy of one of his uncle's wives, and says, "I shall act as usual in the matter in the event of her giving birth to a son." Those words shew that where the grantor meant to make a gift on a condition he knew very well how to express what the condition was to be; and this affords an additional argument against the construction put upon the document by the subordinate Judge. Then follows this clause: "But should she be delivered of a daughter"—an event which happened—"I and my offspring shall have no interest in the said *palayapat*, but you alone shall be the *Zemindar*, and rule and enjoy the same, allowing at the same time, as per former agreement, to the younger brother, *P. Bodhagarusami Tevar*,"—who in the pedigree is called *Chinna Sami*,—"the village that has been assigned to him before." Now the plain meaning of those words seems to their Lordships to be that *Mutta Vaduga* renounces for himself and each of his descendants all interest in the *palayapat*, either as the head or as a junior member of the joint family, whilst at the same time he reserved expressly the rights of the youngest brother, *Chinna Sami*. The effect, therefore, of the transaction, in their Lordships' opinion, was to make this particular estate the property of the two instead of the three brothers, with, of course, all its incidents of impartibility and peculiar course of descent, and to do so as effectually as if in the case of an ordinary partition between the brother, on the one hand, and the two younger brothers on the other, a particular property had fallen to the lot of the two.

This construction seems to their Lordships to be strengthened rather than weakened by the subsequent clause as to the debts. He says, "As regards any debt contracted by me during the time that I was *Zemindar* of the *palayapat* you shall have no concern at all therewith, but I shall myself be responsible for the same." That clause reads as if he wished to transmit the *palayapat*, in which he had abandoned all interest, to his brothers, cleared of the debts incurred by himself as *polygar*, whatever might have been their nature, and whether they were a charge upon the estate or not. Their Lordships see no great improbability in such a transaction. *Muttu Vaduga* believed himself to be, by a title not then disputed, the proprietor of the large and valuable estate of *Shivagunga*. He might therefore well be content to abandon in favour of his brothers all his interest in the comparatively inconsiderable sub-tenure of which, as *Zemindar* of *Shivagunga*, he had become

the superior landlord. That he should have done so and have afterwards lost *Shivagunga* was, no doubt, a misfortune for his family, and would be the greater subject of regret if the *polygarship* of *Padamattur* now carried with it anything more than the right of disputing transactions which were very possibly entered into by the parties in the *bonâ fide* belief that *Dhorai Pandian* had become sole owner of the estate; as, if their Lordships' construction of the document is right, he would have become upon the death of *Chinna Sami* without issue. But this unfortunate consequence cannot, in their Lordships' view, affect the construction of the document, which must be considered by the light of the circumstances as they existed at the time of its execution.

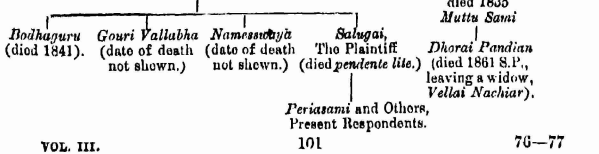
Again, their Lordships may observe, their construction of the instrument is somewhat corroborated by what seems to have been the understanding of the family. It appears that in the suit in which *Muttu Vaduga's* eldest son, *Muttu Sami*, and *Chinna Sami* were sued together for debts alleged to be a charge upon the *palayapat*, both the first and the second Defendants invoked the transaction of 1829, the first contending that as his father had transferred the estate to his brothers, the second and third Defendants, he was no longer responsible for the debt; *Muttu Sami*, on the other hand, relying on the clause in the deed of 1829 by which *Muttu Vaduga* had agreed to take such debts upon himself.

Then, again, in the cases in which *Chinna Sami* first, and afterwards his widow, were so ill-advised as to raise the question of the partibility of *Padamattur*, the suits seem to have been brought against the representatives only of *Muttu Sami*, and the representatives of *Muttu Vaduga* are treated as having no interest in the matter. And, lastly, their Lordships' construction is in some degree further confirmed by the acquiescence of the Plaintiff himself for nearly twelve years in the conveyances and transactions which he now seeks to impeach.

Their Lordships then have come to the conclusion that, as between the descendants of *Muttu Vaduga* and *Dhorai Pandian*, the *palayapat* was the separate property of the latter; that on the death of *Dhorai Pandian*, his right, if he had any left undisposed of in the property, passed to his widow, notwithstanding the undivided *status* of the family; and that therefore the case was one to which the rule of succession affirmed in the *Shivagunga Case* applies.

It follows therefore that their Lordships dissent from the finding of the two Indian Courts on the ninth issue, and hold that the Plaintiff had no title to sue in the life of the widow of *Dhorai Pandian*. This being so, it is unnecessary to consider the other objections taken to the Plaintiff's title. That objection involves considerations of some difficulty which perhaps could hardly be satisfactorily determined without further evidence as to the customary rule of succession to *Padamattur*.

The following pedigree will be found useful to the above case.



Their Lordships will humbly advise Her Majesty to reverse the decrees of both the High Court and the subordinate Court, and to dismiss the three suits, with costs, in both Courts. The Appellants must also have their costs of the appeals; but in taxing those costs the Registrar must set off against the amount of costs payable by the Respondents the taxed costs of the application to bring in fresh evidence, which were in any case to be borne by the Appellants.

14th February, and 12th March, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner, Central Provinces.

SETH GOKUL DASS GOPAL DASS, (Plaintiff)* } *Appellant,*

versus

MURLI and ZALIM, (Heirs of TARAPAT) (Defendants) ... ... } *Respondents.*

Interest on Decrees—Indian Contract Act, s. 20, and s. 23, cl. 2, Mistake of Fact and of Law—Error in Statement of Account.

Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit.

Where the property of a judgment-debtor had been attached in execution for a sum claimed to be due under a decree, but which sum in fact included interest not awarded by the decree,—*held*, that an agreement, whereby the debtor obtained the release of his property on condition of paying by instalments the entire amount claimed inclusive of the interest, was not unlawful and void under cl. 2, s. 23 of the Indian Contract Act; and that the mistaken belief of the parties to the agreement that interest could be recovered by proceedings in execution was not a mistake of fact rendering the agreement voidable under s. 20 of that Act.

In a written agreement by a debtor to pay his debt by instalments, securing the payment by a mortgage of land, the amount of the debt was erroneously stated to be greater than it actually was. In a suit on the agreement, *held*, that such an error was ground for reforming the account, but not for setting aside the agreement.

12th March, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of *India*, in a suit instituted by the Appellant against the Respondents in the Court of the Deputy-Commissioner of *Jubbulpore*, for the foreclosure of a mortgage.

The following are the circumstances under which the mortgage was executed:—On the 27th of June, 1859, the Appellant obtained a decree in the Court of the *Sudder Ameen* of *Jubbulpore* against *Tarapat Patel, malguzar* of *Khairi*, the father of the Defendants, for the sum of Rs. 9,413. 15*a*. 3*p*., being the balance of principal and interest due upon a bond executed by *Tarapat* and the costs of suit. The decree was silent as to the payment of future interest on the amount decreed. By the bond upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of 1 per cent. a month.

Between the date of the decree and the 27th of June, 1865, the Plaintiff endeavoured on several occasions to obtain payment of the amount decreed, and did in fact realise portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the Plaintiff, or of the litigation which ensued upon them. It is sufficient to state that in their Lordship's opinion no laches can be imputed to the Plaintiff in endeavouring to enforce the decree.

In February, 1865, the Plaintiff applied to the Court of the Deputy-Commissioner of *Jubbulpore*, against the Defendants and their father, *Tarapat*, for an attachment and sale of their rights in the village of *Khairi* in execution for the sum of

* 3 Cowell's I. A., p. 78; 3 I. L. R., Cal. p. 602.

Rs. 13,498. 9*a*. 9*p*. claimed to be due under the decree.

That sum included interest on the amount of the decree calculated up to the 14th of October, 1863, after giving credit for payments made on account. Upon that application the Defendants and their father were ordered to be summoned, and upon their non-appearance an order was made on the 25th of July, 1865, for the attachment of their proprietary rights in the village, and for the sale thereof by public auction, after due notice, according to sects. 248 and 249 of Act VIII. of 1859.

On the 3rd of August in the same year orders were issued that the requisite notifications, according to sect. 249, be issued, and that the sale of the right and interest of Defendants in the village of *Khairi* should take place on the fortieth day from that date.

On the 4th the present Defendants presented a petition to the Deputy-Commissioner praying to be relieved from liability for the Plaintiff's claim, and that the attachment might be removed from the village. Upon that petition an order was passed refusing to alter the order already made, and stating that as the Defendants had failed to appear on the date appointed for hearing, the case had been disposed of in their absence, the reason why they had absented themselves not having been explained. From that order they appealed to the Commissioner, and their appeal was rejected.

On the 18th of September, 1865, the mortgage upon which the suit was brought was executed. It was by conditional sale in the following words:—

"*Seth Khusalchand* and *Gokul Dass*, of *Jubbulpore*, Plaintiffs; v. (1.) *Tarapat*, (2). *Murlidbar*, (3). *Zalim Singh*, *Patel*, residents and *malguzars* of the village *Khairi*, *pergunnah Patan*, Defendants.

"Claim.

"Execution of Decree for Rs. 13,498. 9*a*. 9*p*.

"We, *Tarapat*, *Murlidbar*, and *Zalim Singh*, *patels* and residents of *Mouzah Khairi*, Defendants, are the writers of this agreement.

"The Plaintiffs above-named having taken out execution of a decree for the sum above-mentioned, and applied for attachment and sale of the village *Khairi*, the 13th of September, 1865 was first appointed as the date for the sale of the village in accordance with orders from the Judicial Commissioner. Subsequently the 18th of the said month had been fixed as the date for sale, in liquidation of a sum of Rs. 16,498. 9*a*. 9*p*.

"We have now brought the Plaintiffs to terms, and having gone into the accounts, we agree to pay Plaintiffs as principal, interest, costs, and future interest on the decree, in all 19,000 Government *Sicca* rupees.

"Of this we have caused Rs.5000 to be paid by *Naraindass* and *Raghoonath*. This leaves a balance of 14,000 Government rupees, which we agree to liquidate, paying no interest, by yearly instalments as detailed below, and until the liquidation of the whole amount due we hereby mortgage or conditionally sell the village in question, the condition being that in the event of our failing to pay any one of the instalments agreed upon the sale of the village shall become absolute; we and our heirs would then forfeit all proprietary rights in the village, and such rights would be transferred to Plaintiffs, to be thenceforward enjoyed by them and their descendants. Should, however, the failure on our part to pay the instalments in arrears be attributable to unfavourable seasons, &c., the said instalments will be payable next year, and will bear interest at 1 per cent.

"Should the payment in arrears be not made in the next year, along with the one due for that year, the sale of the village will be considered absolute. The terms of this deed of sale would be binding on our heirs and representatives also, and so long as the money due to Plaintiffs remains unpaid, the village shall not be transferred by us to any one else; any such transfer, if made, shall be held to be illegal.

"We relinquish all claims to any money which the Plaintiffs may have recovered at the time of the sale becoming absolute."

The details of the instalments were for the payment on the 15th *Aghan-Sambat*,

1922, corresponding with the year 1865, of the sum of Rs.2000., and on *Jeth* 15 in each of the following twenty years, of the sum of Rs.600., making a total of Rs. 14,000.

On the same 18th of September, 1865, *Tarapat*, the father, each of the Defendants and the Plaintiff respectively, made the following statements, viz. :—

"*Tarapat*, Defendant, son of *Mahadeo*, caste *Koormee*, aged fifty years, *malguzar*, resident of *Khairi*, states on solemn affirmation :—

"'We have effected a settlement of his claim with the Plaintiff by hypothecating our village, and fixing instalments for the liquidation of the same, and beg that our village be released from attachment.' 18th September, 1865.

"*Murli*, Defendant, son of *Tarapat*, caste *Koormee*, aged twenty-eight years, resident of *Khairi*, *malguzar*, states on solemn affirmation :—

"'Having effected a settlement of his claim with the Plaintiff by fixing instalments for its liquidation, I beg that the village be released from attachment. We have hypothecated our village as a guarantee for the liquidation of Plaintiff's claim.' 18th of September, 1865."

"*Zalim*, Defendant, son of *Tarapat*, caste *Koormee*, aged twenty-one years, resident of *Khairi*, *malguzar*, states on solemn affirmation :—

"'We have fixed instalments for the payment of the Plaintiff's claim, and beg that our village be released from attachment. We have mortgaged our village to Plaintiff'. 18th of September, 1865.

"*Seth Khusalchand*, son of *Sawaram*, aged sixty-two years, caste *Maheshree*, resident of *Jubbul*, and a *mahajun* by profession, states on solemn affirmation :—

"'I have taken out execution of a decree against *Tarapat Murli*, and *Zalim*, and their village was about to be sold. The Defendants have, however, made an amicable arrangement for the liquidation of my claim by agreeing to pay instalments, which I have approved. I have no objections whatever, and I beg that the arrangements be sanctioned by the Court, and the village released from attachment. The Defendants have hypothecated the village, and I wish that it should remain so hypothecated, and the case be struck off the file.' 18th September, 1865."

The mortgage was on the same day presented by the Defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy-Commissioner, who thereupon, on the 19th of September, 1865, ordered that the *kistbandi* be sanctioned and the case struck off the file as completely disposed of.

The Defendants continued to pay the instalments under the mortgage up to 15th *Jeth*, 1929, but failed to pay the instalments which fell due in *Sumbat* 1930 and 1931; whereupon the Plaintiff on the 24th of October, 1874, filed his plaint and prayed for a decree for Rs. 7,800, the amount of the instalments remaining unpaid, with a proviso that in the event of the same not being paid up within one year, the rights and interests of the Defendants and their deceased father in the village in question be transferred to Plaintiff, the transaction being then considered as one of an absolute sale.

The Defendants in their written statement alleged, amongst other things, that in June, 1859, a money-decree for Rs. 9,413. 15*a*.3*p*. was passed against *Tarapat*, their father, and that future interest on the decree was not allowed; that the Plaintiff, however, fraudulently went on executing the decree with interest, and eventually, in September, 1865, induced *Tarapat* and the Defendants to execute the deed sued on by dishonestly concealing the fact that future interest had not been decreed.

They also stated that they were ignorant people, and that they executed the deed under a mistake of fact, *i. e.*, under the impression that future interest had been decreed as represented by the Plaintiff; that at the time when the deed was executed, only Rs. 3,798. 4*a*. 9*p*. were due under the decree, and that the Defendants were minors at the time of the execution of the deed.

The plea of minority was found against the Defendants, but the Deputy-Commissioner dismissed the Plaintiff's suit with costs, upon the ground that the claim was based on an illegal contract. He held that

even if the Plaintiff had a right to demand the sum of Rs. 13,498. 9*a*. 9*p*. for which execution had been awarded, there was not sufficient explanation as to how that amount was increased to Rs. 16,498; and further, that even if, as the Plaintiff's counsel had suggested, the Plaintiff in making up the accounts with Defendants added interest for the period from October, 1863, to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for, in the view of the Deputy-Commissioner, it was evident that the Plaintiff was well aware that he had no real claim to interest. But he went further, and held that the plaintiff was not entitled to any interest on the decree; that Rs. 4,820 only were due; and that the Plaintiff, by concealment of facts regarding the amount due, and by misrepresentation of facts, as shewn by the proceedings in the original case, and the application for execution for Rs. 3,000 in addition to the Rs. 13,498 were sufficient grounds for considering that the transactions out of which the contract grew were unlawful.

Upon appeal, the Commissioner was of opinion that there was no sufficient evidence of concealment, but that there was misrepresentation with regard to Defendant's liability to interest within the meaning of Definition 1, sect. 18, of the *Indian Contract Act*, No. 9, of 1872. He further held that the bond was nothing more than a *kistbandi;* that no new consideration for it was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been pronounced invalid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties. He therefore held that the contract was illegal and void under clause 2, sect. 23, of the *Indian Contract Act*, and dismissed the appeal with costs.

A special appeal was preferred to the Judicial Commissioner, who dismissed it with costs, on the ground that the deed was voidable under sect. 20 of the *Indian Contract Act*, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent misrepresentation or concealment of facts on the part of the Plaintiff. There was, no doubt, a mistake of law on the part of the Defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realisation, no such interest having been awarded by the decree. But that mistake appears to have been common, not only to the Plaintiff and the Defendants, but also to the Assistant Commissioner, by whom the order of the 25th of July, 1865, was made for the attachment and sale of the village in execution for the sum of Rs. 13,498. 9*a*. 9*p*. Indeed, until the Full Bench ruling of the High Court of *Bengal* in September, 1866, in the case of *Mosoodun Lall* v. *Bheekaree Singh* (1), the principle of which was upheld by the Judicial Committee in the case of *Pillai* v. *Pillai* (2), there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

In that uncertain state of the law, the Defendants not having appeared to shew cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs. 13,498. 9*a*. 9*p*., which included interest on the decree. No appeal was preferred against that order, nor were any other proceedings adopted to set it aside. It remained in force up to the time of the mortgage, and the village had been actually attached and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the grounds stated by the Commissioner or upon that stated by the Judicial Commissioner. It appears to have been executed by way of compromise, after an examination of the accounts at which the father *Turapat* was present; and it does not appear to their Lordships that, subject to what will hereafter be said as to a sum of Rs. 3000, part of the money secured, the Plaintiff gained any uncons-

(1) 6 Suth. W. R. Mis. Rul., 109.
(2) Law Rep., 2 Ind. App., 228.

cionable advantage by the transaction; for although he was not strictly entitled to an execution for interest caculated for a period subsequent to the date of the decree, there seems to be no reason why he should not have recovered interest as damages in an action upon the decree if he and the Court which issued the attachment had not mistaken his remedy. It is not necessary to refer to the English decisions bearing upon the subject of recovering by action interest upon a judgment which cannot be levied by execution. In the case of *Pillai* v. *Pillai* (1), to which reference has already been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, stated expressly that questions of that nature might be raised by separate suit.

It may be remarked that the rate at which interest was calculated for the period between the execution of the mortgage and the times fixed for the payment of the instalments was extremely low.

It appears, however, to have been assumed that the sum for which the village was liable to be sold in execution was not Rs. 13,498. 9*a*. 9*p*., but Rs. 16,498. 9*a*. 9*p*.

The recital in the mortgage is, "Subsequently the 18th of the said month had been fixed as the date for sale in liquidation of a sum of Rs. 16,498. 9*a*. 9*p*." As to this the Judicial Commissioner says: "In the first Court's judgment the larger sum of Rs. 16,498. 9*a*. 9*p*. is referred to as entered in one of the processes of execution, viz., 'the notice of sale,' but the extant record of proceedings nowhere mentions such a sum. If such a sum was ever entered in such a process it must apparently have been only through a clerical error." Although there does not appear to have been any wilful misrepresentation in this respect by the Plaintiff, their Lordships are of opinion that there was no authority under sect. 249 of Act VIII. of 1859 for increasing the amount for which the village was ordered to be sold in execution from Rs. 13,498 to Rs. 16,498; that the addition has not been satisfactorily explained; and that the deed ought to be reformed by disallowing the additional sum of Rs. 3000. This will reduce the sum secured by the mortgage by Rs. 3000, and a proportionate part of the sum allowed for future interest during the period stipulated for payment by instalments, which may be taken in round numbers as together amounting to Rs. 3480. Deducting Rs.3480, and the eight instalments of the Rs. 14,000 which have been paid, amounting to Rs. 6200, from the total amount of Rs. 14,000 secured, there remains the sum of Rs. 4320 to be paid by the Defendants to the Plaintiff in order to redeem the abovementioned village.

Their Lordships will therefore humbly advise Her Majesty that the decrees of the three Lower Courts be reversed; that in the event of the Defendants paying to the Plaintiff the sum of Rs. 4320, together with the costs of the Plaintiff in the three Lower Courts, within one year from the time of the service upon them of notice of such order of Her Majesty in Council as shall be made in this appeal, or in the event of their paying into the Court of the Deputy-Commissioner of *Jubbulpore* within that period the said sum of Rs. 4320, together with such costs as aforesaid for the use of the Plaintiff, the said village shall be freed and discharged from the said mortgage; but that in the event of the said sum of Rs. 4320 together with such costs as aforesaid, not being paid to the Plaintiff by the Defendants, or paid by them into the said Court for the use of the Plaintiff within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title, and interest of the Defendants in the said village shall be transferred to and vested in the Plaintiff; and in order that due notice of such Order in Council shall be given to the Defendants, their Lordships will further advise Her Majesty that the Plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the Deputy-Commissioner of *Jubbulpore*, in order that notice thereof may be given to the Defendants in due course, and that the Plaintiff do also deposit in

(1) Law Rep., 2 Ind. App., 219.

the said Court such an amount as may be required to defray the costs of serving upon the Defendants notice of the said order.

Considering the peculiar circumstances of this case, and also the fact that the Plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the Respondents ought not to be ordered to pay the costs of this appeal.

5th, 6th, & 8th March; and 13th April, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Allahabad.

SHEO SINGH RAI, (Defendant)* ... ... } *Appellant,*

versus

MUSSUMAT DAKHO and MOORARI LALL, (Plaintiffs) ... } *Respondents.*

Usage of Jains—Estate of sonless widow—Her power to adopt—Position of adopted son—Rights of widow during Son's minority—Declaratory decree, when to be given—Obstruction to Title—Nuncupative Will—Special leave to Appeal.

On the evidence given in this case *held* that, according to the usage prevailing in *Delhi* and other towns in the North-Western Provinces, among the sect of the *Jains* known as *Saraogee-Agarwalas*, a sonless widow takes an absolute interest in the self-acquired property of her husband, has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes place of a son begotten.

Quære—Whether on such an adoption the widow is entitled to retain possession of the estate either as proprietor, or as manager of her adopted son.

A declaratory decree ought not to be made unless there is shewn to be a right to some consequential relief, which, if asked for, might have been given by the Court, or unless a declaration of right is required as a step to relief in some other Court. *Katama Nachiar* v. *Dorasinga Tevar* (1) approved.

A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

Semble—Where a Defendant sets up a nuncupative will as entitling him to property in respect of which the Plaintiff asks for a declaration of his right, a right to have such will declared null and void arises in cases where property legally passes by a will of that nature, since a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred.

A Defendant obtained special leave to appeal to Her Majesty in Council on the ground that the case involved questions of law of great importance to the *Jain sect* of which was a member. On the appeal coming on for hearing he contended that the suit should have been dismissed by the Courts below as a claim for a declaration of right in respect of which no consequential relief was sought or could be given. *Held* that, considering the special grounds on which the Defendant had obtained leave to appeal, the somewhat technical character of the defence he now put forward, and the general circumstances of the case, he ought not to be allowed to insist on this objection.

13th April, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This is an appeal from a judgment of the High Court of the North-West Provinces, which substantially affirmed a decree of the subordinate Judge of *Meerut*.

The suit was originally brought by the Respondent, *Mussumat Dakho*, the sonless widow of *Ishq Lall*, in her own name; *Moorari Lall*, her daughter's son, whom she had adopted, being afterwards added as co-Plaintiff. The Defendant (the Appellant) was a younger brother of *Ishq Lall*.

The family were *Saraogee-Agarwalas*, one of the divisions of the sect of *Jains*, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the Respondents allege, from the ordinary law by which *Hindus* are governed. This difference gives rise to the principal questions to be decided in the present suit.

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* 5 Cowell's I. A., p. 87; 1 I. L. R., All., p. 688.

(1) 2 Cowell's I. A., p. 109; 15 B. L. R., p. 83; *Ante* p. 456.

Ishq Lall died in 1867. He left considerable property, including government notes to the value of upwards of five *lakhs* of Rupees. The widow took out the certificate of administration of his estate, and obtained possession of it.

It is admitted that the adoption by the *Mussumat* of her grandson was made without any authority expressly derived from her deceased husband, and without the consent of his kindred—an adoption therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindu law.

The immediate occasion of the suit arose in the following manner:—*Ishq Lall*, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the *zemindary* of *mouzah Nobali*, in *pergunnah Baghpat*, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the *mouzah* to his widow, and she purchased it at the price of Rs.6,206. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that whilst making up the *wajibulurz* (a document called by the subordinate Judge "the village administration paper"), the Settlement Officer called upon the widow to name her successor to the *mouzah*, with a view to enter the name in this paper; and that in answer to this requisition she requested that the name of *Moorari Lall* should be recorded as her adopted son and successor. The Appellant objected to this being done, and the Settlement Officer thereupon ordered the following special entry to be made in the *wajibulurz*:—

"Para. IX. Regarding special tribes and customs of adoption, second marriage, or succession.

"*Mussumat Dakho* desired that *Moorari Lall*, her daughter's son, whom she adopted, should succeed her after her death. But *Sheo Singh Rai*, the younger brother of her husband, on hearing this, objected that it is illegal that an adoption should take place without the permission of the husband's near relations. The Settlement Officer therefore passed the followidg Order on the 15th of July, 1871: 'The parties may get this point decided by Civil Court, and all points of this paragraph shall be decided by order of the Civil Court.'"

Both the Courts in *India* have stated that the Settlement Officer, in calling upon the *Mussumat* to name her successor, acted in excess of his powers. It has not been shewn what is the precise object of the *wajibulurz*, nor what are the regulations or orders under which it is made. The reference to "Paragraph IX. Regarding special tribes and customs of adoption, second marriage, or succession," seems to indicate that when those special customs are found to exist, it is desired that they should be recorded for the information of the Settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the *Mussumat* by the *Tahsildar*, and that she should be advised to have the question settled by the Civil Court.

The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The plaint (the widow being sole Plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession "by establishment of Plaintiff's exclusive right of inheritance to the estate of her husband, composed of the *mouzah* above described, and to uphold the adoption of *Moorari Lall*, Plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the Defendant's pretensions, under the usages and customs of the *Saraoges* religion." It then alleges that the Defendant during the progress of the late settlement, raised the objection that the widow cannot, unless with the consent of the relations of the family, make an adoption, and that the Plaintiff was referred to the Court by the Settlement Department.

The Defendant, in his written statement, after objection to the suit on the grounds that the adopted son was not made a party to it, that the entry in the *wajibulurz* did not give a cause of action,

and that the suit was unnecessary and premature, stated his defence on the merits as follows:—

"3rd. The law of inheritance applicable to the *Jains* is nothing different from the *Shastras*. They are all subject to the common Hindu law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid; moreover, the custom of adoption is not universally recognised among the people of this sect.

"4th. Among the *Jains*, a widow is not competent of herself to adopt a son, unless with the permission of her husband or the consent of the near heirs.

"5th. The Plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The Defendant, the brother of the deceased, is, under the *Shastras* as well as a verbal declaration of *Ishq Lall*, the owner and possessor of the whole of his estate. The Plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the Defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the *Saraogee-Agarwalas Jains*, the subordinate Judge, without specifically deciding upon these customs, dismissed the suit on the ground that the Plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the subordinate Judge had not sufficiently inquired into and ascertained the special customs of the *Jains*, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under sect. 351, *Civil Procedure Code*, and directed that an opportunity should be given for making the adopted son a party to the suit.

The following passage of the judgment contains the view of the Court with regard to the nature and scope of the inquiry to be made by the subordinate Judge:—

"We are invited by the pleaders of the parties in this Court to give directions to the Court below on the questions of Jain law which are raised in this suit.

"The *Jains* have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them; and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the *Jain* community in the places in which they are said to be numerous and respectable, viz., *Delhi*, *Muttra*, and *Benares*. The questions to be addressed to these gentlemen would be the following:—

"'What interest does the widow take under Jain law in the moveable and immoveavle property of her deceased husband? and does her interest differ in respect of the self-acquired property and the ancestral property of her husband? Is a widow under Jain law entitled to adopt a son without having received authority from her husband, and without the consent of her husband's brother? May a widow adopt the son of her daughter? By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?

"'Has the adoption of a son by a widow any effect, and (if any) what effect in limiting the interest which she takes in her husband's estate? And if the subordinate Judge considers that the verbal gift which the Respondent alleges is established by proof, he might further inquire whether such a gift is valid as against the widow?'"

Upon the suit being thus remanded, *Moorari Lall*, the adopted son, was made a co-Plaintiff, the *Mussumat* being appointed his guardian.

Commissions to take evidence as to the customs of the *Saraogee-Agarwala Jains* were then issued to *Delhi*, *Jeypore*, *Muttra*, and *Benares*, and several leading members of that division of the *Jain* community were examined under them at each of these places. The subordinate Judge has thus summarised their evidence:—

"With the exception of one from

Delhi, the others unanimously declare that, in the absence of any son, a *Jain* widow succeeds to the estate of her husband, moveable and imoveable, in absolute right. 1st. That she can deal with it at pleasure and without restriction. 2nd. That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband, or relatives of such deceased husband; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done, with a slight restriction. 3rd. That a nuncupative will by her husband would not be valid as against her; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

The subordinate Judge then made a decree in favour of the Plaintiff in the following terms:—

"That the Plaintiff is entitled to a decree to be maintained in possession of the *zemindary* property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The Defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at *Jeypore*, had not been examined on oath. Another ground was, "That the finding of the subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the Plaintiff in favour of the Appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of opinion that it would not be proper to decide the important questions of Jain law involved in the case upon the evidence of the *Jeypore* witnesses alone, they determined, before finally disposing of the appeal, to issue fresh commissions from their own Court to *Delhi*, *Muttra*, and *Benares*. These commissions were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than on the first occasion.

Upon the return of these commissions, the cause was finally heard by the High Court, and the judgment now under appeal pronounced. It contains the following general account of the history and religious tenets of the *Jains*:—

"The parties are *Saraogee-Agarwalas*, one of the numerous sub-divisions of the sect of the *Jains*. What little is known of the history of that sect is to be found collected in the learned judgment of the Chief Justice of *Bombay* in *Bhagvandas Tejmal* v. *Rajmal* (1). For upwards of eleven and twelve centuries they have seceded from the creed of the *Vedas*, and their religious tenets have more affinity with the precepts of the *Buddhists* than with those of the *Brahmins*. They recognise the cast system of the *Brahminical Hindus*, and in such ceremonies as they retain, generally avail themselves of the assistance of a *Brahmin*.

"They differ particularly from the *Bhraminical Hindus* in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object."

The judges then proceed to an elaborate review of the decisions in *India* in which the laws and customs of the *Jains* have been considered. It appears to have been contended before them, to use the words of the Court, "that the applicability to *Jains* of the laws of the *Brahminical Hindus*, or what is generally termed *Hindu* law, had been established by so many rulings that the Court was bound to apply it to this case;" and further, that no uniform and consistent body of customs and usages existed among the *Jains* which would enable the Court to affirm that the general law was modified by them. It certainly appears that in most of the decisions referred to by the Judges, the Courts

(1) 10 Bomb. H. C. R., 241.

had held that there was no sufficient proof of the existence of special customs among the *Jains* to displace or modify the general law, though in others, were sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the *Jains* might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved, effect ought to be given to them. The learned counsel for the Appellant, who argued the case at their Lordship's Bar, felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable if it had appeared that in *India*, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether *Hindu* or Mahomedan, the Courts had denied to the large and wealthy communities existing among the *Jains*, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

It no doubt appears from the judgment of the High Court of *Bombay* delivered by Chief Justice *Westropp*, in *Bhagvandas Tejmal* v. *Rajmal* (1) that the Judges of that Court were not satisfied that in the Presidency of *Bombay* usages had been established to exist among the *Jains* at variance with ordinary Hindu law. "Hitherto," they say, "so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island, or in this Presidency, to persons of the *Jain* sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence. On the contrary, their judgment contains this passage:—

"But when amongst *Hindus* (and *Jains* are *Hindu* dissenters) some custom different from the normal Hindu law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal* (1).

The facts in the case before the High Court of *Bombay* were, that after the death of both husband and wife, the brothers of the deceased husband, with the consent of the punch, chose a nephew of the husband, to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the judgment, "not a single *yati*, or *pundit*, or priest, or other expert, either in the lore of the *Jains* or of the *Brahmins*, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindu law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit.

This evidence, particularly that taken at *Delhi*, is entitled to great weight, having regard both to the *status* of the witnesses, and to the consistent manner in which they describe the custom. It is stated in the judgment below that "*Delhi* is the chief seat of the *Jains* in the North-West of *India*, and is the adjoining district to that in which the property is situate."

(1) 10 Bomb. H. C. R., 241.

(1) 14 Moore's Ind. Ap. Ca. 585.

The manner in which the witnesses were called together to be examined, and their position in the *Jain* community, are thus described in the judgment:—

"The Commissioner reports that on receipt of the Court's commission, he called upon the Deputy-Commissioner to furnish him with a list of the names of the principal members of the *Jain* community residing in *Delhi;* that out of 125 persons whose names were so furnished, he selected 26 persons, whom he summoned to attend his Court, and that of the 26 he examined 6, of whom 2, *Zora Mul* and *Ghyan Chand*, were elders of the council of the sect at *Delhi*, appointed to determine all questions of religious and social importance arising in the sect, while the other 4 persons selected were all of a rank that entitled them to admission to the Lieutenant-Governor's *Durbar*. Of these also, one *Buldeo Singh* deposed he was a member of the council before-mentioned. Furthermore, the Commissioner, at the instance of the Appellant, took the evidence of 2 others out of the 26 persons summoned. As all the witnesses so selected by the Commissioners must be presumed to have been impartial, and as either party was at liberty by the terms of the commission to produce any witnesses he desired should be examined, and the Appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the *Delhi* commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned counsel for the Appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct.

These findings are thus stated in the judgment, and their Lordships entirely concur in them:—

"Contrasting this evidence with that given by the independent witnesses examined under the several commissions, and having regard to the position which several of the *Delhi* witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the Respondents. It appears to us, that so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a *Saraogee-Agarwalas* takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox *Hindus;* that she takes an absolute interest, at least in the self-acquired property of her husband (and, as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable evidence, that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The Court adds:—

"We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the Bar, and we have not had the benefit of such assistance from the Bar on this point as on the other issues, there being at present no contest between the widow and the adopted son as to their respective rights. We shall affirm the decree of the subordinate Judge, declaring the validity of adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the subordinate Judge so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the decree.

They will now proceed to consider the objections raised to the suit on the ground

that it is merely declaratory, and can lead to no relief.

It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board, that sect. 15 of the Indian Act VIII. of 1859 relating to declaratory decrees ought to receive the same construction as sect. 50 of the English Act, 15 & 16 Vict. c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court. (*Kathama Natchiar and Others* v. *Dorasinga Tevar* (1).

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

It was contended on behalf of the Respondents that the intervention of the Appellant in the proceedings of the settlement officer, and his objection to the entry on the *wajibulurz* of the name of *Moorari Lall*, as the adopted son of the *Mussumat* on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shewn that the entry thus objected to had been necessary to the settlement of the *mouzah*, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shewn. It would seem that the *mouzah* had been already granted by the Government to the *Mussumat*, and she had been recorded as proprietor. The object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the Settlement Officers; and although the Deputy Collector asked for information as to the *Mussumat's* successor, and upon the Appellants' objection to the entry of the adoption, placed his objection upon the *wajibulurz*, and referred the parties to a Civil Court, their Lordships would have felt great difficulty, to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the decree.

Another ground on which it was alleged the Plaintiffs were entitled to relief was that the Appellant had put forward a nuncupative will of his deceased brother by which he was made the proprietor of the estate, and that the Plaintiffs were entitled, if they had asked for it, to a decree annulling that will.

It would not probably be disputed that if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that in cases where property may legally pass by an oral will an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a especific act by which title to property may be conferred. The reasons, too, for giving such relief in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former.

It was, however, contended, on behalf of the Appellant, that relief against this will was not one of the objects of the original suit, which was confined to the intervention of the Appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this will appears for the first time in the Defendant's answer. But it will be found, on reference to the proceedings, that the claim was persisted in after *Moorari Lall* had been added as a co-Plaintiff, and indeed to the end of the

(1) 2 Cowell's I. A., p. 169; *Ante* p. 456.

suit. One issue framed at the first hearing of the cause was whether the verbal will had been in fact made, and one of the questions put to the witnesses examined upon the customs of the *Jains* was, whether a verbal gift is valid against the widow. The commissions in which this question appeared were issued after the first remand to the subordinate Judge, and after *Moorari Lall* had been made a co-Plaintiff. In his judgment, given after the return of these commissions, the subordinate Judge expressly finds on this issue that a nuncupative will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced," the Defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this will in its final judgment.

The contention, then, on the part of the Appellant that his putting forward of this will ought not to be regarded, is reduced to the objection that it was not introduced into the original plaint. It is, however, questionable whether, when *Moorari Lall* was made a Plaintiff, the suit ought not to be considered for this purpose as a new suit, and whether the Appellant, having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when *Moorari Lall* became Plaintiff, so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

Their Lordships, however, do not think it necessary to give a definitive judgment on this question, because they are of opinion that under the circumstances in which this appeal to Her Majesty comes on to be heard, the Appellant ought to be precluded from insisting on his objection to the decree on the ground of its being declaratory only.

In his petition to the High Court for leave to appeal to Her Majesty, the Appellant made no reference in the grounds of appeal to this objection to the decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave, again no reference was made to this objection, but the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from.

This petition, after fully stating the conclusions of the High Court upon the evidence relating to *Jain* customs, contains the following passage:—"The Petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the *Jain* community, to which the Petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to which they have fully adverted, the importance of the questions upon which the Appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the Appellant ought not, at this stage, to be allowed to insist that by reason of these objections the decree appealed from should be reversed.

Exception has been taken to that part of the decree of the High Court which varied the decree of the subordinate Judge, declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor or as manager thereof on behalf of her adopted son, *Moorari Lall*. The substituted declaration, being in the alternative, is no doubt

in one sense uncertain; but it is independent of the other declarations which decide the rights of the parties as between the Plaintiffs on the one side, and the Defendant on the other, and repel the Defendant's pretensions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being Plaintiffs. It is, no doubt, on this account that the decree, whilst it declares the right of the widow to present possession as against the Defendant, is framed in a form which avoids prejudice to the rights of the Plaintiffs *inter see.*

In the result, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

13th March, and 13th April, 1878.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BHOOBUN MOHINI DEBYA and Another, (Plaintiffs)* ... } *Appellants,*

versus

HURRISH CHUNDER CHOWDHRY, (Defendant) ... ... } *Respondent.*

Grant of Talook—Construction of Sunnud—Will.

S. C., a *Hindu*, granted a *talook* to his sister, K., by a *sunnud* in the following terms:—"You are my sister: I accordingly grant you as a *talook* for your support the three villages, H. F., and K., belonging to my *zemindary*, with all rights appertaining thereto, at a *tahut jummah*, of Rs. 361. Being in possession of the lands and paying rent according to the *tahut jummah* do you and the generations born of your womb successively *(santan svent hromel*, enjoy the same. No other heir of yours shall have right or interest."

At the date of the *sunnud*, K. had one child, a daughter C. She had afterwards a son, who died in her lifetime without issue, but whose widow, by his permission, adopted, after his death, a son C. L.

K. *held* undisputed possession of the *talook* during her lifetime, and by her will devised it to C., her daughter, and C. L., her grandson by adoption, in equal moieties.

On K's death H. C., as heir of his father S. C., took possession of the *talook*. Whereupon C. and C. L., claiming under the will of K., sued for possession.

Held by the Court of first instance, that C. took an absolute estate under the *sunnud* on the death of her mother K., but that having elected to take under her mother's will, and to admit the co-Plaintiff C. L., to a half share in the estate, both Plaintiffs were entitled to maintain the action.

Held by the High Court on appeal, that C., having been born before the date of the *sunnud*, took under it a life interest in the *talook* in succession to the life interest of her mother. But that as the Plaintiffs had not sued in respect of the life interest, but claimed under the will of K., which she was incompetent to make, the suit must be dismissed.

Held by the Judicial Committee of the Privy Council, that the earlier words of the *sunnud*, when read together, were to be taken as conferring an absolute estate of K.; and that the effect of the concluding words "no other heir of yours, &c.," was to make the absolute estate before given, defeasible in the event of a failure of issue living at the time of K's death, in which event the estate was to return to the donor and his heirs; but that as that event had not occurred, it followed that K. took an estate which she could dispose of by will, and consequently that the Plaintiffs were entitled to succeed in their suit.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

The facts which give rise to the questions of law into which this case resolves itself, are as follows:—

Shumbhu Chunder Surmana, in 1819, granted a *talook* to his sister, *Kasiswari Debya*, by a *sunnud* in the following words:—

"*Shumbhu Chunder Surmana.*

"*Sunnud* executed to the worthy to be remembered *Kasiswari Debya*, of good conduct, in the year 1226 B. S.:—

"You are my sister: I accordingly grant you as a *talook* for your support the three *dehas* (villages), *Hurripur, Futehpur*, and *Kudumtoli*, in *chukla Jonardunpur* in my *zemindary, pergunnah Mymensing*, at a *tahut jummah* of Rs.

* 5 Cowell's I. A., p. 188; 4 I. L. R., Cal., p. 23.

361, three hundred and sixty-one rupees, with the land and water, and trees, &c., comprised within the four boundaries, [and] all [rights] appertaining to the said *mouzahs*. Being in possession of the lands and paying rent according to the *tahut jummah*, do you and the generations *(santán sreni)* born of your womb successively *(kramé)* enjoy the same. No other heir of yours shall have right or interest. To this effect I have written and given a *sunnud*.

"The 8th *Bysack*, 1266."

Another translation of the document is given by the High Court substantially to the same effect.

At the date of the *sunnud Kasiswari* had one child only, a daughter, *Chundermoni*, one of the original Plaintiffs in this suit. *Kasiswari* afterwards had a son who died in her lifetime, leaving a widow, who was a co-Plaintiff, suing as guardian of a son whom he had adopted.

Kasiswari held undisputed possession of the *talook* until her death in 1871, and by will devised it (together with other property) to the two Plaintiffs in equal moieties.

On the death of *Kasiswari*, the Defendant, as heir of his father *Shumbhu Chunder Surmana*, took possession of the *talook*, whereupon the Plaintiffs instituted the present suit to obtain possession of it, together with mesne profits from the date of their dispossession on the death of *Kasiswari*. Pending the suit the daughters of *Chundermoni* have been substituted for her as Plaintiffs.

The Plaintiffs claimed under the will of *Kasiswari*. A question, indeed, arose whether their plaint could be construed as containing an alternative claim on behalf of *Chundermoni* under the *sunnud* independently of the will, but in the view which their Lordships take of the case, this question becomes immaterial.

The Defendant denied the right of *Kasiswari* to dispose of the *talook* by will, contending that she took only a life estate under the *sunnud*. The principal ground on which he based this contention in the Court below was that, the terms "*santán*" "*sreni kramé*" imported only sons of *Kasiswari* living at the time of her death, and that these could only take, if at all, as donees under the *sunnud*.

No dispute was raised as to the genuineness of the will of *Kasiswari*, or its validity to pass whatever interest she was capable of devising. The subordinate Judge gave judgment in favour of the Plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be that in his opinion *Chundermoni* took an absolute estate under the *sunnud* on the death of her mother, but that having elected to take under her mother's will, and to admit the co-Plaintiff to a half share of the estate, both the Plaintiffs were entitled to maintain the action against the Defendant. He gave the Plaintiffs a decree for possession together with *wasilat*, the amount of which is not disputed.

On appeal to the High Court, in addition to the contention that *santán* signified sons only, it was urged that the *sunnud* was an attempt to create an estate tail in contravention of Hindu law, and was therefore void except in as far as it gave a life interest to *Kasiswari*.

The High Court do not adopt this view, nor do they agree with the Appellant that the *Hindu* words which have been quoted import issue male only, but they regard them as bearing "the wider and more general meaning of issue." They hold that *Chundermoni* having been born before the date of the *sunnud* took under it a life interest in the *talook*, in succession to the life interest of her mother. But that the Plaintiffs not having sued in respect of the life interest, but having claimed under the will of *Kasiswari*, which she was incompetent to make, their suit must be dismissed. From this judgment the present appeal is preferred.

At their Lordships' Bar the main grounds on which the judgment of the High Court has been supported are—

1. That the *sunnud* is an attempt to create such an estate as is known in *England* by the name of an "estate tail," in contravention of Hindu law, which does not recognise such an estate.

2. That even if this be not so, the gift to the children of *Kasiswari* to be born

after its date as well as to those then born, is in contravention of the rule of Hindu law that no gift can be made to any person who is not "a sentient being" at the time of gift. In support of these propositions the case commonly called the *Tagore Case* (1) was quoted.

It was further argued that if the gift were void because made in favour of a class who could not legally take—that is to say unborn children—it could not be validated *quoad Chundermoni* (who happened to be born at the time), by changing it from a gift to a class, into a gift to a designated individual. And in support of this proposition the cases of *Jee* v. *Audley* (2), and *Leake* v. *Robinson* (3), were cited.

It appears from the *sunnud* that the donor intended to convey more than a life estate. If the estate which he intended to convey was one which the law prohibits, effect cannot be given to his intention; but before coming to this conclusion their Lordships must be satisfied that the instrument does not fairly admit of being construed in a sense to which the law will give effect.

In the judgment of the *Tagore Case*(1) the following passage will be found:—

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in *England*) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shewn his intention to create, although he adds a qualification which the law does not recognise."

The doctrine herein expressed had been frequently acted upon by the Courts in *India*, who have decided that words giving lands to the donee, "his children and grandchildren," conferred upon him an absolute estate. (See judgment of Sir *Barnes Peacock* in the *Tagore Case*(1).)

If the words of the *sunnud*, "You are my sister: I accordingly grant to you a *talook* for your support," had stood alone, it might have been open to question whether an absolute grant, or a grant for life only, was intended: coupled with the words that follow "being in possession of the lands and paying rent according to the *tahut jammah*, do you and the generations born of your womb successively enjoy the same;" they appear to import an absolute estate, such as would have been given had the words been "your children and grandchildren . . . ." And no inference so far arises that the donor had an English estate tail in his contemplation, as the testator in the *Tagore Case* undoubtedly had.

The only difficulty is caused by the words which follow, "no other heir of yours shall have right or interest."

Upon the best consideration which their Lordships have been able to give to the meaning of these negative words, it appears to them that they may be read as referring to the time of the death of *Kasiswari*, that their effect is to make the absolute estate before given defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindu law appears from the decision of this tribunal as to an executory devise in the case of *Soorjeemonee Dossee* v. *Denobundhoo Mullick* (2), as explained in the *Tagore Case*.

Their Lordships are, therefore, of opinion that *Kasiswari* took the whole estate defeasible on the happening of an event which did not occur, and that she

(1) 9 Beng. L. R 377; 18 Suth. W. R. 359; *Ante* p. 82.
(2) 1 Cox, 324.
(3) 2 Mer., 364.

(1) 4 Beng. L. R. (O. C.)182.
(2) 9 Moore's Ind. Ap. Ca 134; 1 P. C. J., p. 583.

had, therefore, an estate which she could dispose of by will.

It follows that the Plaintiffs are entitled to succeed in this suit. It is unnecessary to decide what their rights may be *inter se*.

Their Lordships will, therefore humbly advise Her Majesty that the decree of the High Court be reversed, and that the decree of the Subordinate Court be affirmed. The Appellants will have their costs in the Courts of *India*, and of this appeal.

14th March, and 13th April, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DORAB ALLY KHAN, (Plaintiff)* ... } *Appellant,*

versus

ABDOOL AZEEZ and another, Executors of KHAJAH MOHEEOODDEEN, Deceased, (Defendants) ... } *Respondents.*

Sale by Sheriff under Writ of Fieri Facias—Warranty.

A writ of *fieri facias* issued to the sheriff authorises him to seize the property of the execution debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

But if the sheriff acts *ultra vires, e. g.*, if he seizes and sells property not within his jurisdiction, he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell.

Since there is not in *India* the difference between real and personal estate which obtains in *England*, and moveable and immoveable property there are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate.

A sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor, who has received the purchase money, if it should appear that the sheriff has acted under his authority and by his express directions.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This is an appeal against a decree of the High Court of *Calcutta*, sitting as a Court of Appeal, which, on the 23rd of August, 1875, affirmed the judgment of Mr. Justice *Phear*, who, in the exercise of the original civil jurisdiction of the same Court, had, on the 22nd of April, 1875, dismissed the Appellant's suit with costs.

The suit was instituted in December, 1872, by the Appellant suing as executor of one *Dianut-ut-Dowlah* against *Khajah Moheeooddeen*, who died after leave to appeal had been given in *India*, and is represented by the present Respondents. The case was tried in *India* upon only the first and preliminary issue, viz., whether or not a good cause of action was disclosed in the plaint. It is, however, conceded that the statements in the plaint may be taken to be supplemented by, and to include any fact stated, or to be inferred by necessary implication from the written statement of the Plaintiff, or the documents annexed to and filed with either that or the plaint itself. These are the sheriff's bill of sale of the 9th of October, 1866; a petition of *Dianut-ut-Dowlah* to the Judicial Commissioner of *Oudh* and the order thereon; the will of *Dianut-ut-Dowlah* and the certificate granted to the Plaintiff as the executor named therein; the writ of *fi. fa.*, dated the 18th of June, 1866; and the warrant of attorney to confess judgment in the action in which that writ was issued. For the trial of

* 5 Cowell's I. A., p. 116; 3 I. L. R., Cal. p. 806.

the issue, which is in the nature of a trial on demurrer, the facts stated or to be implied as above mentioned must be taken to be true.

What, then, are those facts? Taken in chronological order, they are as follows:—In 1856, under the before-mentioned warrant of attorney, judgment was entered up in the late Supreme Court of Judicature at *Fort William*, at the suit of *Khajah Moheeooddeen* (the Defendant in this action), and one *Robert O'Dowda*, who was only joined with him as co-Plaintiff in order to give the Court jurisdiction, against *Wazeer Khan* and *Khajah Abdoos Samut*, for the purpose of securing the repayment of Company's Rs. 70,000, with interest, on the 23rd of July, 1856. In order to enforce this judgment against *Khajah Abdoos Samut*, and the representatives of *Wazeer Khan*, who was then dead, a writ of *fi. fa.* was, on the 18th of June, 1866, directed to the sheriff of *Calcutta*, commanding him to cause "to be levied and made of the houses, lands, debts, and other effects, moveable and immoveable, of the said Defendants, within the provinces, districts, or countries of *Bengal*, *Behar*, and *Orissa*, or in the province or district of *Benares*, or in any other factories, districts, and places which then were annexed to and made subject to the Presidency of *Fort William* in *Bengal*, by seizure, and if necessary by sale thereof," a certain sum therein mentioned. The Plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of immoveable properties in *Oudh*, but that nevertheless the sheriff, "by the authority of *Khajah Moheeooddeen*, the execution-creditor, and on the express instructions of his attorney, and professing to act under and by virtue of the said writ," on the 2nd and 20th days of August, 1866, seized the right, title, and interest of *Abdoos Samut* and of *Wazeer Khan*, then in the hands of his heirs and representatives, in a *talook* and premises within the province of *Oudh*, and put the property so seized up for sale on the 4th of October in the same year; that *Dianut-ut-Dowlah* became the purchaser of it for the sum of Rs. 26,000; and that the sheriff afterwards executed to him the bill of sale of the 9th of October, 1866, which is annexed to the plaint. He further alleged that before the execution of the bill of sale, *Dianut-ut-Dowlah* paid the purchase-money to the sheriff who, about the 12th of October, 1866, paid Rs. 5000, part thereof, to the attorney of the Plaintiffs in the suit; and on the 25th of October, 1867, paid the balance of the purchase-money, less his poundage and charges, to *Moheeooddeen* himself; that the sheriff, by his officer, put *Dianut-ut-Dowlah* into possession of the property, but that such delivery of possession was not legal or operative by the law then in force in *Oudh*, and that by that law the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment-debtors or of any other person to *Dianut-ut-Dowlah*; that afterwards and under some proceedings which took place in the Courts in *Oudh* (the nature whereof, except that they began with a proceeding instituted by *Dianut-ut-Dowlah* himself for a partition, does not very clearly appear), the sale was pronounced null and void, and that thereupon and in the month of August, 1868, *Dianut-ut-Dowlah* was removed from possession of the *talook* and premises. The Plaintiff then admitted that *Dianut-ut-Dowlah*, whilst in possession, had made collections to the amount of Rs. 10,937, but alleged that after payment of the Government revenue, collection and law charges, and other necessary outgoings, a balance of only Rs. 446. 6a. 9p. remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase, and then, after stating the death of *Dianut-ut-Dowlah* on the 23rd of June, 1868, the title of the Plaintiff as his executor, a demand by the Plaintiff and a refusal by the Defendant, the plaint goes on to say—"The Plaintiff sues the Defendant for the sum of Rs. 26,000 for moneys had and received by the Defendant for the use of the said *Dianut-ut-Dawlah*."

Mr. Justice *Phear*, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of

the property under the writ of *fi. fa.* In their Lordships' opinion, the decree under appeal cannot be supported upon any such ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the plaint. The jurisdiction of the late Supreme Court, and of the sheriff as its officer, was originally limited by the Charter of Justice of 1774 to the provinces of *Bengal*, *Behar*, and *Orissa*, and though afterwards extended by the 39 and 40 Geo. 3, c. 70, s. 20, was so extended only to the province or district of *Benares*, and to and over all such provinces and districts as might at any time thereafter be annexed to and made subject to the Presidency of *Fort William*. The writ of *fi. fa.*, which was the sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of *Fort William*, he was as much a trespasser as an English sheriff who had seized property out of his bailiwick would be. That the province of *Oudh* was not, when first annexed to *British India*, or at the date of the execution, annexed to the Presidency of *Fort William*, if not one of those historical facts of which the Courts in *India* are bound, under the *Indian Evidence Act*, 1872, to take judicial notice, was at least an issue to be tried in the cause.

The question to be determined was, however, correctly stated in the judgment of the High Court on the appeal. After stating that they must assume it as established that the sheriff had no right to execute the writ upon property in *Oudh*, and also, though that was not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner of *Oudh* was that the sale was declared null and void, and that the Plaintiff's testator was thereupon evicted from the property; the learned Judges said: "The question then arises, can the purchaser, at a sale by the sheriff under a writ of *fi. fa.*, upon being evicted by the execution-debtor, recover the purchase-money which he has paid from the execution-creditor, if it should turn out that the sheriff had no authority to execute the writ at the place where the property was situate?" If that sentence had stood alone, their Lordships think it would have required to be modified by the addition of some such words as "and that he did so execute it under the authority, and by the express direction of the judgment-creditor." They understand, however, that modification to be implied in the next sentence of the judgment, which is in these words:—"We are asked by the Appellant to consider and decide the case upon the assumption that the sheriff in seizing, selling, and conveying the property, was the agent of the execution-creditor; that the execution-creditor was in fact the vendor; and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the Plaintiff's testator." This assumption seems to be amply justified by the eighth paragraph of the Plaintiff's written statement, and the letter therein set forth (1). The question thus stated is novel, and not without difficulty.

Their Lordships propose to consider, first, whether in the circumstances stated the evicted purchaser can have any remedy against the execution-creditor.

There is no doubt that the authorities cited in the judgment of the High Court, and relied upon at the Bar, establish the proposition which is thus stated by Lord *St. Leonards* at page 549 of the 14th edition of his work on Vendors and Purchasers: "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the

(1) "8th. That, before the execution of the said writ of *fieri facias*, Mr. *Nicholas Paliologus*, the attorney of the said *Khajah Mohocoddeen*, wrote and sent to the then sheriff of *Calcutta* the letter following:—

"*Khajah Mohocoddeen* v. *Hossen Ally Khan and Others.*

"To the sheriff.

"Sir,—Please to seize such properties of the Defendant which will be pointed out to you by the Plaintiff, and which are in the actual possession of the Defendants or some of them.

"Yours obediently,
N. Paliologus,
Plaintiff's Attorney."

30th June, 1866.

covenants do not extend, he cannot recover the purchase-money either at law or in equity." This general rule seems by the law of *England* to govern all sales by private contract between the parties either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a sheriff's sale has at best very inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title, and interest of the judgment-debtor with all its defects; and the sheriff who sells, and executes the bill of sale, is never called upon, and, if called upon, would refuse, to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the sheriff, which are governed by rules peculiar to such sales.

Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the sheriff or the judgment-creditor. This, however, is because the sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

The sheriff, however, if he acts *ultra vires*, cannot invoke the protection which the law gives to him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in *India* the difference between real and personal estate which obtains in *England*; and moveable and immoveable property are alike capable of being seized and sold under a writ of *fi. fa.*

The law of *England* as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. *Benjamin* in his work on Sales, 2nd edition, page 611 *et seq.* In *Sims* v. *Marryat* (1), Lord *Campbell*, when commenting on Mr. *Baron Parke's* judgment in *Morley* v. *Attenborough* (2), after saying that the law was not in a satisfactory state, observed: "It may be that the learned *Baron* is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of *England* apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of *Eichholz* v. *Bannister* (3), which was decided in 1864. In that case Chief Justice *Erle* is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner the consideration fails, and the money so paid by the purchaser can be recovered back." This passage, it is to be observed, although contained in the report in the *Law Journal*, is not to be found, *totidem verbis*, in the regular report. The actual decision, however, in which all the Judges concurred, was that on the sale of goods in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise the buyer may recover back the price as

(1) 17 Q. B. (N. S.) 281.
(2) 3 Ex. 500.
(3) 34 L. J. (C. B.) 105; 17 C. B. (N. S.) 708.

money paid as on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the sheriff under a *fi. fa.*, because what the sheriff professes to sell is only the right, title, and interest, whatever that may be, of the judgment-debtor, and this was the express ground of the decision in *Chapman* v. *Speller* (1), where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morley* v. *Attenborough* (2), which, of the modern cases, is the most favourable to the application of the maxim *caveat emptor*, the sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a *pawnbroker* of an article pawned with him as an unredeemed pledge there is no implied warranty of the *pawnor's* title, the judgment of Mr. *Baron Parke* seems to assume that the *pawnbroker* does warrant that the article has been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the *pawnbroker*, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So, too, it may be inferred from *Hall* v. *Conder* (3) that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that letters patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that upon a similar principle the sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction; although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor.

In the present case the subject-matter of the sale was the estate of the execution-debtor, so that if the sheriff had had jurisdiction his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative and wholly ineffectual. The High Courts have assumed that if the Defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so treated) the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immoveable property. This view does not appear to their Lordships to be correct. The Defendant directed the sheriff to sell in his character of sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the sheriff as sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opinion that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaint and the other documents on the record do not disclose a *primâ facie* case for some relief against the Defendant.

Their is, no doubt, a further question whether the Plaintiff has shewn a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon a total failure of consideration. To that their Lordships think the admitted fact of the possession by his testator for nearly two years of the property in question, and his perception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration wholly failed. But it is not quite clear on the record that this objection arises, since if the sale has been treated as a nullity, the purchaser has been accountable, and may have accounted, for what he received; and in any case the Court in *India* will be competent to mould the relief according to the facts finally established at the hearing. Their Lordships, of course, offer no opinion whe-

(1) 14 Q. B. (N. S.) 621.
(2) 3 Ex. 500.
(3) 2 C. B. (N. S.) 22.

ther the Plaintiff will ultimately succeed in establishing his right to any relief. It may turn out that his testator, who never made any claim for a return of the purchase-money in his lifetime, bought with knowledge of the defect in the sheriff's jurisdiction, or has, by acquiescence or in some other way, forfeited any right which he might otherwise have had to relief. They only decide that the Plaintiff has not wholly failed to disclose a good cause of action on the face of the record; and that the cause ought to be tried on the other issues that have been, or may be, raised in it. And they will accordingly advise Her Majesty to reverse the two decrees of the High Court, and to remand the cause for trial upon any other issues settled or to be settled in the suit. They think that the costs of both parties to this appeal should be taxed, and a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as costs in the cause.

5th, 6th, 9th, 10th, 11th, and 13th, April, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Recorder of Rangoon.

BURMAH TRADING CORPORATION, LIMITED, (Defendants)* ... } *Appellants,*

versus

MIRZA MAHOMED ALLY SHERAZEE and the BURMAH COMPANY, LIMITED, (Plaintiffs) } *Respondents.*

Wrongful conversion—Measure of damages—Liability of Master.

In an action for the wrongful conversion of certain timber, the Plaintiff claimed to recover as damages the market value of the timber at the town of *Rangoon* to which it was being conveyed at the time of the conversion. *Held*, that the cost of carriage to *Rangoon* from the place where the wrongful conversion occurred must be deducted.

13th April, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRET COLLIER:—

These are appeals and cross appeals from judgments of the Recorder of *Rangoon* in two suits, in which *Mirza Mahomed Ally*, together with a company called the *Burmah Company, Limited*, were Plaintiff's. The *Burmah Company*, being merely put upon the record as assignees of the Plaintiff's right of action, need not be further referred to. The Defendants in both cases were the *Bombay and Burmah Trading Corporation*. The first action was brought to recover damages for the conversion by the Defendants of a large quantity of logs of timber belonging to the Plaintiff, the second to recover damages for the obstruction by the Defendants of the Plaintiff in the exercise of his alleged right to remove timber from certain forests in *Burmah*. The recorder gave judgment for the Plaintiff in both suits.

The case of the Plaintiff may be stated in outline thus. He was what may be called a middleman between the foresters in the woods of *Burmah* and the merchants of *Rangoon* who bought the timber felled. In the year 1867, he had a right, obtained from the *Burmese* Government, to fell or otherwise possess himself of timber in a certain forest known as the *Ningyan* forest belonging to the King of *Burmah*, and to take the timber by water to *Rangoon*. In that year two other persons, who may be also called middlemen, named *Darwood* and *Goldenberg*, had a concurrent right to obtain and export timber. In the summer of that year *Darwood* and *Goldenberg* succeeded in obtaining from the *Burmese* Government a

* 5 Cowell's I. A, p. 130; 4 I. L. R., Cal., p. 116.

monopoly of the right to export timber from the *Ningyan* forest, lasting for four years. The grant was dated on the 15th of July, 1867, but was not to come into operation until November of that year. In obtaining that grant *Darwood* and *Goldenberg* acted as agents of the Defendants. The Plaintiff's case is that between the date of the grant and the time when it came into operation, he was possessed of a large quantity of logs of timber, in all about five thousand, part of which he had felled, part of which he had bought, and that he would have been able to take these logs by water to *Rangoon* during that interval, in which it was permitted to him and other foresters to take away their timber, but that he was forcibly prevented from doing this by *Darwood*, who acted as an agent of the Defendants. He further goes on to shew that in the next year 1868, he actually found in the possession of the Defendants, at a place called *Tounghoo*, an intermediate station between the *Ningyan* forest and *Rangoon*, a large quantity of logs, 1241 in number, which belonged to him. They are alleged to have been discovered in the year 1868 in the possession, at *Tounghoo*, of a Mr. *Petley*, an agent of the Defendants. The Plaintiff brings his first action to recover damages for the conversion by the company of the logs found at *Tounghoo* in *Petley's* possession. He brings his second action to recover damages in respect of the injury he has sustained by being prevented by *Darwood* in August or September, 1865, from removing the remainder of the logs to which he was entitled. These logs, after deducting such as had by some means come into his possession, he alleges to be in number 1873.

Such is a short outline of the Plaintiff's case. Their Lordships do not propose to review the evidence in detail, a task which was very carefully and laboriously performed by the learned Recorder. They cannot help observing, however, with respect to the evidence in general, that it appears to them of a loose, confused, and embrangled character, and that the Plaintiff cannot be regarded as a satisfactory witness, inasmuch as he has been convicted of perjury.

It now becomes necessary to deal with the two actions separately.

In the first action the Plaintiff, as before observed, claimed damages for the conversion of 1241 logs. The learned Judge has found that 1041 of his logs were converted by the Defendants, and has given as damages the full value of each of those logs at *Rangoon*, which he estimates at Rs. 50. Undoubtedly, in this case there is evidence, which if believed would justify the learned Judge in his finding for the Plaintiff, that a large quantity of his logs was in the possession of the Defendants. The Plaintiff produces a list which is sworn by a person whom he employed to have been made out from memoranda taken from personal observation of logs which he found in *Petley's* possession in 1868, bearing the Plaintiff's property marks, though not his delivery marks. The number of the logs in that list is 1187. There is some further evidence of the same kind respecting a lot of 11 logs. It is contended for the Respondents that this list is to a certain degree confirmed by another list which was put in and sworn to by another witness, of 981 logs, which are alleged to have been found in the same summer and autumn in the possession of *Darwood* in the creeks at *Ningyan*. There is also some evidence of *Darwood* having taken possession of about 1000 logs of timber in the forest. Their Lordships are not insensible to the weight of several observations which have been addressed to them by the counsel for the Appellants impugning the genuineness of these documents, and the general truthfulness of the Plaintiff's case, not the least weighty of which was that the Plaintiff brought actions in 1869 for some far smaller lots of timber which, according to his own shewing, came down the river to *Tounghoo* after the large lot for which he brought his present action in 1872, and that he appears to have demanded this lot for the first time shortly before he brought his action. But after giving due weight to this and other objections which have been made to the whole of the Plaintiff's case, their Lordships have come to the conclusion that whatever view they might have taken of the case had it come before them

as a Court of first instance, it has not been sufficiently established that the learned Recorder, who considered the evidence with great care, was wrong in coming to the conclusion of fact that the Defendants had in their possession a large quantity of logs belonging to the Plaintiff.

Their Lordships, therefore, are not prepared to reverse his finding, that the Defendants had in 1868 a large quantity of logs of the Plaintiff's in their possession, nor are they satisfied that his computation of the number of those logs was wrong. But they are of opinion that he has somewhat erred in his estimation of the damages. He appears to have treated the case as what, in language familiar in *Westminster Hall* a few years ago, was called an action of detenue, in which the Plaintiff sought to recover a specific chattel which the Defendant detained from him, and in which the judgment was that the Defendant do deliver the chattel or pay the value of it. But this is neither in form nor in substance such an action, but more resembles what used to be called an action of trover. The subject-matter of the action is timber, an ordinary article of commerce, which, according to the evidence of the usage of trade is disposed of in the same year in which it arrives at *Rangoon*, either by sale or by being cut up, or in various ways. This the Plaintiff must have perfectly well known, and he could not, and indeed he does not profess, to claim four years afterwards the restitution of the particular logs which were found in 1868 at *Tounghoo*. His claim is to the damages which he has sustained by the conversion of the logs by the Defendants at *Tounghoo* at that date. It may be right indeed to take the value of the logs at *Rangoon*, where the principal if not the only market for them existed, as the basis of the calculation; but from the price at which the Plaintiff could have there sold them must be deducted what it would have cost him to bring them to the market. This principal of estimating the damages is in accordance with the case of *Morgan* v. *Powell* (1), and with other cases with which English lawyers are familiar. It has been found by the learned Judge upon the evidence that Rs. 4 a log would be the cost of conveying logs from *Tounghoo* to *Rangoon*. There is no direct evidence of what the cost of conveying logs from *Ningyan* to *Tounghoo* would be; but the distance is said to be about three days' journey, and the price of logs at *Tounghoo* is more than double the price of logs in the forest, a difference which must in some degree be composed of the cost of conveyance.

On the whole their Lordships are of opinion that they will be doing no injustice to the Plaintiff if they assume the cost of conveying timber from *Ningyan* to *Tounghoo* to be as much as that of conveying it from *Tounghoo* to *Rangoon*. They think, therefore, that the sum of Rs. 8 per log should be deducted from the selling price at *Rangoon*. As some evidence was given of the price which the Recorder adopts, viz., Rs. 50 per log, they adopt his finding on this point. They are therefore of opinion that from the Rs. 52,050 which have been given to the Plaintiff, Rs.8,328 should be deducted, leaving a balance of Rs 43,722.

The next action gives rise to different considerations. It was originally an action for conversion of logs, but the amended plaint alleges in substance that the Defendants obstructed the Plaintiff's right of ingress and egress to the forest, and his right of obtaining and removing timber therefrom, whereby he suffered the damage complained of. It is not necessary further to advert to a question of limitation which was disposed of during the argument; but a more formidable objection to the maintenance of the action has to be dealt with, viz., that the Defendants are not responsible for the wrongful acts of *Darwood* in August or September, 1867, assuming them to be proved; whether or not the Recorder was right in finding that they were proved it becomes immaterial to decide, in the view which their Lordships take of the case.

It was contended on behalf of the Respondents, that *Darwood* was the agent of the Defendants, and that the Defendants are responsible for those acts. That view was endeavoured to be supported by reference

(1) 3 Q. B., 278.

to the case of *Mackay* v. *The Commercial Bank of New Brunswick* (1), in which the rule was laid down as to the principles which regulate the liability of a master for the acts of an agent done without his express authority, but still within the scope of the authority of the agent. Some expressions of Mr. Justice *Willes*, in the case of *Barwick* v. *The English Joint Stock Bank* (2), referred to in the judgment of this board, were especially relied upon, and appear to contain as clear an exposition of the law upon this subject as is anywhere to be found. They are as follows:—"With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit;" and the learned Judge goes on further, with reference to what may be deemed the course of the service, to observe, "In all these cases, it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." It has been contended on the part of the Respondents, that although there is no evidence of the Defendants authorizing the particular acts of violent obstruction of *Darwood* complained of, still that, inasmuch as the Defendants put *Darwood* in a position to do that class of acts, and they were done for the Defendants' benefit, they are responsible for them, upon the principle laid down in the cases just referred to.

It now becomes necessary to refer to what evidence there is of *Darwood's* authority. On the 28th of March, 1867, we have an agreement put in between *Darwood* and *Goldenberg* and the company Defendants, whereby *Darwood* and *Goldenberg* agree to sell to the company, and the company to purchase, the logs which *Darwood* and *Goldenberg* cut. That document establishes the relation of vendor and purchaser only, and not that of master and servant, or principal and agent. The next material fact is that on the 15th of July, 1867, *Darwood* obtained a grant of the monopoly for four years, in obtaining which he must be taken to have been the agent of the Defendants, but that monopoly was not to take effect until the November following. Then follows an agreement in February, 1868, wherein *Darwood* and *Goldenberg* agree to assign over the lease or grant which they had obtained in their own names to the company, and to work for them from that time at certain rates. Undoubtedly this document creates as between *Darwood* and the company the relation of employer or employed. It may be that this relation existed before, and that the document only embodied the terms under which *Darwood* and *Goldenberg* acted for the company in November, 1867, when the monopoly which was obtained in *Darwood's* and *Goldenberg's* names was really exercised on behalf of the company. But their Lordships are unable to find any proof that before November *Darwood* (*Goldenberg* may be thrown aside as he was not in the forest) can be considered as having acted as the servant or agent of the company. Until the lease of the 15th of July, giving the monopoly, took effect on the 1st of November, it would appear that the relation created by the agreement of March, 1867, of vendor and purchaser continued; it is certainly not shewn that any relation other than that of vendor or purchaser existed between the Defendants and *Darwood* up to November, 1867, except that of agent to procure the lease in the previous July, but an agency to procure this lease is a totally different thing from an agency to work the forest on behalf of the company.

In this view, taking the exposition of the law by Mr. Justice *Willes*, which has been quoted, their Lordships are of opi-

(1) Law Report, 5 P. C., 394.
(2) Law Report, 2 Ex., 259.

nion that the acts of *Darwood* cannot be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it is not shewn that *Darwood* was a servant or an agent for the purpose of working in the forest on behalf of the company, or of doing any class of acts analogous to those complained of. It may be added that there is no proof of the Defendants having ever knowingly adopted or ratified those acts, or indeed of the acts having been committed for their benefit.

This being so, their Lordships are of opinion that the second action fails altogether.

They will therefore humbly advise Her Majesty that in the first action the judgment be varied by reducing it from the sum of Rs. 52,050 to Rs.43,722; that the costs of the appeal be borne respectively by each party, but that the cross appeal be dismissed with costs. In the second action they will humbly advise Her Majesty that the judgment appealed against be reversed, and the suit dismissed, and that the Appellants have their costs in the Court below and of this appeal, and that the cross appeal be dismissed with costs.

10th, 11th, 14th, 16th and 17th May, 1878.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

TEKAIT DOORGA PERSHAD SINGH, (Plaintiff)* ... ... } *Appellant,*

versus

TEKAITNI DOORGA KONWARI and Another, (Defendants) ... } *Respondents.*

Res adjudicata—Declaratory Decree—Impartible Property.

In a suit governed by the *Mitakshara*, in which *A*, a Hindu widow, was the Plaintiff, and *B* was one of the Defendants, the Plaintiff sought and obtained a decree for possession of certain lands to which she claimed to be entitled as mother and heiress of her deceased son.

B subsequently brought a suit against *A*, alleging that he and not *A*, had become entitled thereto on the death of *A's* son, under a *koolachar*, or family custom, which excluded female heirs, and gave him a preferential right among male heirs, and thereby sought to recover from her possession of the same lands, and alternatively to obtain a declaration that he was as such heir if then living entitled to possession of them on her death, and that a deed executed by her alienating a portion of them, was valid only for her lifetime.

Held, that the decision in the former suit that *A* was entitled to the lands as mother and heiress of her deceased son, was conclusive against *B's* claim for possession during her lifetime, on the ground that she was not the heiress; but that the Plaintiff was not barred by the adjudication in the former suit from setting up the family custom with the object of showing that on *A's* death he would be entitled to succeed her, if living, and was by reason of such heirship entitled to obtain a declaratory decree as to the deed of alienation.

Since a declaratory decree is a matter of discretion, a claim for a declaration ought not to be remanded by an Appellate Court for further enquiry which is likely to entail delay and ex-

* 5 Cowell's I. A., p. 149; 4 I. L. R., Cal., p. 190.

pense, where the Plaintiff's claim is contingent on his surviving the Defendant, and where the declaration will not be binding on parties with possibly preferential titles who have not been joined in the suit.

The impartibility of property does not *per se* destroy its nature as joint family property, or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is a suit brought by *Doorga Pershad Singh*, son of *Gopi Nath Singh*, alleging himself to be the proprietor of *talook Guddi Chakai* and other property in *Zillah Monghyr*. The suit is against *Tekaitni Doorga Konwari*, widow of *Futteh Narain Singh*, deceased, and mother of *Gurbh Narain Singh*, deceased, and also against *Maharajah Joy Mungul Singh*. It was brought first, to obtain possession from the widow by adjudication of the right of inheritance of the Plaintiff in accordance with *koolachar* or family usage in reference to the property in suit left by *Tekait Gurbh Narain Singh*, son of the late *Tekait Futteh Narain Singh*. Secondly, for an adjudication and order with respect to the right of reversion to the said estate, that a deed which had been executed by the widow in favour of the Defendant *Joy Mungul Singh* should be declared illegal and inoperative after the decease of the widow, the Defendant No. 1.

The property was formerly the property of *Dhurm Narain Singh*, and their Lordships think it must be taken to be joint ancestral family property although impartible. Upon the death of *Dhurm Narain Singh*, who left several sons and other lineal descendants, the property descended to his grandson, *Loke Narain Singh*, the father of that grandson, *Juggernauth Singh*, having died in the lifetime of *Dhurm Narain*. Upon *Loke Narain Singh's* death the estate descended to *Futteh Narain Singh*, the husband of the present Defendant No. 1. *Futteh Narain Singh* left three widows, who upon his death claimed to have the estate registered in their names. The present Plaintiff intervened before the Collector and objected to the registration of the property in the names of the three widows, but the Collector decided in favour of the widows, and their names were registered as the proprietors of the estate upon the death of *Futteh Narain*. After that registration the present Defendant gave birth to a son, *Gurbh Narain Singh*, who lived for a short time and died in his infancy. The Plaintiff claims that upon the death of *Gurbh Narain* he was entitled to succeed to the estate, and that the widow was not entitled, according to the *Mitakshara* law and the custom of the family, to succeed as the mother and heiress of her son.

With regard to the claim to recover possession from the widow, the answer set up is that a former suit was brought by the widow after the death of her son for the purpose of recovering possession of tow thirds of the property from the other two widows with whom the present Plaintiff, who was a Defendant in the former suit, was said to be in collusion, and also to have her possession confirmed as to her own one third. A decree was given in that suit in favour of the present Defendant, the widow, who was the Plaintiff in that suit. The plaint in that case is not in evidence, but it is to be collected from the judgment of the Court of first instance in that suit that it was brought by the present Defendant as mother and heiress of *Gurbh Narain Singh*, deceased. The present Plaintiff as Defendant in that suit in his written statement set up the following defence. He said, "The Plaintiff is not entitled to succeed to the properties left by *Tekait Futteh Narain Singh*. The aforesaid *Tekait* during his lifetime, and, after his death, his widows and the minor son which was born to him, lived in commensality with me the Defendant. The whole of the property in suit is ancestral, hence, according to the *Mitakshara Shastar*, after the death of the said *Tekait* and his minor son, I the Defendant, the paternal cousin of *Tekait Futteh Narain Singh*,

am entitled to the ancestral estates." He goes on in the 4th paragraph, "On the 13th *Jayt* 1274 *Fusli*, I the Defendant on account of my being the rightful party was by the consent of all the three widows of *Tekait Futteh Narain Singh*, the *amlahs*, *ryots*, and lessees and others, installed as the *Gadinashin* of *talook Chakai* according to the usage which has prevailed of old. Since that date I have been enjoying possession of all the *mouzahs* in suit." He there says that he was installed according to the usage, and therefore it may be taken that, notwithstanding the estate was joint family property, he claimed to be installed because according to family usage it was an impartible estate to which he as the eldest branch of the family was entitled to succeed. The Court of first instance in that suit decided that the claim of the Plaintiff be decreed with this specification, "That the Plaintiff aforesaid do recover possession of two-thirds of the estate claimed," that is, the two-thirds which were held by the other widows with whom the Defendant was alleged to be colluding, "and that her possession of one-third be confirmed." There was therefore a decision in that suit between the Plaintiff, who is the present Defendant, and the present Plaintiff, who was the Defendant, that the widow was entitled to succeed as the mother and heiress of *Gurbh Narain Singh* her son. An appeal was preferred to the High Court, and the High Court affirmed that decision.

The question now is, whether in the face of that adjudication the Plaintiff is entitled in this suit to recover the possession of the property upon the ground that he, and not the Defendant as mother of *Gurbh Narain*, was entitled to succeed upon his death. It is contended on behalf of the Plaintiff that he did not in that suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession. The case of *Hunter* v. *Stewart* (1) was cited, in which Lord *Westbury* held that, as the allegations and equity in the first suit were different from the allegations and equity in the second suit, the decision in the first suit was no bar to the proceeding in the second. But there it was expressly stated that the equity in the second suit was different from that which had been set up in the first suit, and that the allegations were also different. In this case, although the allegations are different the claim is the same. The claim on the part of the widow in that suit was based upon her title to succeed as the mother and heiress of her son. The present Plaintiff, who was the Defendant in that suit, relied upon his own title and denied that of the mother, the present Defendant No. 1, but it was adjudged against him, that the mother was entitled to succeed as the heiress of her son.

In a case which is referred to in the judgment of the High Court, reported 11 *Moore's* Indian Appeals, p. 73, it is said, in the judgment pronounced by Lord *Westbury*, "When a Plaintiff claims an estate, and the Defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward." If the Defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained. The Plaintiff in his present suit, in the 8th paragraph of his plaint, says, "On the strength of the aforesaid decree, the Defendant No. 1," that is, the widow, "put your petitioner out of possession." If that decision was correct she was entitled to put him out of possession. But in the next paragraph he says, "The cause of action arose from the said date when your petitioner's dispossession took place." In effect, he says, that although the mother took possession under the decree in the former suit, the taking of possession under that decree gave him a right to sue her to recover the possession back again from her. If such a suit could be maintained there would be no end to litigation.

(1) 31 L. J. (Ch.) 346; 4 De G. F. & J. 168.

A case was referred to from the 3rd *Madras* High Court Reports, p. 320, in which Chief Justice *Scotland* seems to have been of opinion that if the same facts were not set up in the former suit, a decision in that suit would not be a bar in the second suit. The ground, however, upon which Chief Justice *Scotland* thought that the former judgment could be impeached was that the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he set up in the second suit.

In the 2nd Law Reports, Indian Appeals, 283, a similar question was brought before the Judicial committee. It is said, in the judgment delivered by Sir *Montague Smith*, "It was suggested by Mr. *Cave* that the former judgment ought not to be binding because certain witnesses having been examined before the present Appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals that were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given."

But it appears in the present case that the family custom was brought before the Court in the former suit. They say: "As to the third ground, *Doorga Pershad Singh* attempted to give evidence that there is a family custom or *koolachar*, by which, in this family, females were excluded from inheritance. He did not, make any averment to that effect in his written statement, and, therefore, did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the Plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or *koolachar*, the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved."

It was contended that the cause of action in the suit in which the present Defendant was Plaintiff was not the same cause of action as that which is set up by the Plaintiff against her in the present suit. A similar point was considered in the case reported in 2nd Law Reports, Indian Appeals, to which reference has already been made. It was there said (p. 285): "Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch as it is said that the case does not come within sect. 2 of Act VIII. of 1859. Now the section is this: 'The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.' Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense. But however that may be, by the general law, when a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other, it cannot in their opinion be again tried in another suit between them. It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Soorjomoneo Dabee* v. *Suddanund Mohapatter* (1). In that judgment it is said, after reference to the 2nd clause of Act VIII., 'Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause was in substance to declare the will invalid on the ground of the want of power of the tes-

(1) 12 Beng. L. R., 304; 20 Suth. W. R 377.

tator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the *Code of procedure* would by no means prevent the operation of the general law relating to *res judicata* founded on the principle, "*nemo debet bis vexari pro eâdem causâ*". This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down than in a case which was referred to in volume 3 of *Atkyns*, *Gregory* v. *Molesworth* (1), in which Lord *Hardwicke* held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. *Smith* to the case of the *Duchess of Kingston*.' A decision of the High Court of *Bengal* has been referred to, the case of *Sheikh Rahmatulla* v. *Sheikh Sarintulla Kaghi* (2), as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it."

Their Lordships think it clear that the decision in the former suit, that the Plaintiff as mother was the heiress of her son, and that she as such heiress was entitled to possession, is conclusive against the present Plaintiff, who was a party to that suit, that she was so entitled, and that she having taken possession under that decree the Plaintiff is barred by the adjudication from recovering the possession from her upon the ground that she is not the heiress, and that he was entitled to succeed to the property upon the death of her son.

(1) 3 Atkyns, 626.

(2) 1 Beng. L. R. F. B. 81. The reference to this case seems to be a mistake. Probably the case intended to be referred to is *Kriparam* v. *Bhugawan Das*, 1 Beng. L. R. A. C. 68.

As to the second portion of the claim, namely, whether the Plaintiff is entitled to have it declared that the deed which the widow executed in favour of *Joy Mungul* is void and invalid as against the reversionary heirs, the Plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the Defendant No. 1. No doubt the family custom might be set up in this suit for that purpose, for although the Plaintiff is barred by the former adjudication from setting it up for the purpose of shewing that he is entitled to possession during the life of the Defendant No. 1, he is not thereby barred from shewing that upon her death, he, if he survives, will be entitled to succeed her. See the case of *Barrs* v. *Jackson* (1).

The Plaintiff in his plaint says: "The aforesaid estate was originally the ancestral property of the ancestors of *Tekait Dhurm Narain Singh*, the ancestor of Plaintiff. The aforesaid property as a *raj* is not divisible, and according to the ancient family usage the succession has always run in this manner, that the eldest heir male of the superior branch succeeds to the entire estate to the exclusion of other male heirs of the inferior branch, who only receive suitable maintenance; no widow or any female heir after the decease of the proprietor acquires a right to succeed. In the event of the decease of the proprietor of the *mehal* in dispute leaving a female heir or female heirs who have descended from females, the eldest heir male of the eldest branch of the second degree, which said branch may have descended from males, becomes the heir and successor, to the exclusion of females and the aforesaid heirs. In fact, this practice obtains in other *zemindaries*, known as *Godis*, in *pergunnah Chakai* and *Khurugdiha* in the neighbourhood of *talook Chakai*, the proprietors and occupants whereof are of the same caste as the Plaintiff and his ancestors. Conformably to this ancient usage, the property in suit passed to the late *Tekait Futteh Narain Singh*, and after him to the late *Gurbh Narain Singh*, son of the aforesaid *Futteh Narain Singh*.

(1) 1 Y. & C. 585.

Tekait Gurbh Narain Singh died a minor unmarried in the month of *Chayt*, 1272, F. S., leaving Plaintiff the eldest male heir of the eldest branch of the second degree of the said family, and, according to the family usage, your Petitioner is entitled to succeed to the disputed property." Then he mentions the former suit, and says: "Should your Petitioner not be held entitled to immediate possession of the property in suit, he, as the next heir, is entitled (consistently with the practice of succession referred to above) to the reversionary right in the property after the decease of the Defendant No. 1. The alienation of the said six *annas*, which is alleged to have been made for the payment of bond debts, was not made for such a purpose by which in the event of the Defendant No. 1 being a female heir, such alienations would be binding upon the reversioner, nor was it made under legal necessity, which entitles the purchaser to hold possession for a longer period than the lifetime of the vendor. Your Petitioner therefore prays that he may put in possession of the property in suit; but should the Court not deem him deserving of this relief, that an order be passed in reference to the aforesaid alienation, declaring the said alienation ineffectual after the demise of the Defendant No. 1, and that the reversioner is not bound by it."

In the present case there are other members of the joint family nearer in degree to the deceased *Gurbh Narain* than the present Plaintiff, who, in the absence of family custom, might be entitled (under the ordinary *Mitakshara* law) to succeed to the estate, assuming it to be joint family property; indeed, that fact was not disputed. The impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. The rule upon this subject was stated in the *Shivagunga Case* (1). It is there said: "The *zemindary* is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject. Hence if the *Zemindar* at the time of his death and his nephews were members of an undivided Hindu family, and the *zemindary* though impartible was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar* at the time of his death, was separate in estate from his brother's family, the *zemindary* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but *Gouri Vallabha Tevar's* widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that even if the late *Zemindar* continued to be generally undivided in estate with his brothers's family, this *zemindary* was his self-acquired and separate property."

The same rule was laid down by their Lordships in a recent case which was decided on the 12th of February in the present year, the case of *Periasami* v. *The Representatives of Salugai* (2), "It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. *Oiya Tevar*, the then *Zemindar* of *Padamattur*, died in 1815. He was succeeded by his eldest son, *Muttu Vaduga*. That person had two brothers, and therefore, whether *Oiya Tevar* were previously joint with his brother *Gouri Vallabha*, the *istimirar Zemindar* of *Shivagunga*, in respect of

(1) 9 Moore's I. A., Ca., 539; 2 F. C. J., p. 25.

(2) 5 Cowell's I. A., p. 61; *Ante* p. 795.

Padamattur or not, the later estate must be taken to have descended to *Muttu Vaduga*, as ancestral estate. He would therefore necessarily be joint in that estate so far as was consistent with its impartible character with his two younger brothers, the latter taking such rights and interest in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a *raj* or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate though impartible was up to the year 1829 in a sense the joint property of the joint family of the three brothers."

Unless then the Plaintiff can establish the family custom or *Koolachar* which he has set up, he is not entitled to sue for a declaration in respect of the deed. Two issues were raised as to the alleged custom. First, "Is there a *koolachar* in the family by which females are excluded from succession or not?" And, secondly, "Does the law of primogeniture regulate the succession to property in the family or not?" The Judge of the First Court did not decide them. He merely ordered that a decree be passed in favour of the Plaintiff in this way; that the Plaintiff should be taken to be the next heir after the death of *Mussumat Doorga Konwari* the Defendant, and that at that time he would be competent to bring a suit for the cancelment of the deed of sale executed in favour of *Maharajah Joy Mungal Singh*. He came to that decision upon the ground that other nearer heirs had not come in to dispute the Plaintiff's right, but he did not express any opinion as to the evidence which was given in support of the custom.

Upon appeal from that decision to the High Court, that Court found that the custom had not been proved. They say, "We are of opinion that no family usage or *koolachar*, either excluding females or giving the preferential right of succession to direct descendants in the eldest male line, has been proved. Nearly the whole of the instances adduced by the witnesses as proof of *koolachar* must be referred to succession to undivided estate under *Mitakshara* law." In a subsequent part of their judgment they say, "In fact all the witnesses rely principally on local custom as applying to *Surujbunsi Rajpoots*. But the evidence shews that in *pergunnah Purra*, a *Ghatwali zemindary* in *Beerbhoon* held by *Soorujbunsi Rajpoots*, a woman had succeeded. We are of opinion that the evidence fails to prove any family or local custom excluding the succession of females, and also fails to prove a *koolachar* or local custom whereby the succession goes otherwise than under the ordinary *Mitakshara* law, as applied to impartible estates, under which it is admitted that the Plaintiff would not, under existing circumstances, be the next reversioner, inasmuch as there are at least two persons who would be preferential heirs to him. With respect to local custom even if the Plaintiff were entitled to raise that question in this case, which we think he is not, we are of opinion that there is no defined district pointed out over which the alleged custom extends."

This is not a case in which the Court was called upon to set aside the deed. It was merely asked to declare that the deed to *Joy Mungul* was not binding against the reversioner. It is entirely a matter of discretion whether to make any declaration of that kind or to leave the question open until the widow's death.

There is very conflicting evidence with regard to the deed, and as to the existence of such a necessity for the first Defendant's alienating a portion of the estate as would render the deed in favour of *Joy Mungul* valid against a reversionary heir. If it could be proved that there was a legal necessity for raising a portion of the money which formed the consideration for the deed, but not the whole of it, the deed would not be wholly void as regards the Plaintiff, but would be valid as against him to charge the estate for the amount necessary to be raised. The evidence is not such as to enable their Lordships to determine what, if any, portion of the advances made to the Defendant No. 1, were made for purposes for which, according to Hindu law, she would as an heiress have been entitled to alienate the estate. Therefore, even if their Lordships should affirm the findings upon the first and second issues of fact in favour of the Plain-

tiff, it would be necessary to remit the case to the Lower Court to inquire whether all or any, and, if any, what part of the advances which formed the consideration for the deed were made for purposes for which the Defendant No. 1 could lawfully alienate a portion of the estate; a course which was adopted in the case reported in 8 *Moore's* Indian Appeals, 556.

Such an inquiry would be attended with considerable expense, and would cause great delay, and if the inquiry should result in a finding favourable to *Joy Mungul*, the decision might not be final in his favour, because the present Plaintiff might die in the lifetime of the widow, and the estate might never come to him. Further, there are others who might prove a preferable title to the Plaintiff and to the Defendant No. 1, and who would not be bound by any decision in this or in the former suit to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further inquiry, which, after causing considerable expense and delay, would not be binding upon the whole family.

Under these circumstances, therefore, their Lordships think that they ought not to advise Her Majesty to make a declaratory decree with respect to the deed executed in favour of *Maharajah Jog Mungul Singh*. In this view of the case any finding upon the first and second issues of fact becomes unnecessary, and their Lordships abstain from expressing any opinion as to the finding, or rather the expression of the opinion of the High Court upon those issues, so that it may be left open to all parties hereafter to raise the question as to the family custom set up by the Plaintiff. Their Lordships will therefore humbly advise Her Majesty to set aside the finding of the High Court upon the first and second issues of fact as being unnecessary, and to affirm their decree dismissing the Plaintiff's suit. It will then be open to any of the parties to raise the question of family custom hereafter, if they deem it necessary, and the decree in this suit will not be *res judicata* as to the first and second issues of fact. Their Lordships think that the Appellant, having failed in his appeal, the great object of which was to recover possession from the widow, must pay the costs of this appeal.

15th May; and 5th June, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Selborne, the Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HER MAJESTY THE QUEEN,* *Appellant,*

versus

BUBAH, ... *Respondent.*

Jurisdiction of High Courts—Legislative Power of the Governor-General in Council—Delegation—Conditional Legislation—24 and 25 Vict., c. 104—Act XXII. of 1869, s. 9.

By the terms of the Act 24 & 25 Vict., c. 104, the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council.

An exercise of legislative authority by the Governor General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the Statute 24 & 25 Vict., c. 104, and by the Letters Patent issued under that Statute.

By the 9th section of Act XXII. of 1869, passed by the Governor General of *India* in Council, the Lieutenant Governor of *Bengal* was empowered, from time to time, to extend, *mutatis mutandis*, to the *Jainkia*, *Naga*, and *Khasi Hills*, the provisions contained in other sections of the Act, whereby the administration of civil and criminal justice within the district called the *Garo Hills* was, from a date to be fixed by the said Lieutenant Governor, to be withdrawn from the jurisdiction of the Courts of civil and criminal judicature constituted by the Regulations of the *Bengal* Code and the Acts of the Legislature of *British India*, and to be vested in such officers as the Lieutenant-Governor might appoint. *Held* by a majority of the *Calcutta* High Court that as the Indian Legislature was to be regarded as an agent or delegate, acting under a

* 5 Cowell's I. A., p. 178; 4 I. L. R., Cal. p. 172.

mandate from the Imperial Parliament, which must in all cases be executed directly by itself, the above provisions purporting to authorize the Lieutenant-Governor of *Bengal* to extend Act XXII. of 1869 to the *Jaintia*, *Naga*, and *Khasi Hills*, since they involved a delegation of legislative power, were void and of no effect. *Held* by the Judicial Committee of the Privy Council, that the decision of the majority of the High Court was erroneous and rested on a mistaken view of the powers of the Indian Legislature. That legislature has powers expressly limited by the Act of the Parliament which created it, but has, when acting within those limits, plenary powers of legislation as large and of the same nature as those of Parliament itself.

When plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is not uncommon, and, in many circumstances, may be highly convenient.

5th June, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. LORD SELBORNE:—

This appeal has been brought under the following circumstances:—

In the year 1869 the Indian Legislature passed an Act (No. XXII. of 1869), purporting, first, to remove a district called the *Garo Hills* from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue, constituted by the regulations of the *Bengal* Code and the Acts passed by any Legislature then or theretofore established in *British India*, and from the law prescribed for such Courts and offices by such Regulations and Acts; and, secondly, to vest the administration of civil and criminal justice, within the same territory, in such officers as the Lieutenant-Governor of *Bengal* might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of *Bengal* should, by notification in the *Calcutta Gazette*, direct. By the 9th section the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the *Jaintia Hills*, the *Naga Hills*, and such portion of the *Khasi Hills* as might, for the time being, form part of *British India*," being, as their Lordships understand, a mountainous district, conterminous towards the east with the *Garo Hills*.

The Lieutenant-Governor of *Bengal*, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the *Garo Hills*; and afterwards, by another notification published in the *Calcutta Gazette* on the 14th of October, 1871, he extended all its provisions to the district of the *Khasi* and *Jaintia Hills*, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of *Assam*, subject to the general direction and control of the Lieutenant-Governor; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy-Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Under this Act, and these notifications, one *Burah* (the Respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy-Commissioner of the *Khasi* and *Jaintia Hills* upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd of April, 1876, the sentence was commuted by the Chief Commissioner of *Assam* to transportation for life. On the 9th of July, 1876, they presented a petition of appeal to the High Court at *Calcutta*; and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the

case fell within their appellate jurisdiction; and they sent for the record of the proceedings with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of *Bengal* to extend the Act of 1869 to the *Khasi* and *Jaintia Hills*, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz. (1), that the act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the *Garo Hills*, and, therefore, could not do so as to the *Khasi* and *Jaintia Hills*, assuming them to have been brought within its operation; and (2), that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not sect. 9 only, was void, and *ultrà vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at *Calcutta;* but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the junior counsel for the Respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition, that the 4th section of Act XXII. of 1869 purports to remove the *Garo Hills*, not from the jurisdiction of the High Court, established by Her Majesty's letters patent under the authority of Imperial Statutes, but only from that of the local Courts, constituted by the regulations of the *Bengal* or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutetant-Governor of *Bengal*) substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature," mentioned in the 4th section of the Act of 1869, were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that under the terms of the 8th and 9th sections of the *High Courts Act* (24 & 25 Vict., c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December, 1865), under which the *Calcutta* High Court is constituted, appeals might have gone to that Court from criminal tribunals of first instance, established by the Lieutenant-Governor of *Bengal* in the *Garo*, or the *Khasi* and *Jaintia Hills*, if Act XXII. of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorized the Lieutenant-Governor to appoint tribunals, not of first instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of *Assam*, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 & 25 Vict. c. 104), which passed in the same session with the *Indian Councils' Act;* and because, by sect. 22 of the *Indian Councils' Act* (24 & 25 Vict. c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-Ge-

neral shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 & 25 Vict. c. 104?

Now, it appears to their Lordships, from the express terms of the Act 24 & 25 Vict. c. 104, that (unless there should be anything to the contrary in the letters patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by letters patent, "to erect and establish a High Court of Judicature for the *Bengal* division of the Presidency of *Fort William*," and others at *Madras* and *Bombay*. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and *Suddor* Courts in the several presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 & 29 Vict. c. 15). But, as some argument was founded on the 18th, it may be fit here to observe, that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts;" and that the same power was, in substance, conferred upon the Governor-General of *India* in Council (not in his legislative, but in his executive capacity) by the repealing Act of 1865.

The 9th section of 24 & 25 Vict. c. 104, expressly says, that each of the High Courts shall, within its own presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her letters patent, grant and direct;" and that, "save as by such letters patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council," the High Court in each presidency shall have all the jurisdiction of the former Supreme and *Suddor* Courts, abolished by sect. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's letters patent) is here distinctly recognised.

The 11th section is similar in effect. It enacts that, after the establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of *India*, which had been applicable to the Supreme Courts of *Bengal*, *Madras*, and *Bombay*, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the letters patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of *India* in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the *Calcutta* letters patent of the 28th of December, 1865, were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the letters patent of the 28th of December, 1865 (clause 44), it is "ordained and declared that all the provisions of these our letters patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings

for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the statute 24 & 25 Vict. c. 104, or of the letters patent issued under that statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council as might remove any place or territory from the jurisdiction of the High Court at *Calcutta* is expressly contemplated and authorized both by those statutes and by the letters patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council: and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice *Markby*, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of *Bengal* by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *à fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of Legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in *India*, and

arm with general legislative authority, a new legislative power, not created or authorized by the *Councils' Act*. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of *Bengal*; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the *Garo Hills*, what was done as to the *Khasi Jaintia Hills?* The Legislature decided that it was fit and proper that the adjoining district of the *Khasi* and *Jaintia Hills* should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the *Garo Hills*, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordship's judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in *India* are mentioned in the opinions of the Chief Justice of *Bengal*, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII. of 1859, XXIII. of 1861, and XXV. of 1861).

By section 365 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories not subject to the general regulations of *Bengal*, *Madras*, and *Bombay*, until the same shall be extended thereto by the Governor-General in Council" (not in this legislative capacity), "or

by the Local Government to which such territory is subordinate, and notified in the *Gazette*." Section 445 in the Code of Criminal Procedure is precisely similar. And by section 39 of Act XXIII. of 1861, when any such extension as that authorized by section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of *India*; great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir *Richard Garth* well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the *Councils' Act* of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

18th and 31st May, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of Fyzabad, Oudh.

MAHARAJAH PERTAB NARAIN SINGH,* ... } *Appellant,*

versus

MAHARANEE SUBHAO KOER and others, *Ex parte* TRILOKINATH } *Respondents.*

Appeal to Privy Council—Re-hearing, Grounds for.

An order passed by the Judicial Committee of the Privy Council after hearing an appeal is final, and an application for a re-hearing will not be granted except upon the ground that the applicant has by some accident, without blame or default on his own part, not been heard, and the order has inadvertently been made as if he had been heard.

Rajunder Narain Roy v. *Bijoy Govind Singh* (1) and *Ex parte Kistonath Roy* (2) approved.

31st May, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

This application seems to involve two distinct questions:—

1st. Whether the Petitioner, if assumed to have been properly made a party to the suit in the Courts below, and bound by the proceedings therein, is entitled to have a re-hearing of the appeal by reason of his not having entered an appearance

* 5 Cowell's I. A., p. 171; 4 I. L. R., Cal. p. 184.

(1) 1 Moore's P. C. Ca., 117.

(2) L. R., 2 P. C., 271.

as Respondent to the appeal, or authorized any person to do so for him; and of the Appellant having failed to take the usual steps against him in order either to compel his appearance, or to have the appeal regularly heard *ex parte* against him.

2ndly. Whether, under the circumstances stated in the petition, he ought not to be treated as a person not properly represented in the suit in the Courts below, and therefore not bound by the proceedings therein; and if so, whether he is entitled to have the order of Her Majesty in Council varied so as to prevent its being used against him as a bar to any proceedings which he might otherwise be entitled to take in the Courts of *India*.

The first question must, their Lordships think, be answered in the negative. The jealousy with which this tribunal regards any attempt to question the finality of one of its judgments, particularly after its confirmation by an Order in Council; the very rare instances in which such an order has been allowed to be re-opened or varied; and the peculiar grounds upon which, if at all, this can be permitted, are elaborately considered in Lord *Brougham's* judgment in the case of *Rajunder-Narain Roy* v. *Bijoy Govind Singh* (1); and in the more recent case of *Ex parte Kistonath Roy* (2). It results from these authorities that the thing cannot be done unless by some accident, without any blame, and without any default on the part of the party himself, he has not been heard, and an order has been inadvertently made as if he had been heard.

Now, what are the facts in this case as regards the proceedings on the appeal here. The Appellant, who has been successful here, brought his suit in the proper Court of *Oudh* for a declaration of his title as the successor of *talookdary* estates of the late *Maharajah Man Singh* (not praying for a decree of possession) against the *Maharanee* and widow of *Man Singh*, the Petitioner, then an infant, as represented by *Luchmi Nath*, his brother and guardian, and two other parties (one being *Luchmi Nath* in his own right), who, for the present purpose, may be left out of consideration. The Court of first instance dismissed the Plaintiff's claim, and that decree was affirmed by the Appellate Court, with only a variation as to the costs of the suit, which the Appellate Court directed to be paid to all parties out of the estate, instead of leaving each party to bear his own costs. In the hearing of both decrees the Petitioner is named as one of the Defendants; in the lower Court as an infant, appearing by his guardian *Luchmi Nath*; in the Appellate Court as an ordinary Defendant.

The crucial question in the cause was, whether an instrument in the nature of a will executed by the late *Maharajah* on the 22nd of April, 1862, and under which his widow had executed an appointment in favour of the Petitioner, had been revoked by the *Maharajah* in his lifetime.

This tribunal decided (1) this question in favour of the Plaintiff (Appellant), reversing the decrees of both the Courts below, and substituting a declaration of the title of the Appellant as heir to the *Maharajah* under clause 4 of sect. 22 of Act I. of 1869. The report to Her Majesty was made after a full hearing, on the assumption that the Petitioner, as well as the *Maharanee*, was represented by the counsel who appeared as for the Respondents on the appeal; and the Order in Council made in pursuance of it is, on the face of it, a final adjudication against both in favour of the Appellant's title.

It is now said, however, that the Petitioner never appeared to, and was not represented on, this appeal; and that the proper steps to have it heard against him *ex parte* were not taken. This case is supported by the affidavit of Mr. *Wilson*, the solicitor, who ostensibly conducted the appeal for the Respondents, who swears that he was retained only for the *Maharanee*; that he entered an appearance for her alone; that he had no instructions to appear for the Petitioner, and never entered an appearance on his behalf; and

(1) 1 Moore's P. C. Cases, 117; S. C. 2 Moore's Ind. Ap. Ca, 214; 1 P. C. J, 175.

(2) Law Rep 2 P. C. 274; S. C. 6 Moore's P. C. (N.S.) 360; 2 P. C. J. 428.

(1) See *Maharajah Pertab Narain Singh* v. *Maharanee Sabhao Kooer*, Law Rep. 4 Ind. Ap. p. 228; *Ante* p. 740.

that, although the case filed by him was intituled in the same manner as the Appellant's petition of appeal, and was headed, "Case of the above Respondents," this was by a clerical error, which was not discovered by him until it was *recently* (that is presumably after the hearing of the appeal) brought to his notice.

On the other hand, it seems to their Lordships to be established by the affidavits of Mr. *Lattey* and of his clerk, Mr. *Hewitt*, by the record itself, and by the bill of costs hereafter mentioned, all taken together, that although Mr. *Wilson* sent to Messrs. *Watkins & Lattey*, the solicitors for the Appellant, a note to this effect, "*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer*—I have this day entered appearance for the Respondent in the above appeal," Messrs. *Watkins & Lattey*, on the 26th of May following, when they sent the manuscript record to Mr. *Wilson* in the usual course of business, distinctly asked him by letter whether he appeared for all the Respondents, and received no answer to that inquiry; that afterwards, and in the month of November, 1876, when a clerk of Mr. *Wilson's* and Mr. *Hewitt*, on behalf of Messrs. *Watkins & Lattey*, met at the Council Office for the examination of the printed record, the former indorsed his own, and allowed the Appellant's proof of the record to be indorsed, "*T. L. Wilson*, for the Respondents;" that the record as finally printed bears that indorsement; that Mr. *Wilson*, in May and June, 1877, was served with orders calling upon him to bring in the printed cases of all the Respondents; that he made no objection to the form of such orders, but ultimately brought in the printed case, headed as the case of "the above-named Respondents;" that he thus induced his opponents and this Committee, on the hearing of the appeal, to believe that he was acting for all the Respondents; and that after their Lordships had pronounced their decision, which, amongst other things, directed the costs of all parties to the appeal to be taxed, with a view to the payment of them out of the estate, he brought in before the registrar a bill of costs, which was not only headed as the bill of costs of all the Respondents, but contained items of charge relating to the correspondence between himself and the Petitioner in *India* with reference to the appeal.

Their Lordships must remark that if the case stood here, they would, upon these facts, have serious ground of complaint against Mr. *Wilson*, whose conduct of the case of his admitted client, if he really had no authority to represent the Petitioner, was such as to mislead not only his opponents, but their Lordships. They cannot admit his explanation that the heading of the case was a mere clerical error, and that in fact he was acting, and purporting to act, for the *Maharanee* alone. Whatever may have been his personal knowledge of these proceedings, he must be held to be responsible for the acts of his clerks, and cannot be acquitted of, to say the least, gross carelessness in allowing the appeal to be conducted as he says it was.

The case, however, does not rest on Mr. *Wilson's* conduct of the appeal. The Petitioner has himself filed an affidavit, from which it appears that in May, 1875, after the decree of the Appellate Court in *India*, but whilst the appeal to Her Majesty was pending, the *Maharanee* executed a further appointment in his favour, by which she relinquished the life interest which she had reserved by the former instrument; that he, being then of full age, though a minor when the suit was commenced, was put into possession of the property; and in 1877 corresponded directly with Mr. *Wilson* touching the appeal, in which, in fact, he had become the sole person interested, and furnished the funds for defending it, at all events in the name of the *Maharanee*. He had, therefore, full knowledge of the pendency of the appeal; and unless he was content, as he might well be, since their title was almost identical, to defend it in the name of the *Maharanee*, he might have taken, and ought to have taken, the necessary steps to appear by separate counsel in order to defend his interests. It seems, then, to their Lordships, that this is not a case in which, according to the principles laid down in the cases above referred to, the order of Her Majesty can be re-opened or

varied, on the mere ground that he was not properly represented upon the appeal, or cited to appear to it. It cannot be said that there has been no default on the part of the Petitioner.

He asserts, however, that he was never properly made a party to the suit in the Courts below, and that the proceedings in *India*, so far as he is concerned, were *coram non judice*. He alleges that his brother *Luchmi Nath* was not his guardian; that the objection was taken in an early stage of the suit; that *Luchmi Nath* was then dismissed from the suit, not only as a Defendant in his own capacity, but also as the supposed guardian of his infant brother; that no guardian *ad litem* was ever appointed in his place; that whatever part *Luchmi Nath* afterwards took in the management of the suit, he took as agent on behalf of the *Maharanee* alone; that he, the Petitioner, was never properly represented in the suit, was never duly served with process therein, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly. If these facts can be established, it may be that the final decree in the suit, *i.e.*, the declaration of the Plaintiff's title, considered independently of the Order in Council, and merely as a decree of the Indian Courts, would not be *res judicata* against the Petitioner. But it is clear that that issue can only be properly tried in a new suit in *India*. And there is the more reason for trying the question in *India*, since what the Petitioner desires is not a mere re-hearing of the cause on the evidence as it stands, which would probably be of little advantage to him, but a retrial of it on fresh evidence.

It is, however, said, that in such a suit in *India* the Order in Council might be opposed to him as a fatal bar. It would, however, be open to the Petitioner to contend that it was not such a bar, if he should succeed in showing that he was not bound by the decree against which the appeal was preferred. Their Lordships do not wish to prejudge that question, as they would prejudge it if upon this application they were to recommend Her Majesty to vary the Order in Council. Should a new suit ever be brought, the determination of the Indian Courts upon that, as upon any other question raised in such suit, will be subject to appeal. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this petition with costs.

22nd and 23rd May; and 22nd June, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner, Lucknow Division, Oudh.

RAMJISDAS and IMTIAZ ALI, * ... } *Appellants,*

versus

RAJAH BHAGWAN BUX and Another, ... } *Respondents.*

Act XXIV. of 1870, (Oudh Taloukdars Relief Act.)—Appeal, beyond time, allowed under the circumstances.

Under the exceptional legislation (*Oudh Taloukdar's Relief Act* XXIV. of 1870), and under the exceptional circumstances of the case as regards the person to appeal being the person against whose order the appeal is to be preferred, and the opposite party preferring an appeal after the expiration of six weeks from the date of that order &c. *held* that the appeal preferred in the Court below, though after the said six weeks was properly allowed.

22nd June, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This is an appeal from a judgment of the Commissioner of the *Lucknow* Division of

* 5 Cowell's I. A., p. 107.

the Province of *Oudh*, by which he varied an order made by the Superintendent of Incumbered Estates under the *Oudh Talookdars Relief Act* of 1870.

To make the judgment and the grounds of appeal from it intelligible a short history of the case is necessary.

On the 3rd of June, 1870, *Rajah Omrao Singh*, *talookdar* of *Pakra Ausari*, executed a deed whereby he acknowledged that he had received Rs. 60,000 from the Appellants, for which sum he pledged his estate to them. They were to hold the estate and receive the rents and profits of it for twelve years, after which time he was to be entitled to repay them the principal and interest at 12 per cent. per annum and to recover possession of the estate.

Soon after another advance of Rs. 12,000 was made to the *Rajah*, and Rs. 3000 were advanced to his brother for which he became security. Some other small sums were advanced to him at 18 per cent.

His estate was soon after taken possession of by the Court of Wards on a representation, which turned out to be unfounded, of his incapacity; subsequently on his application the provisions of the *Oudh Talookdars Relief Act* (XXIV. of 1870) were duly applied to the estate.

The order directing the application of the Act to the estate, and appointing a manager, was dated the 30th of October, 1871. Mr. *Glynn*, the Deputy-Commissioner of the province, who had been the manager under the Court of Wards, was appointed manager under the Act. In November, 1872, he was succeeded by Mr. *Finn*.

The *Oudh Talookdars Relief Act* appears to have been enacted mainly in the interest of the *talookdars*, for the purpose of protecting them in some degree against the claims of money-lenders by which their estates were being consumed, and undoubtedly some of its provisions are somewhat stringent against creditors. With its policy, however, we have no concern. The Act, after restraining proceedings in execution against the *talookdar* and his estate,—invalidating all incumbrances created by him during the management, investing the manager with large powers for protecting and improving the property, and other purposes, and providing for the proof of debts, proceeds to enact as follows:—

"9. The manager shall in accordance with the rules to be made under this Act determine the amount of the debts and liabilities due to the several creditors of the *talookdar*, and persons holding mortgages, charges or liens on the said property, or any part thereof.

"10. An appeal against any refusal, admission or determination under sects. 7, 8, or 9, shall lie, if preferred within six weeks from the date of such determination, to the Commissioner of Division to whom the manager is subordinate, and the decision of such Commissioner or of the manager if no such appeal has been so preferred, shall be final.

"11. When the total amount of such debts and liabilities has been finally determined, the manager shall prepare and submit to the Chief Commissioner a schedule of such debts and liabilities, and a scheme for the settlement thereof, and such scheme when approved by the Chief Commissioner shall be carried into effect. Until such approval is given, the Chief Commissioner may, as often as he thinks fit, send back such scheme to the manager for revision, and direct him to make such further inquiry as may be requisite for the proper preparation of the scheme."

Section 20 enables the Chief Commissioner to make rules consistent with the Act in all matters connected with its enforcement, and declares "that such rules when approved by the Governor-General of *India* in Council, and published in the local official *Gazette*, shall have the force of law."

Rules were duly made in pursuance of the Act, of which the 8th is in these terms:—

"When the amount of any debt, both principal and interest, has been determined, the manager may direct that interest, at a rate not exceeding 6 per cent. per annum, shall be paid on the aggregate sum declared to be due from the date of the decision till the date of payment."

The combined effect, therefore, of the Act and of the Rule made under it is that

the manager is to determine the amount due for the principal and interest up to the date of his determination, calculating such interest according to the contract rate (if any), and may allow subsequent interest on the amount so determined, as upon a judgment debt, up to the time of payment, provided the rate of such subsequent interest does not exceed 6 per cent.

Mr. *Glynn* on the 4th of September, 1871, while he was manager under the Court of Wards, made the following memorandum:—

"The claim (of Appellants) for Rs. 60,000 + Rs. 12,000 will now be registered. There were Rs. 3000 let off, and I will not bring them in now against the *Rajah* after a compromise. About the remaining Rs. 3107. 8*a*. inquiry will be made on copies of the claimants' books being received. The *Rajah* will be referred to also about this money and it will be admitted if no valid reason be shewn against my doing so by the *Rajah*."

After Mr. *Glynn* was appointed as manager under the Act, the following memoranda were made by him:

"Will not let off more than the Rs. 3000. *Imtiaz Ali* will let off 10 per cent. for cash payment on interest.

"27th April, 1872."

"The interest on the Rs. 72,000 will be according to the bond up to September, 1871, and after that at 6 per cent. per annum. The claim for Rs. 3107. 8*a*. in respect to *Babu Quidal Singh* is not admitted. The *Babu* has his own village, and the *Babu* should be proceeded against.

"10th, June 1872."

It has been contended on the part of the Respondent that this last memorandum was a "determination" by Mr. *Glynn*, under the 10th section of the Act, and that not having been appealed against within six weeks it became final. Their Lordships, however, do not regard it as such a determination. On the appointment of Mr. *Finn* as manager in November, 1872, the Appellants brought their claim before him, contending, and rightly as it appears to their Lordships, that there had been no final determination by his predecessor, whereupon Mr. *Finn* made an order, which he was induced to alter on review. His order on review, dated the 25th of November, 1872, increased the principal sum, and thus concluded:—

"Interest on the debt to date of decision will be calculated at the rate agreed upon. Future interest upon the sum covered by the bond at 1 per cent. (per mensem), and remainder of the debt at 6 per cent. per annum."

Soon after this order the *Rajah* died and was succeeded by his infant son, who is a Respondent together with the manager (or superintendent) of the incumbered estates.

After a good deal of delay this order was brought to the attention of the Chief Commissioner, who, acting probably under the powers conferred on him by the 11th section of the Act, appears to have disapproved of so much of it as directed future interest at 12 per cent. per annum, regarding this rate of interest as prohibited by the 8th rule, in which view their Lordships concur. Thereupon (and on the 8th of June, 1874), the following proceeding was recorded by *Pundit Kali Sahae*, described as Superintendent of Incumbered Estates, *Lucknow* Circle:

"A docket No. 1322, dated the 29th of April, 1874, has been received from the personal assistant to the Chief Commissioner under cover of the Commissioner's docket No. 1704, dated the 4th of May, 1874, directing that the superintendent was not authorized to award interest at a higher rate than 6 per cent. Wherefore a higher rate of interest than 6 per cent. will not be allowed.

"Ordered that a letter be addressed to the decree holders, communicating to them the above information. This proceeding will be filed with the record."

On this the Appellants became unable to avail themselves of Mr. *Finn's* order and a deadlock appears to have ensued. The next material proceeding was taken by the present Appellants, who appealed to the Commissioner of the *Lucknow* Division against the foregoing order of *Kali Sahae*. The Division Commissioner referred them to the Chief Commissioner, who declined to interfere in their behalf, whereupon they preferred another appeal

to the Division Commissioner, dated the 10th September, 1874, wherein they contended that Mr. *Finn's* order was right and that it was final. The petition concludes in these terms:

"Under these circumstances your Petitioner most respectfully re-submits his petition of appeal with inclosures, and prays that it may be formally admitted and judicially disposed of to enable any of the parties feeling aggrieved by the decision to prefer his appeal under section 4, Act VI. of 1874, to Her Majesty's Privy Council."

The present Appellants therefore, in September, 1874, desired a judicial determination on substantially the same questions as are raised in the present appeal.

It does not appear what, if anything, was done upon the appeal of September, 1874, and it may be inferred that the proceedings dropped, or were superseded by those next to be mentioned.

On the 23rd of October, 1874, an appeal raising the same question in another form was presented by the present Respondents against the order of Mr. *Finn*, on the ground (among others) that it was illegal on the face of it in giving a rate of interest prohibited by law. On this appeal the Commissioner ordered that, Mr. *Finn's* calculation of principal being adopted, the interest should be calculated under the terms of the deed up to Mr. *Glynn's* order of the 10th of June, 1872, and thereafter at 6 per cent. per annum.

This is the judgment now appealed against, and the point mainly relied upon is, that the appeal being out of time, the Commissioner had no jurisdiction to entertain it. The Commissioner was aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by the 10th section of the *Oudh Talookdars Relief Act*, and appeared to think that sect. 338 of Act VIII. of 1859 might apply to the case, in which view their Lordships cannot concur. He proceeded to dwell on the exceptional nature of the case, on the fact of the Respondent being a minor and incapable of exercising his right to appeal, except through the manager, who himself made the order, and could scarcely be expected to appeal against it—a state of things which the Act does not seem to contemplate—he referred to the action of the Chief Commissioner, who objected to the allowance of interest beyond the lawful rate, practically setting aside Mr. *Finn's* order, and he might have referred to the appeal of the now Appellants against the order of the 8th of June, 1874, whereby they desired an adjudication on practically the same question as that raised in the appeal before him, expressly with the object of getting rid of the deadlock occasioned by the conflicting decisions in *Oudh* by an appeal to Her Majesty in Council. He finally came to the conclusion that he had power to amend so much of the order as was manifestly at variance with the law. Their Lordships, although the case is not free from difficulty, are not so clearly satisfied that under the exceptional legislation with which they have to deal, and the exceptional circumstances of this case, the Commissioner had not this power to deal with the order of his subordinate officer, as to feel themselves driven to a decision the effect of which would be to reverse an order which appears to them, except in one particular, just and proper, and to set up another which, if acted upon, would practically repeal the 8th rule made under the *Oudh Talookdar's Relief Act*. The particular referred to is that the order directs the 6 per cent. interest to commence from the 10th of June, 1872, the date of Mr. *Glynn's* memorandum; whereas in their opinion that date should be the 25th of November following, when the gross amount then due for principal and interest was finally determined by Mr. *Finn*. They will therefore humbly advise Her Majesty that the order appealed against be varied so far as to direct that the amount determined by Mr. *Finn* on the 25th of November, 1872, to be due should be adopted, and that subsequent interest should be allowed thereon at the rate of 6 per cent. per annum. There will be no costs of this appeal.

28th and 29th May, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MESSRS. JARDINE, SKINNER, & CO., (Defendants)* ... ... } *Appellants,*

versus

RANEE SURUT SOONDARI DEBI (Plaintiff) ... } *Respondent.*

Right of Occupancy—Ijara—Right to Renewal.

Plaintiff sued for ejectment of the Defendant from her share of the land on service of notice. Defendants pleaded right of occupancy, and their right to a renewal of the lease under the terms thereof.

Held, differing from the High Court, that a right of occupancy can be acquired in respect of an undivided share of an estate, but *held* concurring with the High Court, that Defendants held as temporary *Ijardars*, and their holding as such prior to and during the lease, did not create in them a right of occupancy, and that after the expiration of the lease, they held over subject to the terms of that lease.

Defendants might have renewed the lease if they liked, according to the stipulations in the agreement, but that it is too late for them to rely upon their title to a renewal of the lease, which, if it had been granted, would now have expired.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The Appellants in this case are Messrs. *Jardine, Skinner, & Co.* They were the Defendants in a suit brought against them by *Ranee Sarut Soondari Debi* to recover possession of a 2 *annas* 15 *gundas* share of upwards of 20,000 *bighas* of *chur* land.

The question is whether the Plaintiff was entitled at the time when she commenced her suit to treat as trespassers the Defendants who had unquestionably held as *Ijaradars* under her. The *ijara* was dated the 12th *Jeyt*, 1272, corresponding with the year 1865, and was to continue for a term of five years. It comprised a large quantity of land besides the *chur* land now in dispute. As to the latter the *kubulyat* executed by the Defendants' agent contained the following stipulation: "Having fixed a yearly rent of Rs. 609. 4 *a.* for your *nij* share of 20,950 *bighas*, describing them as per boundaries given in the schedule below, you have included it in the aforesaid *ijara* rent of Rs. 4417. 9*a.* 5*r.* I shall be in possession of the said *chur* as a *jote*. Upon the expiration of the term of the *ijara* of the said *mehals*, a *pottah* and *kubulyat* will be respectively given and taken in respect of the *jote*, regard being had to the quantity of land and amount of rent that shall be determined to belong to your *nij* share in accordance with the productive power of the land within the area determined by a measurement of the said *chur*. If I do not take a *pottah* and give a *kubulyat* within two months after the fixing of the rate of that land, you will make a settlement with others." In other words, the Defendants were to be entitled at the expiration of the term of five years to a renewal of the lease of the land in dispute at a rent to be fixed according to the measurement of the land to be made at that time, and to the productive powers of the land.

The Defendants at the expiration of the lease continued in possession. Nothing was done with regard to assessing the rent for the new lease for nearly three years afterwards, but the Defendants remained in possession, and continued to pay the old rent into Court, the Plaintiff having apparently refused to accept it. In *Pous* 1279 the Plaintiff caused a notice to be served upon the Defendants. That notice, after referring to the abovementioned stipulation in the *kubulyat*, and stating that a *jummabundi* had been made of the said land assessing the rent at Rs. 1448. 8*r.* 2*a.* under a measurement, the rates being fixed in accordance with the productive powers of the various sorts

* 5 Cowell's I. A., p. 164.

of land mentioned in the schedule, and the rates paid by tenants of a similar class for lands of a similar description, proceeded as follows: "Notices have been repeatedly given to you requiring the exchange of *pottah* and *kubulyat*, but you have notwithstanding failed to appear and make any settlement. For this reason you are again informed by means of this notice that in accordance with the provisions of the *kubulyat* dated 14th *Jeyt* 1272, B.S., given by you, you shall appear personally or through your manager or other authorized person within two months from the date of the service of this notice at *Putia*, the *Sudder Cutcheri* of my *zemindary* and appertaining to *Zillah Rajshahye*, and taking a *pottah* at the rent mentioned in this notice, deliver a *kubulyat*. If you do not do this within the said period, after its expiration a settlement will be made with others." There is no proof of the former notices mentioned in this document. For all that appears from the evidence this was the first notice served upon the Defendants. Some further correspondence took place, but nothing was settled between the parties, and the Plaintiff filed her plaint in August, 1874. The Defendants insisted that by reason of a long occupation of the lands they had acquired a right of occupancy, and that the Plaintiff had no right to turn them out of possession. In their written statement they say: "The lands in dispute have been held by us in *jote* right for upwards of twelve years since their formation, and the Plaintiff therefore included the said *jote* in the *pottah* of 12th *Jeyt*, 1272, and realised rent accordingly. The rents of the years 1277, 1278, 1279, and 1280 have been deposited by us in the *moonsiff's* Court at *Jungipore*. We have acquired the right of occupancy in the Plaintiff's share of the said lands, and possess a legal right to hold and enjoy the same on payment of a rental of Rs. 609. 4*a*. per year." They claimed, therefore, a right of occupancy acquired, by virtue of the provisions of Act VIII. of 1869 of the *Bengal* Government, or under Act X. of 1859 of the Governor-General in Council.

With reference to this claim the Judge of the Court of first instance laid down two issues, the 4th and 5th, which are: "Was there a *jotedar* holding by Defendants of Plaintiff's share antecedent to, independent of, and not merged in the interest conferred by the *ijara* lease. If there were such a *jotedar* holding has it ripened into a right of occupancy?" In his judgment he says: "I find that the Defendants had a *jotedary* tenure antecedent to the *ijara* lease, and not merged therein; but that this tenure has not been shewn to have been strengthened by the acquisition of a right of occupancy in the lands included therein." As their Lordships understand the learned Judge in this part of his judgment, he held that there was a *jotedary* holding, but that the Defendants had not gained a right of occupancy which entitled them to hold possession as against the Plaintiff independently of the stipulation in the *ijara*.

The High Court put their conclusions on the above issues far more clearly. They say: "At any rate it seems an irresistible conclusion that the occupancy of the Defendants in these lands was connected with and arose entirely out of their tenure as *ijaradars* of the *pergunnah*. That being so, the case falls under the repeated decisions of this Court, that no farmer or leaseholder can, during the term of his lease, create for himself a subtenure which is to enure after the lease expires to the prejudice of the owner whose *locum tenens* he is during the term of his lease. But even if that were not so, it is impossible to see how the Defendants could have acquired either a right of occupancy or a *jotedar* right in respect of an undivided share of an estate."

Their Lordships do not concur in the view thus expressed by the High Court, to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate; but they fully concur in the conclusion that the Defendants' holding as *ijardars* prior to and during the lease of 1865 did not create in them a right of occupancy, and that after the expiration of the lease of 1865 they held over, subject to the term of that lease.

They are also clearly of opinion that in

point of law the agreement contained in the *pottah* to grant a renewal of the lease did not create or vest in the Defendants a fresh term of years. It merely gave them a right to a renewal of the lease, and to compel the Plaintiff to renew it if she should attempt to turn them out of possession at the expiration of the term. It also gave the Plaintiff a right to the land, and to let it to others if the Defendants should refuse to accept a *pottah* and execute a *kubulyat* within two months after the rent to be paid during the renewed term should have been duly ascertained and fixed. Accordingly, when after the expiration of the lease, and before the Defendants acquired a right of occupancy, the Plaintiff gave them notice that unless they renewed the lease according to the terms which she pointed out, she would settle with others, or in other words that she would turn them out of possession, the Defendants might if they had pleased have required the Plaintiff to perform her agreement, and to grant them a lease upon the terms stipulated; but even if they had done so they could not, in their Lordships' opinion, have compelled her to grant a lease for a longer period than five years. Nothing is said in the *ijara* as to the duration of the new lease, and a term for a longer period than the original term could not reasonably be implied. The Defendants however took no measures to obtain a renewal of the lease, and at the present moment the period of five years from the expiration of the lease of 1865 has expired. The Judges of the High Court say: "She waited for three years after the expiry of the *ijara* lease before she gave notice to the Defendants, and allowed the Defendants to occupy at the old rate, which was very much less than what was now demanded. After that she waited for two years more before she brought the present suit; and finally about six or seven years have now elapsed since the termination of the *ijara*, and the Defendants are still holding at the rate of Rs. 609 that which the Plaintiff claims to be worth Rs. 4000. Having regard simply to this circumstance, it appears to us that the Defendants had already had the full benefit which they could have derived from the stipulation in the *ijara pottah*. They could not have required the Plaintiff to give them the land for more than five years, nor could they have expected to hold the land at anything like so favourable a rent as that at which they have been so long enjoying." Their Lordships are of opinion that the Plaintiff had no right to measure the lands in the absence of the Defendants, or herself to determine finally the rent at which the lease should be renewed. If the rent at which the Plaintiff offered to renew the lease were too high, the Defendants were not bound to accept it; but in that case it lay upon them to take measures to compel the Plaintiff to renew at a proper rate, having regard to the stipulations of the lease. This they did not do at any time before the commencement of the suit otherwise than by stating in the letter of the 4th of November, 1873, their readiness to accept a renewal at a rent to be fixed in accordance with the terms stipulated. Even in their defence to the suit, though they stated that they were ready to take a *pottah* upon the terms stipulated, they still, as already stated, set up a right of occupancy at the rent of Rs. 609. 4*a*. a year. It appears that a great portion of the land has been diluviated, and it would be impossible now to measure the land as it existed at the time of the expiration of the lease, or to ascertain what were the productive powers of the land at that time.

Their Lordships are of opinion that the Plaintiff had a right to turn the Defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the Defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; but that it is too late for them to rely upon their title to a renewal of the lease which, if it had been granted, would now have expired. They have, therefore, no equity to resist the Plaintiff's claim to recover the possession of the land.

Under these circumstances their Lordships are of opinion that the decree of the High Court ought to be affirmed, and they will humbly advise Her Majesty to that

effect. The Appellants must pay the costs of this appeal.

2nd July, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

THE ZEMINDAR OF PITTAPURAM, (Plaintiff)* } *Appellant,*

versus

THE PROPRIETORS OF THE MUTTA OF KOLANKA, (Defendants)... } *Respondents.*

Res-judicata—Suit between the same parties— Sec. 2, Act VIII. of 1859.

The Plaintiff sued to recover possession of certain houses and grounds as belonging to his *zemindary*, setting forth that the premises in question had been occupied by his paternal grandmother, on whose death the Defendants had taken wrongful possession. The Defendants claimed to be legally entitled to the premises in question, and contended that the Plaintiff's suit was barred under section 2, Act VIII. of 1859, by reason that the Plaintiff had already, during his grandmother's life time, brought a suit against her and the Defendant's father, as a co Defendant, to establish his right to the same premises, which suit had been dismissed. The Defendants also pleaded limitation.

It appeared that in the former suit the relief sought by the Plaintiff was substantially to restrain his grandmother from acts of waste in alienating property which had belong to her deceased husband by assigning it to her co Defendant; but that as regards the property now claimed, although it was mentioned in the plaint, no charge had been made that she has assigned it, or intended to assign it, to her co-Defendant, nor any allegation to show that the co-Defendant had any interest in it.

Held, reversing the decisions of the Lower Courts, that, under the circumstances, the decision in the former suit was not a decision in a suit between the same parties, or parties under whom they claimed, and that the cause of action in the present suit was not determined in the former suit.

Held also, that the Defendants plea of limitation could not be determined without a finding as to whether the Plaintiff's grandmother, who died within the period of limitation, had held the premises with the Plaintiff's leave, or as a trespasser.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK :—

This is an appeal in a suit brought by the Plaintiff to recover possession of certain houses and grounds appertaining thereto, situate in the fort of *Pittapuram*, which he claimed as part of his *zemindary* of *Pittapuram*. He stated in his plaint that his father, "*Sri Rajah Row* (late) *Venkata Surya Row Bahadur*, and the Defendants' father, *Sri Rajah Row* (late) *Kumara Venkata Row Bahadur*, were brothers, of whom the Plaintiff's father, who was elder, succeeded to the ancient *zemindary* of *Pittapuram* belonging to their father, *Sri Rajah* (late) *Niladry Row Bahadur*; and after him the Plaintiff became his successor." He further said, "As the Plaintiff's paternal grandmother, *Sri Rajah Row* (late) *Bhavayamma Garu*, was a member of the Plaintiff's family, she lived in some of the houses within the fort of *Pittapuram* belonging to the Plaintiff, and had in her use some grounds appertaining to that fort; and while so she died on the 11th of March, 1870. The Defendants retained the said houses and grounds in their possession even after her death, on the ground of their having occupied them with her until her death; and although the Plaintiff demanded them to surrender them up to the Plaintiff in July, 1870, they have not done so yet; and therefore the cause of action arose in that month."

The Defendants, in their written statement, set up in defence that the claim was barred by the *Statute of Limitations*; and, further, they stated that they were entitled to the property in dispute, and that the Plaintiff had no right to recover the same on the pretext that the property formed a part of his *zemindary*. In paragraph 3 they said, "The Plaintiff brought the suit No. 4 of 1862 on the file of the late Civil Court against the Defendant's father, and others, for a decree establishing his right to these houses and other

* 5 Cowell's I. A., p. 206; 2 I. L. R. Mad., 23.

property; and the said suit having been dismissed, he has now again brought this suit for the said houses; and this suit is therefore opposed to sect. 2 of the Code of Civil Procedure." Upon that an issue was raised whether the Plaintiff was barred under sect. 2 of the Civil Procedure Code from bringing the suit by reason of the cause of action or any part thereof having been previously heard and determined by a Court of competent jurisdiction in a former suit between the same parties or parties under whom they claim.

The principal question in this appeal is, whether the right to recover the property in suit was determined in a former suit, and whether, as regards that property, it was a suit between the same parties or parties under whom they claim.

The former suit was brought in 1862 against the widow of *Niladri Row*, the grandfather of the Plaintiff, and also against the father of the Defendants and the sister of their father.

The grounds were, first, that the widow had misappropriated certain moveable property belonging to the estate of her deceased husband *Niladri*, and had with part of the proceeds thereof purchased certain *nuttas* described in No. 1 of the particulars annexed to the plaint, and had alienated the same to the co-Defendants by deed of gift; secondly, that the lands described in No. 2 of the said particulars were *sree* lands to which she was entitled only for life by way of maintenance, but that she had executed a document transferring them to the co-Defendants as a gift.

There was also another item in the particulars, No. 3, described as "An upstair house situated within the fort of *Pittapuram* belonging to the Plaintiff, and valued at Rs. 4000, together with three houses attached thereto, as well as a yard and compound.

There is no doubt as to the fact that the property mentioned in No. 3 is the same property as that which is now sought to be recovered. As regards the properties described as Nos. 1 and 2, the Plaintiff sought, amongst other things, to have the deeds of gift cancelled, to recover possession of No. 1, and for a prohibition against the alienation of property No. 2. As regards the property described in No. 3, and which was sought to be recovered in the present suit, there was no distinct allegation of fact either in the plaint or in the written statement, nor anything to connect the present Defendants' father therewith, or to disclose any claim thereto on the part of the Plaintiff; and their Lordships have come to the conclusion that substantially the relief sought in respect of it was, as stated by the High Court, to restrain the widow from acts of waste.

As regards Nos. 1 and 2, which are not the subject of the present suit, they had been assigned by the widow to the co-Defendants, who, of course, were interested in them, and necessary parties to the suit; but as regards the houses and other property the subject of the present suit there was no charge that she had ever assigned or that she intended to assign them to the co-Defendants, nor any allegation to shew that the co-Defendants had any interest whatever in them.

As regards that portion of the property, then, to which this suit relates, and as to which the High Court considered the former suit was one to restrain waste, the widow was substantially the only Defendant, and her co-Defendants were no parties to the suit.

No issue was raised nor any evidence offered on either side in respect of that part of the property, either to shew that the Plaintiff was entitled to an injunction or for any other purpose, and the Plaintiff's suit was dismissed. The High Court, on appeal, affirmed the judgment. They said: "The judgment must be affirmed with respect to the houses and premises described as No. 3, there being no evidence whatever relating to this head of claim." Under these circumstances their Lordships are of opinion that the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claim establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

The issue as to *res judicata*, however,

was not the only issue in the present suit; other issues were raised. The first was, "Whether the houses and sites claimed appertain to the *zemindary*, and, as such, are the property of the Plaintiff, the *Zemindar*, or are the property of the Defendants." The judge of the first Court did not determine that issue. He said: "I find in the affirmative on the fourth issue" (that is, the issue as to *res judicata*); "and with the evidence before me, under which I hold the Plaintiff estopped from bringing this suit, I could not but find, were it necessary to record a finding, against the Plaintiff on the first issue." As regards the estoppel, the same principle which applies to *res judicata* must apply to that; the parties were not bound by the estoppel, inasmuch as the former suit was not substantially, as regards the houses and property in the present suit, a suit between the same parties, nor was there in it a claim or a decision as to the right.

There was also another issue, namely, whether the suit is barred by limitation. As regards that issue the Judge of the first Court says: "To sum up, I find that the grandmother of the Defendants, and her son, and afterwards her son's sons, lived together in the premises now sued for as their principal place of residence, not only from 1835, as stated by the Defendants, nor from 1845, as stated by the Plaintiff, but the grandmother and her son lived there from and before the death of *Niladri Row* in 1828, and continuously, with but few breaks or visits at times." There is, however, no express finding as to the title under which the mother remained in possession. If the houses were part of the *zemindary* which descended to the Plaintiff, it would be important to ascertain whether the mother remained in possession by reason of an agreement or other arrangement by which she was to be allowed to remain there for her life as her place of residence, or whether she continued there as a trespasser holding the property as in her own right. There has been no finding upon that point, and therefore it will be necessary to have it determined. If she held in her own right or as a trespasser, then the *Statute of Limitations* would be a bar, but if she held under an arrangement by which she was allowed to remain there for her life, the occupation during her life would not be a bar to the present suit, inasmuch as she died within the period of limitation.

As regards the first and second issues, therefore, their Lordships think that under all the circumstances the case ought to be remanded to the High Court to determine them, and this more especially as the Respondents are not present to argue the case upon the evidence.

Under these circumstances their Lordships will humbly advise Her Majesty that the finding upon the fourth issue be set aside, and the decree of the High Court be reversed, and that the case be remitted to the High Court to determine the first and second issues, and to decide the case upon the merits.

The costs of this appeal will be taxed here, and are to be costs in the cause.

5th, 6th, 7th, and 9th November, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of judicature at Fort William in Bengal.

SYUD BAZAYET HOSSEIN and others, (Defendants)* ... } *Appellants,*

versus

DOOLI CHUND, (Plaintiff)... *Respondent.*

and

MOULVIE MAHOMED WAJID (Defendant) ... } *Appellant,*

versus

SYUD BAZAYET HOSSEIN and others, (Plaintiffs) } *Respondents.*

Debts of Deceased Mahomedan—Right of Creditors as against bond fide Purchaser—Alienation by heir-at-law of Mahomedan Estate—Lis pendens.

The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage.

But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of *lis pendens*.

9th November, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The first of these appeals is from an order of a Division Bench of the High Court of *Calcutta*, passed on special appeal. The order is dated the 23rd of May, 1873, and modified an order of the Judge of *Zillah Gya*, dated the 27th of March, 1872, which last-mentioned order reversed that of the subordinate Judge, dated the 29th of July, 1871, and made in the Appellant's favour.

The suit was instituted by the Respondents to establish their titles as purchasers in execution of a decree obtained by them against *Najmooddin* of 14 *annas* of *mouah Bhojeporg* in *mehal Rewai Taturia*, in *Zillah Gya*, and to recover possession thereof.

The suit was brought under those circumstances: *Khorshed Ali*, a Mahomedan of the *Soonee* sect, died in October, 1865. He left three widows, *Mussumat Zohrun*, *Mussumat Begum*, and *Mussumat Tayyuban*. He also left a son named *Najmooddin*, who it was contended was not the legitimate son of his father (but whose title has since been established in the suit), and a sister.

The son's title having been established as the legitimate son and heir of his father, the three widows became entitled under the Mahomedan law as sharers to one-eighth of the estate of their deceased husband, and the son *Najmooddin* to seven-eighths of the estate. The son claimed the whole property under a *mokurrary* which he alleged had been granted to him by his father on the 16th of March, 1862. The widows claimed large sums of money on account of dower; but on the 13th of June, 1866, before any proceedings had been taken by the widows to recover their dower, *Najmooddin*, the son, executed a mortgage bond in favour of *Sital Pershad* for Rs. 4890. The bond was dated the 13th of june, 1866, and was as follows:—"Whereas Rs. 1295, under a bond dated the 14th of February, 1866, A. D., Rs. 1000, the principal amount under a registered bond, dated the 18th of May, *idem*, and Rs. 118. 4*a*. the interest on the aforesaid two bonds, in all Rs. 2413. 4*a*., are justly due to *Baboo Sital Pershad*, son of *Baboo Ajoodhai Lal 'mahajon'* (banker), by caste an *Agarwala*, inhabitant of *Kusba Sahebgunge*, *pergunnah* and *Zillah Gya*, from me the declarant; and at present

* 5 Cowal's Ind. Ap. p. 211; 4 I. L.R., Cal., p. 402.

having taken Rs. 2386. 12*a.* in cash for payment of the rents of the *mouzahs* held in lease and *mokurrary* from the *Ranees*, the wives of *Rajah Modh Narain Singh*," —referring to a *mokurrary* held by the father himself, as to a portion of the estate,—"hence cancelling the former bonds, I execute this bond for Rs. 4800, and declare and give in writing, that I shall repay the said amount, principal, with interest at two per cent. per mensem, in full on the 30th of *Magh*, 1274" corresponding with 1867—"to the *Baboo* aforesaid. As a guarantee for the payment of the amount in question, I mortgage 8 *annas* of the entire 16 *annas* of *mehal Rewai Taturia, pergunnah Muhair, Zillah Gya*, which I have as my property, and *mokurrary* in my possession and holding up to the date of the execution of this deed. As long as the amount in question, principal with interest, is not repaid, I or my heirs shall not transfer the same by sale, conditional sale, gift, or mortgage, or convey it in any other way to anybody else. Should I and they do so, the same will be null and void." Then at the end of the bond, "For the further satisfaction of the banker:"—that is, of *Sital*,—"I have kept a *mokurrary pottah*, dated the 16th of March, 1862, A. D., of the *mehal* mortgaged in this bond by the banker," meaning that he had deposited with the banker the *mokurrary* under which he claimed to hold the whole estate from his father.

Some question has arisen upon the construction of the bond, whether it was merely a mortgage of the *mokurrary* which he alleged to have held from his father, or whether it was a mortgage of his estate so far as he could charge it.

Their Lordships are of opinion that the mortgage operated to transfer his interest in the estate, and not merely the *mokurrary* which he alleged had been granted to him by his father. It is important to determine this question, because in a subsequent proceeding, to which advertence will presently be made, the *mokurrary* alleged to have been granted to him by his father was held to have been made merely *benamee* for the benefit of the father. The mortgage was on the 13th of June, 1866. At that time, if *Najmooddin* were the legitimate son of the deceased,—and it has now been decided that he was,—he had the right to convey his own share of the inheritance, and was able to pass a good title to the alienee, notwithstanding any debts which might be due from his deceased father.

For that position the 6th *Bengal* Law Reports, p. 54, was cited as an authority. In that case the share of an heir was seized and sold in execution of a decree against the heir in his individual and not in his representative capacity, and it was held that the purchaser had a right to hold the property against a creditor of the ancestor who had obtained a decree for her debt before the seizure in execution. In that case the creditor was the widow of a deceased Mahomedan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty. In *Sugden* on Vendors and Purchasers, p. 655, the edition of 1862, it is laid down that, "although an heir-at-law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them." In *Williams* on Executors, at p. 872, a similar rule of law is laid down with regard to executors. It is said, "It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors into the hands of the alienee. The principle is, that the executor or administrator in many instances must sell in order to perform his duty in paying debts, &c., and no one would deal with an executor or administrator if liable afterwards to be called to account."

In the present case, in the course of the argument a distinction was attempted to be drawn by the learned counsel for the Appellant between an absolute sale and a mortgage; but it appears to their Lordships that there is no valid distinction in this respect. An executor may very properly mortgage a portion of the assets of

his testator for the purpose of raising money to pay debts, and in many cases it may be very beneficial to the estate that such a course should be adopted.

In *Williams* on Executors, p. 873, it is said, "As an executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets."

In *Campbell* v. *Delancy* (1): "The heirs of a deceased Mahomedan mortgaged some property of their ancestor. After the mortgage a judgment-creditor, in respect of a debt due from the estate of their ancestor, attached and sold the mortgaged property in execution of his decree. Held, that the sale was subject to the mortgage."

Their Lordships entirely concur in the view of the law which was laid down in the case cited from the 6th *Bengal* Law Reports, and the other authorities cited, and are of opinion that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *boná fide* purchaser for value to whom it has been alienated by his heir-at-law.

That being the law, it is necessary now to refer to what took place.

After the mortgage bond had been executed by *Najmooddin*, two of the widows, viz., *Mussumat Zohrun* and *Mussumat Begum*, instituted a suit against *Najmooddin*, and also against the sister of the deceased, who would have been entitled as an heir of the deceased in case *Najmooddin* was not a legitimate son. They sued to set aside the *mokurrary* under which the son claimed to be entitled to the whole estate from his father; to declare that he was a mere stranger; and they prayed for an order that possession of the estate should be recovered by them, and that the dower which they claimed should be paid out of the estate.

Lengthened proceedings took place in that suit, and ultimately on the 11th of June, 1868, the High Court, upon appeal by *Najmooddin* against whom a decree had been made in the lower Court, made the following decree: "That the Appellant is the legitimate son and an heir of *Khorshed Ali*, deceased; that the Appellant must account for the assets of the estate of *Khorshed Ali* which have come to his hands, and that to the extent of these assets he is liable to pay the amount due to the Plaintiffs *Zohrun* and *Begum* in respect of their dower, the said *Zohrun* and *Begum*, in respect of their claim, ranking *pari passu* with other ordinary creditors of the estate. When the debts due by the estate of *Khorshed Ali* shall have been satisfied, the residue is to be divided between the heirs, who are *Najmooddin* and the three widows *Zohrun*, *Begum*, and *Tayyuban*, in the shares to which they are by Mahomedan law entitled."

After the suit had been instituted by the first two widows, *Tayyuban*, the other widow, brought a similar suit, and obtained a similar decree in the High Court. Under the decrees in the suits by the widows executions were issued, and the share of *Khorshed Ali* in the property in question, *mouzah Bhojepore*, was attached as part of the assets of their deceased husband.

On the 26th of June, 1867, *Sital Pershad* sued *Najmooddin* on the mortgage bond, and obtained a decree in that suit, by which it was ordered that the sum due on the bond should be realized from the property mortgaged, and other property of the Defendant.

The present Respondent derived title under a sale of the mortgaged property in execution of that decree, and the High Court upheld his right to it. It should be remarked that several decrees and orders, both interlocutory and final, were made in the suits of the widows, and that the property in suit was attached in those suits long before it was attached in *Sital's* suits. But their Lordships consider that this is immaterial, and that it is unnecessary to refer to the several proceedings in the suits of the widows, because they are of opinion that the bond which was executed by *Najmooddin* to *Sital* gave him a title to the estate which had been mortgaged by the bond before the institution

(1) Marshall's Rep., 509.

of the suits by the widows, and that the rights of *Sital* and of those who claim under the sale in execution of his decree are not affected by any of the proceedings in the widows' suits.

Their Lordships are of opinion that the decree of the High Court was correct, and they will humbly advise Her Majesty that the judgment and decree be affirmed and the appeal dismissed with costs.

The second appeal to which this judgment relates is similar to the preceding case instituted by *Bazayet Hossein* and others against *Dooli Chund*, with one exception.

The Appellant claimed under a sale in execution of a decree upon a mortgage bond executed by *Najmooddin* to *Abdool Aziz* on the 13th of October, 1867. The great distinction between this case and the other is that in the present case the mortgage bond was executed pending the suits brought by the widows, whereas in the other case the mortgage bond was executed before the institution of the widows' suits. In this case the widows claim under a purchase in execution of the decree of the widow *Tayyuban*, the effect of which was stated in the judgment in the other appeal. The High Court held that the purchaser under the decree upon the mortgage bond was bound by the decree of the widow, inasmuch as the mortgage had been executed during the pendency of the widow's suit. Mr. Justice *Phear*, in delivering judgment, says, "I need hardly say that a decree of this kind, directing the person in whose hands the property was, to account for it in order that it might be applied for the purpose of discharging the debts due from *Khorshed Ali*, was a decree against that property, and operative to bind it in the hands of *Najmooddin*, and therefore of any other person who took from *Najmooddin* with notice of the decree, or under such circumstances as to make him affected by the doctrine of *lis pendens*."

Their Lordships agree in that view of the law, and are of opinion that the Appellant in this case was bound by the decree obtained by the widow *Tayyuban*.

A question was raised in the course of the argument as to whether the decree of the High Court warranted the execution which the widow took out; and whether some further order of the Court was not necessary before execution could be issued upon it. No application, however, was ever made to set aside the execution upon the ground that it was not warranted by the decree of the High Court, nor was any point of this kind taken in the Lower Court. Under these circumstances their Lordships are of opinion that that point cannot now be taken.

They, therefore, hold that *Abdool Aziz* and all persons claiming under him, or under the sale in execution of the decree upon his bond, were bound by the decree of the High Court in the suit instituted by the widows before the bond was executed.

Under those circumstances they will humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal with costs.

8th and 9th November; and 3rd December, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMESHUR PERSHAD NARAIN SINGH, (Plaintiff)* ... } *Appellant*,

versus

KOONJ BEHARI PATTUK and another, (Defendant) } *Respondents*.

Right to the use of Water—Artificial Watercourse.

The right to water flowing to a man's land through an artificial watercourse, constructed on a

* 6 Cowell's I. A., p. 83; 4 I. L. R., Cal. p. 633.

neighbour's land, must rest on some grant or arrangement, proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal origin.

Such a right may be presumed from the time, manner, and circumstances under which the easement has been enjoyed.

3rd December, 1878.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

In this suit the Appellant (Plaintiff below), the owner of *mouzah Chahul* and four other *mouzahs*, complained of the diversion of water, which, as he alleged, ought to flow from an adjoining estate belonging to the Defendant, called *mouzah Mahooet*, to his own.

Mahooet lies to the south of the Plaintiff's *mouzahs*, and the land falls in a northerly direction from *Mahooet* towards them.

A large reservoir, called *Mahooet Tal*, formed by artificial embankments, has existed for a long time in the Defendant's *mouzah*. It appears to be fed partly by water which is brought from a natural river by artificial channels, and partly by the collection of the rainfall on the adjoining land, and was undoubtedly created for irrigating purposes. A large *khonwa* (overflow channel) has been cut on the eastern side of this *tal* running in a northerly direction, by which, and by other channels, water from this *tal* has flowed to another and lower *tal* constructed at the northern extremity of *mouzah Mahooet*, and mainly upon it, called *Chahul Tal*, from which last *tal* the water is carried by several channels to *mouzah Chahul* and the other *mouzahs* of the Plaintiff, for the purpose of irrigating them.

According to the evidence in the case, this system of irrigation has existed beyond living memory.

The complaint of the Plaintiff is that the Defendant has placed to *grandees* or dams in the *khonwa* above described, and has also cut a new channel from the northern part of the *khonwa*, the effect of which is to prevent the water in the *khonwa* from flowing to the *Chahul Tal*, and to divert it altogether from his *mouzahs*. He also complains that the Defendant has prevented the water issuing from the *tal* on its western side from flowing to his land as it had formerly done, and has carried it into or in the direction of the River *Ponwar*.

The Plaintiff does not dispute the right of the Defendant to use the water of the *Mahooet Tal* for irrigating that *mouzah*, but, subject to that use, claims, as a right, that the overflow water of the *tal* and the surplus water, after irrigating the Defendant's *mouzah*, shall be allowed to flow in the accustomed manner to his *mouzahs*.

The defence, as their Lordships understand it, is twofold. In the first place, the Defendant denies the Plaintiff's right to any of the water flowing from the *tal*; and, secondly, he contends that if any right exists, it is to the overflow of the *tal* only, and that he has not infringed this limited right.

The subordinate Judge passed a decree in favour of the Plaintiff, declaring him to have the right to irrigate the lands of his *mouzahs* with the water of the *Mahooet Tal*, and giving relief against what he found to be wrongful diversions of the water in the manner which will be hereafter commented upon.

Upon appeal to the High Court this decree was reversed. The Judges of that Court seem to have considered that the Plaintiff had put his claim in such a way that, if affirmed, it would deprive the Defendant of the use of the water of *Mahooet Tal* for irrigating his own *mouzah*. Their Lordships, however, do not understand the claim to be so extensive as it was thus assumed to be. It does not very distinctly appear whether the Judges of the High Court meant to decide that the Plaintiff had not such a right as they considered him to have claimed, or that he had established no right whatever to the flow of any of the water issuing from *Mahooet Tal*. They rested their judgment, however, in a great degree on the fact that the *tal* and *khonwa* are artificial works erected on the Defendant's own *mouzah*.

There is no doubt that the right to the water of a river flowing in a natural chan-

nel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The above distinction seems to be now clearly established, for, although it was said by the Court of Queen's Bench, in the case of *Magor* v. *Chadwick* (1), that it was no misdirection to tell the jury "that the law of watercourses is the same, whether natural or artificial," it was held in a subsequent case, which appears to their Lordships to be correctly decided—*Wood* v. *Waud* (2)—that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable.

It was said by the Court in *Wood* v. *Waud* (3):—

"We entirely concur with Lord *Denman*, C. J., that 'the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision, *Greatrex* v. *Hayward* (1), *Baron Parke* shortly states the principle thus:—

"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

In the case then in question the Court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In a subsequent case the Court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned Judge who tried the cause, to the effect that if the stream were an artificial one no right whatever could have been acquired in it. The Court held the direction was incorrect, "because" (in the words of the Court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream": *Sutcliffe* v. *Booth* (2).

What then, is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created, and have been actually enjoyed? In the first place, as a question of fact, the *Mahooet Tal* appears to be of a permanent nature. Next, the construction of the *Chahul Tal*, which receives the surplus water of

(1) 11 A. & E. 586.
(2) 3 Ex. 748; 18 L. J. (Ex.) 305.
(3) 3 Ex., at p. 777.

(1) 8 Ex., 293.
(2) 32 L. J. (Q.B.) 136.

the upper *tal*, by means of the *khonwa* and other channels, indicates that a permanent and connected system of irrigation for what are now the Plaintiff's and Defendant's *mouzahs*, beneficial to both estates, was by these means provided. The fact that this lower reservoir, which seems to have acquired the name of the *Chahul Tal*, was built mainly on the Defendant's *mouzah*, leads irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that *mouzah*; and it is evident, from its situation, that its main, if not only, use was to store water for the convenient irrigation of the Plaintiff's *mouzahs*. Then it is proved that the water has been used and enjoyed for irrigating these *mouzahs* from a time beyond living memory. It appears to their Lordships that, from all these facts, a presumption fairly arises that this enjoyment had an origin which conferred a right.

It may be that at the time when this system of irrigation was adopted the *mouzahs* now belonging to the Plaintiff and the Defendant formed one estate, and if so, on severance, the right to the continued flow of the water in the accustomed channels would arise and subsist (see on this point *Watts* v. *Kelson* (1); or, if the *mouzahs* were always separate, it may be that, by the construction of the *Mahooet Tal*, water was intercepted which would naturally have flowed to *Chahul*, and that this or some other consideration existed, which led to an agreement between the proprietors respecting the use of the water.

Other circumstances were proved which support the presumption of a legal right to the enjoyment of the water.

In 1831 proceedings were taken in the Criminal Court of *Zillah Berar* by the owners of *Chahul* against some *ryots* of *Mahooet* in consequence of their having closed the *khonwa* from *Mahooet Tal* to *Chahul Tal*, which led to a *razinamah* being come to, dated the 6th of April, 1831, between the *Elakadars* of the two *mouzahs*. In that agreement the *khonwa* is described as being then an ancient one. It recites that disputes arose respecting "the closing of a long standing *khonwa* of water of the *tal* of *mouzah Mahooet*." The arrangement come to is thus expressed:—

"Now between our client aforesaid and the said *Rajah Saheb* a compromise has been made in this manner: that when the water of the '*tal*' of *mouzah Mahooet* aforesaid is about to overflow, and there happens to be any necessity for discharging the same, at that time our client aforesaid shall discharge the water of the said '*negar*' towards the '*tal*' of *mouzah Chahul*, &c., through the course of the long standing '*negar*,' which the *Elakadar* of *Chahul*, &c., declares to be a '*khonwa*'; that they shall not open it towards the River *Ponwar* or in any other direction. And that the power of closing and opening the '*negar*' of the '*tal*' of *mouzah Mahooet* aforesaid, rests with the *Elakadar* of the said *Mahooet*.

"As *Moulvi Kasim Ali*, '*Elakadar*' of *mouzah Mahooet*, has acknowledged the '*khonwa*' of '*tal*' *Mahooet* towards the *mouzah Chahul*, &c., therefore a mutual adjustment has been effected, and the contents of the *razinamah* are true."

The effect of this arrangement seems to be that the overflow of the *tal* shall be always discharged through the *khonwa*, and in no other direction. This agreement appears to refer only to the overflow water discharged from the *tal* through the *khonwa* (which was then apparently the only matter in dispute); but it is a clear acknowledgment of a right to this overflow. This is made plain by the statement that "the *Elakadar* of *mouzah Mahooet* has acknowledged the *khonwa* of *Tal Mahooet* towards the *monzah Chahul*."

It was objected that this *razinamah* does not bind the proprietor of *Mahooet*; but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water.

The parties were again before the Criminal Court in 1804; the *Elakadar* of *Mahooet* being on this occasion the complainant. What then occurred appears in the following record of the proceedings:—

(1) Law Rep. 6. Ch 160.

"Case in respect of the dispute for the use of the water of *Tal Mahooet*.

"It is evident that the property in dispute lies in *mouzah Mahooet*, and is known by the name of *tal*.

"It appears that both parties claim the right to use the water collected in this *tal*. The point at issue is this: Whether one party alone has the right to the water, or both the parties are entitled to the use of it? It seems that a protracted period has elapsed, that a dispute had occurred regarding this very *tal* between the parties concerned in the present case. From the *razinamah* (deed of compromise) filed by the second party, against the genuineness of which the first party has no reason to object, the above dispute appears to have been decided as follows: That the people of *mouzah Mahooet* had entered into an arrangement with the opposite party to allow the water of the *tal* aforesaid to flow towards the *Tal Chahul*, and not to allow the same to flow in any other direction. This proves that although the *tal* is situated within the lands of the first party, and although by virtue of the *razinamah*, the first party is vested with the power of discharging or withholding the water, yet the opposite party is entitled to the use of the said water when it is once discharged. Therefore it is

"Ordered, that according to sect. 320 of the *Criminal Procedure Code*, the first party shall not exclusively hold possession of the water, the subject of litigation, till the said first party obtain a decision from a competent Court declaring that he is entitled to hold possession without the participation of any other person."

The *Mahooet* proprietors do not seem to have challenged this decision of the magistrate in the Civil Court.

The map produced by the *Elakadars* of *mouzah Mahooet* in the course of the proceedings just referred to, affords strong evidence in support of the claim of the Plaintiff, that the overflow of the *tal*, and also the surplus water remaining after the irrigation of the Defendant's *mouzah*, ought to flow to the *Chahul Tal*, without being diverted by the Defendant, except for irrigating *mouzah Mahooet*, and it seems to their Lordships that the Subordinate Judge was correct in attaching great importance to this map. The witnesses for the Plaintiff, to whom this Judge gave credit, also prove a continuous use and enjoyment of the water.

It is not inconsistent with the Plaintiff's claim that the power of fixing the time for letting off the overflow from the *Mahooet Tal* should reside with the Defendant. The necessity for this operation would obviously occur in the rainy seasons, and it is apparent upon the evidence that in these seasons a considerable quantity of water is let off, which runs down to the *Chahul* reservoir, and is stored there.

Their Lordships therefore are of opinion that the Plaintiff has established a right to have the overflow water of the *Mahooet Tal* discharged into the *khonwa*, so that it may flow through it towards the *Chahul Tal*; and also a right to the flow of the surplus water towards the *Tal* as heretofore. But they think that his whole right is subject to the right of the Defendant to irrigate the lands of *mouzah Mahooet*, and to take by proper channels and other proper means so much of the water as may be proper and requisite for such purpose.

Their Lordships will now consider the evidence of the Defendant's interference with these limited rights.

As to the diversion by means of the two *grandees*, and the new channel on the eastern side of *Mahooet*, the *Ameen* has found, and the evidence (to which credit is given by the Subordinate Judge) supports his finding, that the two *grandees*, No. 1 and No. 2, obstruct the flow of water from the *khonwa* into the channels which lead to the reservoir of *Chahul*, and thus divert the water which would otherwise have flowed to it, and cause it to run into the new channel cut by the Defendant in a north-easterly direction, by which it is ultimately discharged into the river *Bahgween*.

The Defendant does not deny this diversion, but asserts that it was done to irrigate his own lands.

It is, however, found that by the *Ameen* that neither of the *grandees* nor the new channel is required for this purpose, and

in this also his report is corroborated by the evidence. The Subordinate Judge of *Gya*, by whom the *Ameen* was examined, has adopted his findings, and has also come to the conclusion that these obstructions were made to injure the Plaintiff.

The judgment of of the High Court does not disturb the above conclusions of fact, and indeed passes them by, the learned Judges being of opinion, as already stated, that the Plaintiff had failed to establish the right he claimed.

The Subordinate Judge has ordered that these obstructions should be abated, and their Lordships agree in this respect with his judgment.

As to the alleged diversion to the west, the Subordinate Judge seems to have considered that the Defendant had made a breach in the western bank of the *tal*, and cut a new passage to carry the water along the western side of his fields to the River *Ponwar*, and he has ordered this assumed new passage to be closed. This part of the decree seems to have been made under a misapprehension of fact. The *Ameen*, as their Lordships understand his report, finds that no breach had been made in the western bank of the *tal*, but he does report that two *nalas* had been formed, which carried the water to the River *Ponwar*. It is not very clear, upon the *Ameen's* report, whether these *nalas* were cut by the Defendant or were naturally formed. He does, indeed, also find that there is a passage for the water to go "to the west of the river *Ponwar*." This cut or passage, it is to be observed, is not mentioned in the plaint. Even if it had been complained of, their Lordships think that the evidence of any diversion of water by these means to the west is too obscure to warrant a decree directed against any specific act, and, therefore, the decree of the Subordinate Judge, so far as it directs the closing of the assumed new passage, ought not to stand. If, however, any acts have been done on the western side of *Mahooet* contrary to the declaration of right which their Lordships will advise Her Majesty to make, the injunction, which they will also advise, will embrace such acts, and enable the Plaintiff to compel their discontinuance.

On the whole case, their Lordships have come to the conclusion that the decree of the High Court cannot be maintained. They are also unable to affirm in its entirety the decree of the Subordinate Judge. In that decree the right is declared in terms which are, in their opinion, too wide and general, and they have already observed that the specific order to close the assumed new western channel is supported neither by allegation nor by sufficient proof.

They also think that it was not correct to insert in the decree a declaration of the Plaintiff's right to scour the *khonwa*. *Primâ faice*, and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of the water, but no issue was raised on this point, nor does it appear that any effort of the Plaintiff to cleanse the watercourse has been obstructed by the Defendant.

Their Lordships will therefore, humbly advise Her Majesty to reverse both the decrees below, and in lieu thereof to direct that a decree be passed in favour of the Plaintiff, declaring that the Plaintiff has a right in the overflow of water discharged from the *Mahooet Tal*, whenever the same is discharged by the Defendant, and that such overflow ought to be discharged into the *khonwa* on the eastern side of the said *tal*, and to flow through the same towards the *Chahul Tal* in the accustomed manner for the purpose of irrigating *mouzah Chahul* and the other four *mouzahs* of the Plaintiff mentioned in the plaint; and also declaring that after the Defendant's right to the use of the water of the said *tal* for the purpose of irrigating the lands of *mouzah Mahooet* by proper and requisite channels and other proper means has been satisfied, and subject thereto, the water which may remain after such use by the Defendant, ought to flow, in the accustomed channels and manner, towards the *Chahul Tal*, for irrigating the said *mouzahs* of the Plaintiff, without being diverted therefrom, otherwise than by such diversion as may be occasioned by the irrigation of the

lands of *mouzah Mahooet* in a due and proper manner as aforesaid; and also that by the said decree it be ordered that the *grandees* marked No. 1 and No. 2 in the *Ameen's* map be removed, and that the new *kurrah* from the said *khonwa* shewn in the same map, from the spot marked by the letter *alif* to the spot marked by the letter *ba* be closed; and that it be further ordered that the Defendant be enjoined not to discharge or divert the overflow of the *Mahooet Tal*, or the water remaining after irrigating *mouzah Mahooet*, as aforesaid, in any direction or manner contrary to the above declaration of right.

Their Lordships consider that the Plaintiff is entitled to receive from the Defendant his costs incurred in the Court of the Subordinate Judge of *Gya*, but as an appeal to amend and limit the decree of that Court became in their opinion necessary, they think that the parties ought to pay their own costs respectively in the High Court, and they will advise Her Majesty accordingly.

The Appellant will have the costs of the appeal to Her Majesty.

15th November, 1878.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMANUND KOONDOO and Another, (Plaintiffs)* } *Appellants,*

versus

CHOWDHRY SOONDER NARAIN SARUNGY and Others, (Defendants) } *Respondents.*

Principal and Surety — Execution against Surety—Interest—Giving Time.

R sued *M*, *B*, *C*, and *P* for money due for goods supplied. Separate *solehnamahs* were filed by each of the four Defendants, in which they admitted the debt, and each undertook to pay one-fourth thereof, with interest, by instalments, and each further agreed that if the other three should make default and the amount due by them should not be realized by the sale of their property, then he should be liable to make good the deficiency. A decree was passed by the Court in accordance with the terms of the *solehnamahs*. *C* and *P* each paid up their fourth shares, but *M* and *B* having failed to pay, *R* applied for execution against *C* and *P* in respect of the liability of *M* and *B*, *Held*, that in the absence of proof that the whole property of *B* had been exhausted, *R's* application could not be allowed.

Where a decree for payment of a certain sum with interest was passed against certain Defendants as principal debtors and against other Defendants as sureties, and it appeared that the decree holder had allowed time to the principal debtors for the purpose of increasing the amount of interest,—*held*, that the decree-holder was not entitled to interest after the time when he might and ought to have put up the property of the principal debtors for sale, when possibly it might have realized the whole of the debt then due.

* 4 I. L. R., Cal., p. 331.

THEIR Lordships' judgment was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This is an appeal from a decision of the High Court of *Calcutta*, affirming an order made by the Judge of the *Zillah* of *Midnapore* with respect to the execution of a decree made on the 5th July 1866 in a suit instituted by *Ramanund Koondoo* and *Ramnidhi Koondoo* against *Srimatya Manika*, a widow, *Beer Narain*, and two persons who may be designated by the name of *Sarungy*. The decree recites that the Defendants, together with the late husband of the widow *Manika*, had become indebted, in respect of goods supplied, to the Plaintiffs in a sum of about Rs. 53,000, and that the debtors filed a *solehnamah*. Each of them filed a separate *solehnamah* in precisely the same terms, with the necessary alterations in respect to names; that of *Manika* (the first recited) stated that "the sum of Rs. 56,500 was the debt claimed by the Plaintiffs, including costs; that the Defendant was liable for Rs. 14,125, being one-fourth of that amount; and that being unable to pay that money in cash, she, according to the *kistbundi* given below, had recorded the following conditions of payment, viz., that interest should run on the entire amount due at the rate of 12 *annas* per cent. per month from this date; that the Defendant should pay to the Plaintiffs the principal amount according to the *kistbundi*" (appended to this *solehnamah*), "together with interest on the entire amount at the above rate, and cause the payments to be endorsed on the decree passed according to the present *kistbundi solehnamah*; that no plea of payment should be admitted other than the endorsements of the payments on the decree; that if in breach of these conditions there should be default in the payment of the entire amount or any part of the amount of any one instalment, the Plaintiffs should at once realize from the Defendant the amount of all the instalments, together with interest at the rate of Rs. 2 per cent. per month from this date, by executing the decree passed on the basis of the *kistbundi* in this *solehnamah*; that if the other three co-sharers of the Defendant who have made separate *kistbundis* should neglect to pay the monies respectively due by them, and the entire amount should not be realized by the sale of their property, then the Defendant and her three co-sharers should all be liable for the amount remaining due; that the *talooks* in the possession of the Defendant, and described in the second schedule, should remain hypothecated until the entire amount due to the Plaintiffs was realized in the manner above-mentioned; that as long as the amount due to the Plaintiffs remained unpaid, she should not be able to make an alienation of this property by gift, sale, &c., to anybody, or encumber the same by mortgage or *ijara*, &c.; that in case of non-payment of the money, it should be realized by the sale of that property and other moveable and immoveable properties of the Defendant's husband, whether held in his own name or *benami*; and that when the entire amount of this *kistbundi* was paid, the *kistbundi* should be returned." Then there follows a list of the days on which the instalments are payable, and their amount. The second schedule gives the names, together with the Government revenue of six *mouzahs*, in each of which each of the Defendants held a share of three *annas* and four *gundas*.

The combined effect of the four documents is, that each of the debtors is liable, as a principal, to one-fourth of the whole debt, viz., Rs. 14,125; that upon default being made by any one of the debtors, and all the property of that debtor having been taken and sold for the purpose of making good that default, then the other debtors shall be liable for the whole amount remaining due.

In 1873 an application was made by the Plaintiffs against the two *Sarungys*, who had admittedly paid up the whole of their share of the debt, with proper interest, to make them liable, by an execution against them, in respect of the default of the other two debtors, *Beer Narain* and *Manika*; the whole sum remaining due is alleged to have amounted, with interest, to Rs. 65,000. The default was not de-

nied, and the Plaintiffs endeavoured to prove that the whole property of *Beer Narain* had been sold. No evidence seems to have been given that the whole of the property of *Manika* was sold, and there is no finding upon that subject.

The question dealt with by both Courts was, whether it was proved that the whole of the property of *Beer Narain* had been exhausted. This question reduces itself to a comparatively small point,—in their Lordships' view, not attended with much difficulty. It may be assumed to have been proved that the whole of the property of *Beer Narain* had been sold excepting his share of *mouzah Tudrooi*, mentioned in the second schedule of the *solehnamah*, and thereby hypothecated to the Plaintiffs.

It appeared that one *Bykunt Nath* in 1868 bought the right, title, and interest of *Beer Narain* in this *mouzah* at an execution sale under a decree recovered by one *Soonder Mull* in respect of a simple money claim which had accrued a considerable time after the date of the *solehnamah*. He also paid off a mortgage debt due to one *Golap Dé*, to whom the *mouzah* had been mortgaged before the *solehnamah*, and who had obtained a decree under which it had been advertised for sale. Therefore *Bykunt Nath* obtained the interest of the judgment-debtor, which was subject to both mortgages; he also obtained the interest of the first mortgagee, but he did not obtain the interest of the Plaintiffs, who were the second mortgagees, and that interest, which must be assumed to be of some value, in the absence of evidence that it is worthless, has not been sold. That is the finding of both Courts, in which their Lordships concur. It therefore appears to them that the Plaintiffs were not, at the time they applied for it, in a condition to issue execution against the two Defendants as sureties for the debt of *Beer Narain*.

Only one further question remains in the case. The Subordinate Judge has intimated that if the Plaintiffs sell what remains of *Beer Narain's* property, they may be in a position to issue execution against the Defendants (a subject upon which, as there is no cross-appeal, their Lordships are not in a condition to give any opinion), but that they can only obtain interest up to the 11th of April 1867, when the estate was first ordered to be put up for sale. It has been contended that they are entitled to claim interest beyond that time. The learned Judge's finding is, that the decree-holders have allowed additional time to the defaulting debtors for the purpose of increasing their own amount of interest, the effect of postponing the payment being that, instead of interest at 9 per cent., they obtain what may be termed penal interest at the rate of 24 per cent. Undoubtedly it appears to their Lordships that there has been a great deal of delay, and apparently unnecessary delay, in putting up the property for sale under the execution. Applications have been from time to time made by the defaulting debtors for time to postpone the sale. That time has been granted and agreed to by the Plaintiffs; and it would appear that in some cases the Plaintiffs have themselves desired the postponement. The result has been that the sale has been put off for a number of years. Private sales have indeed been made, but no compulsory sale of any portion of the property seems to have taken place till many years after the first order for sale in April 1867.

Under these circumstances, and considering the finding of the learned Judge that the Plaintiffs have consented to and indeed desired this postponement for the purpose of increasing the interest to which they are entitled, and thereby laying an additional burden upon the sureties, their Lordships are of opinion that the Subordinate Judge is justified in ordering that the Plaintiffs shall not be entitled to interest after the time when they might and ought to have put up the property for sale, and when possibly it might have realized the whole of the debt then due.

For these reasons their Lordships think that the decision of the High Court affirming that of the lower Court is right, and they will humbly advise Her Majesty that that decision be affirmed, and that this appeal be dismissed with costs.

15th and 16th November, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of Lucknow Division, Oudh.

PRINCE MIRZA JEHAN KUDR BAHADUR, (Plaintiff)* ... } *Appellant,*

versus

NAWAB AFSUR BAHU BEGUM, (Defendant) ... } *Respondent.*

Limitation regarding claim to Houses in Lucknow and Mouzahs in Oudh—Abandonment of Confiscation regarding Houses—Effect of Proclamations.

Plaintiff claimed certain houses in *Lucknow* and a certain *mouzah* in the province of *Oudh*. *Held* that Government having given up altogether their rights to all the houses in *Lucknow* under the confiscation, it is unnecessary to determine the effect of Lord *Canning's* and Sir *James Outram's* proclamations regarding the houses, and the question of limitation regarding them, if the Defendant was in possession before the proclamation, must be determined in the same manner as if there never had been any confiscation at all.

As regards the *mouzah*, *held*, the effect of Lord *Canning's* proclamation of 1858 was to put an end to all previous titles, and whatever title either party has to the *mouzah* must have been acquired by some grant of the Government subsequent to the proclamation, and within 12 years previous to the commencement of the suit. The question of limitation therefore does not arise, and Defendant being in profession Plaintiff must recover on his own title.

Certain issues framed and case remanded accordingly for re-trial.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decisions of both the lower Courts on the question of limitation must be reversed, and that this case must be remanded to be retried and determined in the lower Courts upon certain issues which will be directed by their Lordships.

The action is brought by Prince *Mirza Jehan Kudr Bahadur* against *Nawab Afsur Begum*. The property in respect of which the action is brought consists of two portions, the one of certain houses in the city of *Lucknow*, and the other of *mouzah Sahrawan* situate in the district of *Unao* in the province of *Oudh*. The Defendant obtained possession of both properties, and the Plaintiff brought his suit claiming two-thirds of the property. His claim is now reduced to two-thirds of of two-fifths. He claimed two-thirds of the property upon the following grounds: He said that the property originally belonged to *Nawab Malkar Kishwar*, who may be called, as she has been called in the argument, the Queen-Mother. He said, "After the mutiny the said estate was taken possession of by the British Government, and the Government retained its possession, pending an inquiry into the conduct of the owner and other matters connected with the State, till 1864. In 1864 the Government, after inquiry, ordered the property to be released in favour of the heirs of *Nawab Malkar Kishwar Sahibah*, and the Defendant obtained possession of the same on her own part and on the part of the other heirs of *Nawab Malkar Kishwar Sahibah*. Thus it was that on the 16th of November, 1863, the Settlement Court ordered the settlement of *mouzah Sahrawan* to be made with the heirs of *Nawab Malkar Kishwar Sahibah*, and in accordance with that order the Defendant got possession of the village on her own part and on the part of the other heirs of *Nawab Malkar Kishwar Sahibah*." With reference to that allegation the Defendant says, "In the settlement papers of *mouzah Sahrawan* the Defendant's name only has been recorded; and this being a claim for an amendment of the settlement, cannot be entertained in this province." No issue appears to have been raised in the lower Courts with reference to that contention of the parties.

* 6 Cowell's I. A., p. 76.

By Lord *Canning's* proclamation of the 15th March, 1858 (1), all the proprietary rights in the soil of the province were confiscated; and by a proclamation of Sir *James Outram* it was notified that "for those who have fled from the city"—speaking of the city of *Lucknow*—"having locked up their houses, that if they would not return within ten days and re-occupy their houses, the property, with their houses, will be confiscated."

(1) LORD CANNING'S PROCLAMATION OF 15TH MARCH, 1858.

"Proclamation.

"The army of His Excellency the Commander-in-Chief is in possession of *Lucknow*, and the city lies at the mercy of the British Government, whose authority it has for nine months rebelliously defied and resisted.

"This resistance, begun by a mutinous soldiery, has found support from the inhabitants of the city, and of the province of *Oudh* at large. Many who owed their prosperity to the British Government, as well as those who believed themselves aggrieved by it, have joined in this bad cause, and have ranged themselves with the enemies of the State.

"They have been guilty of a great crime, and have subjected themselves to a just retribution.

"The capital of their country is now once more in the hands of the British troops.

"From this day it will be held by force which nothing can withstand, and the authority of the Government will be carried into every corner of the province.

"The time, then, has come at which the Right Honourable the Governor-General of *India* deems it right to make known the mode in which the British Government will deal with the *talookdars*, chiefs, landholders, of *Oudh* and their followers.

"The first care of the Governor-General will be to reward those who have been steadfast in their allegiance at a time when the authority of the Government was partially overborne, and who have proved this by the support and assistance which they have given to British officers.

"Therefore the Right Honourable the Governor-General hereby declares that *Drig Byjai Singh, Rajah* of *Bulrampur, Kulwant Singh, Rajah* of *Padnaba, Rao Hardeo Bux Singh*, of *Katiari, Kashipershad, talookdar* of *Sissendi, Jahar Singh, Zemindar* of *Gopal Khan*, and *Chande Lal, Zemindar* of *Mauraw(n (Baiswara)* are henceforward the sole hereditary proprietors of the land which they held when *Oudh* came under British rule, subject only to such moderate assessment as may be imposed upon them, and that these loyal men will be further rewarded in such manner and to such extent as upon consideration of their merits and their position the Governor-General shall determine.

"A proportionate measure of reward and honour, according to their deserts, will be conferred upon others in whose favour like claims may be established to the satisfaction of the Government.

"The Governor-General further proclaims to the people of *Oudh*, that with above-mentioned exceptions the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.

"To those *talookdars*, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of *Oudh*, surrendering their arms, and obeying his orders, the Right Honourable the Governor-General promises that their lives and honour shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them, and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government.

"To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor General will be ready to view liberally the claims which they may thus acquire to a restitution of their former rights.

"As participation in the murder of English men or English women will exclude those who are guilty of it from all mercy, so will those who have protected English lives be specially entitled to consideration and leniency."

Their Lordships think it unnecessary to determine what was the effect of Lord *Canning's* proclamation with reference to the houses, or what was the effect of Sir *James Outram's* proclamation of the 22nd of March, 1858, because, with reference to all the houses in *Lucknow*, which are the subject of the present suit, the Go-

vernment gave up altogether their rights under the confiscation. Paragraph 4 of the letter of the 6th of July, 1863, from the Secretary of the Chief Commissioner to the officiating Commissioner is as follows: "The Chief Commissioner understands from the Deputy-Commissioner that the value of the property lies almost entirely in the buildings, which consist of shops, mosques, tombs, and *mehal serais*. The value of the land is so trifling in comparison that the principle of treating the buildings as having become by accretion part of the land, and having lapsed with the latter, as was ruled in the case of the *Khas Mohul's* claim to the *Alumbagh*, should not, in the Chief Commissioner's opinion, though incontestably sound, be enforced in this case. The property, as the Chief Commissioner learns from the Deputy-Commissioner, yields a rent of no more than Rs. 2000 a year, as few of the shops hold tenants. It is therefore of no great value to Government, nor is it likely to become of greater, whereas it may improve under private management. For these reasons the Chief Commissioner thinks the right of Government to the property should be abandoned, and possession relinquished, but not in favour of *Afsur Bahu* or anyone else. Claimants must agree among themselves or apply to the Civil Court to decide their pretensions."

Their Lordships, taking this letter into consideration, are of opinion that it was the intention of the Government to abandon altogether the confiscation as regards the houses and property in the city of *Lucknow*, and to leave the former owners to their rights in the same way as if there had never been any confiscation. If the Defendant in the suit had been in possession, as she alleges, of the houses and other property in the city of *Lucknow* before the proclamation, the question of limitation might arise as against the Plaintiff with regard to these houses and other property. But this question has not been tried in the cause, and upon the evidence before them their Lordships have not the means of determining it. All they can do is to express their opinion with regard to these houses and other property, that if the Defendant was in possession before the proclamation, the question must be determined in the same manner as if there had never been any confiscation at all.

With regard to the *mouzah*, it appears to their Lordships to be clear that the question of limitation does not arise. Their Lordships are of opinion that the effect of Lord *Canning's* proclamation of 1858 was to put an end to all previous titles. Whatever title, then, either party has to the *mouzah* must have been acquired by some grant or some proceeding of the Government subsequent to that proclamation, and any grant or proceeding under which he can have acquired a title must have been within the period of twelve years prior to the commencement of the suit. Therefore, with regard to the *mouzah*, the question of limitation will not apply, but the question of title must be determined, and the Defendant being in possession, the Plaintiff must recover on his own title.

From a minute of the Chief Commissioner, dated the 25th of October, 1863, it appears that in a suit between *Bhyroon Singh* and others, and the present Defendant *Afsur Bahu Begum*, *Bhyroon Singh*, and others claimed that, having mortgaged the *mouzah* to the Queen-Mother, they were entitled to have the revenue settlement made with them. The Settlement Commissioner decided that the settlement ought not (for certain reasons which were given) to be made with the then Plaintiffs, but that it ought to be made with *Afsur Bahu*, the present Defendant. Upon an appeal which came before the Chief Commissioner, he says: "I agree with the Commissioner in holding that the mortgagee was really the Queen-Mother, though the deed was drawn up in the name of *Agha Ahmed*, and the *Zemindars* in their appeal plainly indicate her as the party who acquired possession of the village by the mortgage. But in the meantime the Commissioner's orders must be so far modified as to make his decree run in the name of the heirs of *Malkar Kishwar*, and not of her daughter *Afsur Bahu* alone; for it has been shewn in another case that there is no proof of the alleged gift by the deceased Queen of all her pro-

perty. *Afsur Bahu* and her other children can claim to share in it."

It has been contended that the words "the heirs of *Malkar Kishwar*" did not include the present Plaintiff, inasmuch as he was not an heir of his grandmother. But it may be a question whether by the words the "heirs of *Malkar Kishwar*" the Chief Commissioner did not intend to include the Plaintiff to the extent of the share which but for the confiscation he would have inherited from his father, the General *Sahib*, who was one of the heirs of the Queen-Mother, and was living at the time of her death. That is a question which will have to be considered in determining whether the Plaintiff, by reason of the Chief Commissioner's decree, was not entitled to two-thirds of the share of his father, that being the only portion which he now claims.

The question, however, does not depend merely upon the order of the Chief Commissioner, which does not appear to have been ever carried into effect. It was not a decision between the present Plaintiff and *Afsur Bahu*, the present Defendant, but it was in a proceeding between certain Hindu gentlemen, who are not now parties, and the present Defendant. The Chief Commissioner said that the decision of the Commissioner ought to be that the settlement should be made with the heirs of the Queen-Mother. We have not got the proceedings which took place subsequently to the order of the Chief Commissioner. The order was sent by the secretary to the Chief Commissioner to the Settlement Department, and the document was filed in that department. The settlement, however, does not appear to have been made in accordance with the direction of the Chief Commissioner. As far as can be ascertained from the record, it seems to have been made with the present Defendant alone, for there is a proceeding in which a person, evidently the agent of the Plaintiff, says, "At the regular settlement"—that is the proceeding in 1864 after the date of the Chief Commissioner's ruling—"the village has been assessed at Rs. 2973, which I, the agent, will, under the terms entered in my application, continue to pay by instalments detailed below for thirty years from *Rabi* 1271 F. to *Kharif* 1301 *Fasli* (corresponding with 1894), and thereafter, pending the wishes of the Government." So that then he offers, as the agent of the present Defendant, to take the settlement of this *mouzah* for thirty years at the revenue of Rs. 2973. We have not the *kubulyat* which was entered into at the time when the regular settlement was effected. Possibly it was a *kubulyat* executed by the agent on behalf of his client, the present Defendant; and it appears, as far as one can judge from a document which is set out in the record,—though that document has not any date attached to it,—that the settlement was actually made with the present Defendant alone, and that she was recorded as the person who had taken the settlement from the Government. The document is No. 4. Under the head "name of *lambardar*" is the name of the present Defendant. Then the property is mentioned, and in the column headed "names of sharers" the Defendant is mentioned as the only person, "*Nawab Afsur Bahu Begum Sahibah*, daughter of the King *Amjad Ali Shah*," and then the amount of the revenue assessment is Rs. 2973; that is the revenue which was stated in the offer made by the agent. Without seeing these documents it is impossible to say whether the Plaintiff did or did not acquire a title to this property, or to a share in it, from the Government after the confiscation; and it appears to their Lordships that the case must be remanded in order that the question may be tried whether the Plaintiff, after the confiscation, acquired a title to any share in this *mouzah*. One issue should be raised, whether, after the Chief Commissioner's order that a settlement was to be made with the heirs, a settlement was made with the heirs, or whether it was made with any other and what person, and under what circumstances, and what was the effect of the settlement. It also appears to their Lordships that if any *kubulyat* was executed, that *kubulyat* ought to be called for and examined by the Court, in order that it may be ascertained whether the Defendant took the settlement on her own behalf adversely to

the other heirs, or whether she took it as a trustee for herself and the other heirs.

Upon the whole their Lordships are of opinion that, as regards the *mouzah*, there is no question of limitation, but only a question of title which must be tried. With regard to the houses, the question of limitation may arise in the manner which their Lordships have already indicated.

Several issues were raised in the Lower Court which now appear to be irrelevant, and their Lordships think that the cause ought not to go down upon those irrelevant issues; on the other hand, there are fresh issues which ought to be settled and tried; and their Lordships are of opinion that the proper course will be that the learned counsel for both parties should submit to their Lordships any issues which they think ought to be tried in the Court below. Their Lordships will then finally settle the issues upon which the record is to be remanded.

On the 14th December, 1878.

AT THE COUNCIL CHAMBER.

As to the mouzah.

Minutes having been prepared by counsel, in obedience to the foregoing directions of their Lordships, their Lordships considered and approved the same, and agreed thereupon humbly to advise Her Majesty that the decisions of the Civil Judge of *Lucknow* and of the Commissioner of the *Lucknow* Division, bearing date respectively the 16th of August, 1875, and the 22nd of January, 1876, be reversed, and that the case be remanded to the Court of the Commissioner of the *Lucknow* Division to direct the cause to be tried and determined by the Civil Judge of *Lucknow* upon the following issues, viz.:—

1st. Whether the Plaintiff, after the confiscation of the *mouzah Sahrawan* under Lord *Canning's* proclamation, acquired by any and what means any and what right or title to any and what share of and in the said *mouzah?*

2nd. Whether, after the Chief Commissioner's order of the 25th of October, 1863, directing that a settlement should be made in the names of the heirs of *Malkar Kishwar* (the Queen-Mother), the settlement was so made; or whether a settlement was made with the Defendant, or with any other and what person or persons, and under what circumstances, and what was the effect thereof?

3rd. Whether, at the time of such settlement, and if any, what *kubulyat* was executed by any and what person or persons?

4. Whether the Plaintiff was, according to Mahomedan law, one of the heirs of the said *Malkar Kishwar;* or whether the Commissioner intended by the word "heirs" to include the Plaintiff to the share, or any portion of the share, which his father would have been entitled to if he had been then alive?

As to the houses and other property in the City of Lucknow.

1st. Whether, considering that the confiscation of some of the above houses and property was abandoned by the Government, leaving all the former owners to their rights by law, the Plaintiff was entitled to any and what share thereof at the time when he brought his suit?

2nd. Whether the Defendant was in possession of the said houses and property, or of any and what portion thereof, and, if so, under what circumstances, before the proclamation of Lord *Canning*, and, if so, whether the suit of the Plaintiff in respect thereof was barred by the *Act of Limitation?*

As to all the property in suit.

3rd. Whether the late *Malkar Kishwar* (the Queen-Mother) did in her lifetime make some and what gift in respect of the said properties, or any and what portion thereof, in favour of the Defendant, and, if so, whether the same was valid in law?

The costs of this appeal on both sides will be taxed here, and the respective amounts will be costs in the cause, and abide the event of the final decision of the lower Court.

19th November, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the judicial Commissioners of Oudh.

THE MAHARAJAH OF BULRAMPUR (Defendant)* ... ... } *Appellant,*

versus

UMAN PAL SINGH and GONESH SINGH, (Plaintiffs) ... ... } *Respondents.*

Construction of "Holding under Contract" in Act XXVI. of 1866, Oudh.

The terms "holding under Contract" embrace any holding under arrangements from which a contract may be inferred. And the land not being granted on account of service or by favour of the *taloukdar*, the holder thereof is entitled to a sub-settlement under Act XXVI. of 1866.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

In this case the Settlement officer has found that the Respondents are entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the *Maharajah* of *Bulrampur*. The Commissioner of *Fyzabad* has confirmed that finding; and upon appeal to the Judicial Commissioner, he saw no reason to disturb it.

The question turns upon the construction of Act XXVI. of 1866, and the rules, which have the effect of legislative rules, scheduled in that Act.

It appears that the *Raj* of *Bulrampur* is a large and ancient estate, and that these Respondents have held the villages —a part of that large *Raj*—for a very considerable period of time. The documentary evidence shews that they have been in possession from at least as early as the year 1771. Mr. *Cowie* admits that they held as sub-tenants; that there was an under-tenure under which they legally held the villages; and the only question is whether they held so as to bring their under-tenures within the definition of sub-proprietary rights given in the rules annexed to Act XXVI. of 1866.

The rules are not very clearly worded, but they seem sufficiently clear to enable a plain decision to be given in this case. Rule 2 says, "To entitle a claimant to obtain a sub-settlement he must shew that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." It is not necessary to inquire what "the period of limitation" means, for no question of limitation arises. The important part of Rule No. 2 is, "He must also shew that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favour of the *taloukdar*, held such lands under contract *(pucka)* with some degree of continuousness since the village came into the *taloukdar*." "Some degree of continuousness" is a vague phrase, but No. 3 supplies a definition of it. Rule No. 3 is, "The words 'with some degree of continuousness' will be interpreted as follows: If the village was included in the *taloukdar*, before the 13th of February, 1836"—and this village falls within that category—"the lease must have been held for not less than twelve years between that date and the annexation of the province." Undoubtedly, if there was a holding under contract in this case, the necessary degree of continuousness has been satisfied; and the only question is, whether or no there

* 5 Cowell's I. A., p. 225.

was sufficient evidence that these lands were held "under contract *(pucka)*."

Mr. *Cowie* has referred to some of the documentary evidence which appears to shew that they were held under what are called leases. The Settlement Officer has found that that holding was, within the meaning of these rules, a holding under contract. Their Lordships think, supposing the evidence supports his finding as to the lease, and being confirmed by the Commissioner they are not disposed to look too narrowly at the facts, that in point of law the decision is correct. The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Then the Settlement Officer has found that the land was not granted "on account of service or by favour of the *talookdar*."

Their Lordships having looked at the judgments of the Settlement Officer and of the Commissioner of *Fyzabad*, have observed that both those officers took very considerable pains to arrive at a correct conclusion in this case; and their Lordships see no reason whatever to suppose that they have not come to a correct decision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss this appeal.

19th November, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

JOY NARAIN GIRI, (Plaintiff)* ... } *Appellant,*

versus

GRISH CHUNDER MYTI, (Defendant) ... } *Respondent;*

and

JOY NARAIN GIRI, (Defendant) ... } *Appellant,*

versus

GRISH CHUNDER MYTI, (Plaintiff) ... } *Respondent.*

Hindu Law—Joint Estate—Partition.

Although a suit by a member of a joint Hindu family against his co-sharer for a separate share of the joint estate be not in terms a suit for partition, yet, if it appear that the intention of the Plaintiff was to obtain the share which he would be entitled to on a separation, and the decree passed in the suit assigns him that share, such decree does in fact effect a partition, at all events, of rights, which, under the doctrine laid down in the case of *Appovier* v. *Rama Subba Aiyan* (1), is effectual to destroy the joint estate.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRET COLLIER:—

The facts necessary to the understanding of this case are as follows:

Joy Narain Giri and *Shibpershad Giri* were grandsons of *Nund Kishore Giri*; they were joint in estate, and between them

* 5 Cowell's I. A., p. 228; 4 I. L. R., Cal., p. 434.

(1) 11 Moore's I. A. Ca., 75; 2 P. C. J., p. 218.

had the whole interest in the estate inherited from their grandfather. *Shibpershad Giri*, in consequence of his cousin *Joy Narain* refusing to allow him any participation in this joint estate, left the house in which they had jointly resided, went to reside with the husband of his sister, and had to maintain himself for some time by moneys which he borrowed. Under these circumstances he brought an action against *Joy Narain*, in which he alleged that *Joy Narain* had expelled him from the joint family, and that he sued to recover possession of his eight *annas* share of all the joint properties, both real and personal, with mesne profits and interest from the date of dispossession. In that suit he obtained a decree the material part of which is in these terms, "The Court orders that the half of the various properties which, as stated above, are in the possession of *Joy Narain* be decreed to the Plaintiff; that the date of separation from commensality is to be reckoned from the month of *Bysack* of the year 1272, and that from that date to the date of obtaining possession he is to get the mesne profits of the immoveable properties according to what will be ascertained in execution of decree; that with regard to the household chattels, &c., the Plaintiff is to obtain half of what the Defendant has admitted; that the Plaintiff is to obtain half of the proceeds of the pledged properties which are sold for the realization of the government rent, as well as half of the amounts of the decrees realized from the month of *Bysack*, 1272; that the Plaintiff is to obtain half of the proceeds of 12 *soleee* and 4 *bissee* of paddy at the rate of Rs.20 per *bissee*, and that he is to obtain half of all the properties mentioned in the said decree."

From that decree of the Subordinate Court there was an appeal to the High Court of *Calcutta*, which confirmed the decree. After the confirmation of that decree by the High Court, and pending an appeal by *Joy Narain* to Her Majesty in Council, *Shibpershad Giri* died; and thereupon *Joy Narain* applied for his widow to be substituted for him in the suit as Respondent in the appeal. The Courts in *India*, however, gave effect to a will—which had been made by *Shibpershad Giri* some short time probably before his death, in which he gave all his property to *Grish Chunder Myti*, the son of his sister—and made *Myti* the Respondent. The appeal came on in 1873 before Her Majesty in Council, whereupon Her Majesty, by the advice of this Board, affirmed the decree of the High Court of *Calcutta*. Upon this, *Joy Narain* commenced the present suit, in which in effect he alleges that he and *Shibpershad Giri* having been joint in estate, and there having been no seperation between them, the decree enured for his benefit, and that he, as the heir of *Shibpershad Giri*, was entitled to the whole of the joint property; there was also an alternative prayer that if that were not so he might be appointed as manager; and he sought, among other things, to set aside the will of *Shibpershad Giri*. Pending this present suit, *Grish Chunder Myti*, who, as substituted Respondent, had obtained the judgment of this Board affirming the decree in the previous suit, applied for the execution of that decree in 1874; whereupon *Joy Narain* objected upon the ground which he raises in this suit, namely, that the former suit really enured for his benefit, and that *Grish Chunder Myti* took no right under it; he also alleged, among other objections, the pendency of the suit which he had already brought. The Courts in *India* allowed *Grish Chunder Myti* to execute the decree; and the second appeal, which we have now before us, is from the High Court allowing the execution of that decree.

It appears manifest from this statement of the case that the questions in both appeals are substantially the same. The real question in the cause is, whether there was a separation of estate between *Joy Narain* and *Shibpershad Giri*.

Their Lordships regard the conduct of *Shibpershad Giri*, when he left the house in which both he and *Joy Narain Giri* lived, and withdrew himself from commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for

his separate maintenance—as well as his making a will—as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation. But further, it appears to their Lordships that the decree which has been read is in effect to give to *Shibpershad Giri* a separate share of the property of the grandfather. It gives him in terms possession of the 8 *annas* which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation,—that is, from the time when he left the house in which he had been living with his cousin,—and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually in terms for a partition, yet that the decree does effect a partition, at all events, of rights which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of *Appovier* v. *Rama Subba Aiyan* (1).

Their Lordships think it necessary to say that they do not regard their decision in this case as conflicting with a case which has been called to their attention of *Debee Pershad* v. *Phool Koeree* (2). The suit in that case is described by Mr. Justice *Kemp* as a suit by *Debee Pershad* for a declaration of his right to a share in the estate of his grandfather *Deen Dyal*. Such a suit would not be inconsistent with an intention on the part of *Debee Pershad* to obtain a declaration of his being entitled to a joint interest in a joint estate; but here, for reasons already given, their Lordships regard the plaint as of a totally different character, indicating a distinct intention, to which effect is given by the judgment, of obtaining a separation of estate, and as regards both the real and personal property.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and they will humbly advise Her Majesty that that judgment be affirmed, and that both appeals be dismissed.

(1) 11 Moore's Ind. Ap. Ca., 75; 2 P. C. J., p. 218.
(2) 12 Suth. W. R. 510.

20th and 21st November, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

GOURI SHUNKER, (Plaintiff)* ... } *Appellant,*

versus

THE MAHARAJAH OF BULRAMPORE, (Defendant) ... } *Respondent.*

"Oudh Estates Act" (I. of 1869)—Mortgagee—Birt Zemindary—Under-proprietary Rights—Sub-settlement—Malikanah.

An estate in *Oudh*, which had been confiscated under Lord *Canning's* proclamation of the 15th March 1858, was granted to *B.* as *talookdar*. *G. S.*, who at the date of the proclamation was in possession of the estate as mortgagee "with *birt zemindary* rights," under a conditional deed of sale from the former owner, was thereupon dispossessed, and *B.* put into possession. Failing in other attempts to recover possession, *G. S.* brought a claim, in which he asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him.

The claim was dismissed by the Settlement Officer as being for a direct settlement of a superior proprietary right, and as such barred by the *Oudh Estates Act*, No. I. of 1869.

On appeal to the Commissioner the claim was modified into one for a sub-settlement of an under-proprietary right, and a decree was made declaring the Plaintiff's under-proprietary *zemindary* title, and awarding him possession under the terms of the deed of conditional sale, till such time as the mortgage should be redeemed, or the title perfected by foreclosure.

* 6 Cowell's I. A., p. 1; 4 I. L. R., Cal., p. 839.

On appeal to the Judicial Commissioner, this decree was reversed and the claim dismissed on the ground that the effect of the mortgage deed was to convey to the Plaintiff on the mortgage becoming absolute, the full proprietary title, and not merely a subordinate one.

Held by the Judicial Committee of the Privy Council, that the "*birt zemindary* rights" which the mortgage purported to convey, implied a merely subordinate *zemindary* interest, and that the claim of the Plaintiff to a sub settlement was valid.

Quære—Whether, even if the interest intended to be conveyed by the mortgage was not in strictness sub-proprietary, a sub-settlement might not have been supported.

Quære—Whether, under Act XX. of 1866, *B.* as *talookdar* was entitled to *malikanah.*

THE judgment of their Lordship's was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The broad question raised by this appeal is whether the Plaintiff is entitled to any and what rights in four villages which must be taken to be parcel of the *talook* of *Tulsipore*, of which the Defendant, the *Maharajah* of *Bulrampore*, is now the proprietor as *talookdar* within the meaning of the *Oudh Estates Act*, No. I. of 1869.

The estate of *Tulsipore* was formerly the property of one *Dirgh Narain Singh*, who, it is said, was at the time of the first capture of *Lucknow* during the mutiny a rebel, and imprisoned in the residency, and afterwards went, still in custody, to the *Alumbagh*, where he died. His heirs continued in rebellion, and the result was that in 1859 the estate of *Tulsipore* was created into a *talook* under the new system, in favour of the *Maharajah* of *Bulrampore*, who was allowed to engage for the revenue as *talookdar* at the summary settlement of that year. His title has since been confirmed in the fullest manner by the *Oudh Estates Act*, and therefore it must be taken for granted that he is *talookdar* of all the villages for which he then settled, as included in the *talook* of *Tulsipore.*

The title of the Plaintiff arose in this way: The former *Rajah* of *Tulsipore* on the 4th of March, 1856, a very few weeks after the first annexation of *Oudh*, borrowed from the Plaintiff a sum of Rs. 7,001, and, as a security for that sum, executed to him the instrument in the nature of a mortgage by way of conditional sale, which is set out above. That instrument, after declaring that he had borrowed this money, and that in lieu of the same he had made a conditional sale to the Plaintiff of the four villages in question, with all the four boundaries, and *birt zemindary* rights for the period of four years, commencing from the 4th of March, 1856, and ending on the 4th of March, 1860, goes on to say: "The above named creditor is allowed to take possession of the aforesaid villages, to pay the Government revenue, and to appropriate the surplus profits to his use in lieu of interest. Neither will I have any claim to profits, nor will the creditor have any claim to interest. I shall be entitled to get back the deed when I pay the money at the stipulated period."

At the summary settlement which the British Government proceeded to make upon the first annexation of the province, the Plaintiff, the mortgagee, applied to have the settlement of these four villages made directly with him. That settlement was not completed until the 4th of June, 1857,—a period very shortly antecedent to that at which British rule ceased for a time in the province of *Oudh;* and, when made, was made to endure only for the time during which the Plaintiff would be in possession of the villages strictly in the character of mortgagee, that is, only up to the time fixed for the redemption of the mortgage. Then came the mutiny. After that came Lord *Canning's* proclamation of the 15th of March, 1858, the effect of which has been so often discussed here that it is not necessary more particularly to refer to it. Early in 1859, the Government, having apparently retained during the intermediate period this estate of *Tulsipore* under some kind of attachment, finally determined to grant it to the Respondent. The *sunnud*, if any, granted to him is not upon the Record, but it is established that he was admitted to engage for the revenue on the 21st of January, 1859, and that the settlement was completed on the 25th of the following May.

The Plaintiff, who was in actual possession of the villages as mortgagee, was dispossessed on the 31st of January, 1859, when, in anticipation of the final settlement, the *Maharajah* of *Bulrampore* was put in possession. The Plaintiff subsequently made various attempts to assert his rights, and to recover possession, with which we have on the present occasion no concern; and on the 15th of May, 1866, he was referred to the regular settlement which was afterwards to be made, and told that he must prefer any claim which he could substantiate at that settlement. Accordingly in October, 1870, when the settlement was in progress, he filed his plaint in the present suit.

The Plaintiff in terms, asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him. On the 3rd of March, 1873, the claim was dismissed by the assistant settlement officer, who treated it apparently as one for the direct settlement of a superior proprietary right, and held that, as such, it was barred by the *Oudh Estates Act*, and the rights which the *talookdar* had acquired. There was an appeal to the Commissioner of the district, Mr. *Capper*, and before him the suit assumed the character of one for a sub-settlement of a sub-proprietary right, which it has ever since retained. That it is competent to the Courts to allow a Plaintiff so to modify his claim, was ruled by their Lordships in the case of the *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (1).

Mr. *Capper*, in his judgment of the 10th of May, 1873, ruled that the mortgagee, if his title were perfected by foreclosure, would be the legal owner of *birt zemindarg* rights subordinate to the *talookdar;* but that the mortgage was still redeemable. He thought, however, that the case was not ripe for decision, and remanded it for the trial of an issue whether the Plaintiff had got possession of all or any of these villages prior to *Phagun* 1267 *Fusli*. This issue was found in the affirmative; and the fact was not disputed by the Respondent when the case came back to Mr. *Capper*. Mr. *Capper*, on the 28th of August, 1873, then made a decree in these terms: "The Court orders and decrees the appeal and cancels the decree of the 3rd of March, 1873. *Gouri Shunker*, Plaintiff, and his co-sharers, if any, are decreed an under-proprietary *zemindary* title in *mouzah Bairwa*, *mouzah Bijwa Kalan*, *mouzah Bindhwa*, *and mouzah Kabya Bhari*, and possession under the terms of the deed of conditional sale dated *Phagun Sudi* 13th, 1263 *Fusli*, till such time as the lien shall be redeemed, or till the title shall be perfected by foreclosure." The Respondent then appealed from this decree to the Judicial Commissioner, Mr. *Currie*. That officer, on the hearing before him of the 31st of March, 1874, seems to have objected to the decision of Mr. *Capper* on the ground that he had assumed what ought to have been proved. He said, "It is very material, for a proper determination of this case, that the exact nature of the title intended to be conveyed under the deed should be decided. The Defendant urges that the title intended to be conveyed was the full proprietary title, and this view of the case is supported by the fact that this suit is laid for the full proprietary title. On the other hand, the Plaintiff urges that the deed never intended to convey to him more than an under-proprietary title, that is, a title as *birtia*, the wording of the deed being 'with all the rights attaching to a *birt zemindary*.'" He accordingly sent the case down to the Settlement Officer, that is the Judge of first instance, for the investigation and determination of two issues: the first was, "What is the meaning of the term 'with all the rights appertaining to a *birt zemindary*' in the mortgage bond on which the Plaintiff bases his claim." The second was as to the date and circumstances of the seizure by the Government of the villages as part of the property of the rebel *Rajah* of *Tulsipore*. Nothing, however, ultimately turned upon the finding upon this issue, which was in accordance with the facts already stated.

On the first issue a number of witnesses were examined before the lower officer. He, upon that evidence, whilst professing that he knew very little himself about these tenures, came to the conclusion

(1) Law Rep. 4 Ind. Ap. 198; *Ante* p. 280.

"that the deed pledged the proprietary title in these four villages; that it was intended that the mortgagee should hold independently for the four years named; and that at the end of that period, on failure to redeem, the Plaintiff would have become the independent proprietor of the property." And he accordingly found on the first issue that the meaning of the words, "with all the rights appertaining to a *birt zemindary*," did in this case signify independent proprietary possession, and not a right of property to be held in subordination to the *talookdar*.

The case, with these findings and the evidence on which they were based, went back to the Judicial Commissioner, who then made the decree which is the subject of the present appeal. He dismissed the suit upon the grounds stated in his judgment.

Before considering those grounds in detail, it is desirable to observe, that the Judicial Commissioner seems to have agreed with the Commissioner, Mr. *Capper*, that if the effect of the mortgage was to create a tenure subordinate to that of the *talookdar*, the claim of the Plaintiff to a sub-settlement would be valid. The question upon which the determination of the suit thus depended was that which was principally argued here, namely, what was the nature of the estate conveyed by way of conditional sale; that is, whether, supposing the mortgage deed to have become absolute, the Plaintiff would have held the villages from that time as an independent *Zemindar*, or as a *Zemindar* in some sense subordinate to the *talookdar*, the villages remaining in that way parcel of the *Tulsipore* estate.

It need hardly be said that if the Judges in *Oudh* had given a clear interpretation of the words "*birt zemindary*," their Lordships would have been very slow to question that interpretation, or even to draw from the evidence any inference other than that which those who are acquainted with the tenures of the province had already drawn. Mr. *Capper*, an experienced officer, assumed that the words "*birt zemindary*," import a subordinate tenure. From the first part of the final judgment of the Judicial Commissioner, it seems that he would have understood the words in the same sense if they had stood alone. He says, "The conclusion at which I arrive is that had this deed been executed prior to the annexation of the province, the introduction into it of the words '*birt zemindary*' would have conveyed the meaning that the mortgagee agreed to hold the property mortgaged in subordination to the mortgagor, or, in other words, that he consented to the mortgaged villages being retained in the mortgagor's *hubulyat*, instead of his entering into direct engagements with the Government officials for the revenue of such villages." He then goes on to consider how this construction of the words ought to be affected by a consideration of the surrounding circumstances under which the deed was executed, and the probable intention of the parties, and he proceeds, "But as the deed was executed subject to the annexation of the province by the British Government, and at a time when the policy was to do away with *talookdars*, and to deal with village occupants as independent proprietors, and considering also that immediately after the execution of the mortgage the Plaintiff demanded and was admitted to direct engagement with Government for the land revenue due on the mortgaged villages, I can but conclude that the nature of the title intended to be conveyed under the deed was the full proprietary title, and not merely the subordinate and dependent title of '*Birtia*.'" There are therefore two reasons assigned for the conclusion to which he came, and neither of them, in their Lordships' judgment, appears to be satisfactory. The deed, no doubt, was executed subsequent to the annexation of the province, but there is no reason to suppose that, at the time it was executed, the parties were at all aware of what the future policy of the Government, when it came to change the fiscal arrangements of the *Nawabee*, would be, for that policy at that time had not even been declared; and therefore it is unreasonable to suppose that the parties contracted with reference to a system under which the Government would make the new settlement with the village occupants as independent

proprietors. Then again, their Lordships think that little, as to what the intention of the parties at the time may have been, can be inferred from the fact that after that policy had been declared, and the Government proceeded to make summary settlements with the immediate possessors of villages, and in fact adopted the policy of breaking up the great *talookdary* estates, the mortgagee did go in under that system to settle for the revenue of these villages. It was, after all, a mere fiscal arrangement; and the very terms of the settlement which he did make treated his interest as a defeasible interest, and confined the summary settlement made with him to the period which the mortgage had to run before it became redeemable. Their Lordships cannot attach much weight to the statement which he then made, and which is not in the terms of the mortgage deed, as to what his rights would be had not redemption taken place. The Judicial Commissioner, however, having for these insufficient reasons come to the conclusion above stated, held that the Plaintiff being in possession of the villages at the date of Lord *Canning's* proclamation under a title which would give him the full proprietary right in the soil, when and if his mortgage became absolute, fell within the scope of the proclamation; and that his title was by that proclamation swept away, and was not set up again by the subsequent explanation of the proclamation which is contained in the two letters annexed to Act I. of 1869. Everything in this decision, therefore, turns upon the correctness of the finding, that the intention of the parties was to pass the full proprietary title in the event of the mortgage not being redeemed at the proper time, and that there was therefore no sub-proprietary right in the villages as included in the *talook* settled in 1859 which could be the subject of a sub-settlement. Their Lordships have already intimated that they are not satisfied with the reasons which the learned Judge gives for his construction of the instrument, or rather for the qualification of that which he would understand to be imported by the words "*birt semindary* right," by reason of the particular circumstances of the case; and in their own opinion it is highly improbable that the intention of the parties when the contract was made was such as is imputed to them. They do not think it likely that the *Maharajah* (the mortgagor) at that time contemplated the impossibility of his redeeming the mortgage; or that, if he did, he intended in such an event to lose that influence and power and consideration which the great landowners of *Oudh* derived from the inclusion of subordinate *semindaries* in their own *talooks;* and if the words "*birt semindary*," as seems to be admitted, may import the trasfer of merely a sub-proprietary right, their Lordships conceive that to be in this case the more rational construction to be put on them. And it is in their opinion a strong argument in favour of this construction that it makes all the subsequent acts of the Government and the parties which have led to the inclusion of these villages in the *talook* of *Tulsipore* consistent with reason and justice. It is clear that the Government did not intend to grant anything except that which was properly and legitimately part of the estate of the rebellious *Rajah* of *Tulsipore*. It is also clear that as Lord *Canning's* proclamation had then been explained and was understood, the Plaintiff, if he had acquired the absolute interest as *Zemindar* in these villages, and if the villages were thus wholly served from the *talook*, would have been allowed to engage for the revenue, not as *talookdar*, but as independent *Zemindar*. Nevertheless, the villages when the settlement was made were treated as part of *Tulsipore;* and were accepted by the *Maharajah* as part of his *talook*. He had no other title to them except the grant of the estate of *Tulsipore;* and it is more reasonable to conclude that they were properly so included, than to say that by mistake the Government took property which belonged to another man, put it into an estate to which it no longer belonged, and that by reason of the *Estates Act* and the other proceedings which have taken place a wrong has been done which is now irremediable.

Their Lordships will now deal with an argument which was much pressed, viz.,

that there can be no sub-proprietary right unless there be a substantial rent or service to, be rendered by the sub-proprietor to the *talookdar*, and that in this case all that could be paid by the mortgagee after foreclosure would be the Government revenue assessed upon these villages, without giving the *Rajah* any beneficial interest in the collections of the villages. This objection does not appear to have occurred either to Mr. *Capper* or to Mr. *Currie;* nor was it treated as an objection in the case already referred to in Law Rep. 4 Ind. Ap., in which a sub-settlement was granted to a lady who does not appear to have paid anything to her former co-sharer in the estate (as he in fact was) in respect of the four villages of which she was found to be sole proprietor. Nor do their Lordships find, either in the letters of Lord *Canning* or in the rules annexed to Act XX. of 1866, anything which necessarily imports that it is essential to the enforcement of the rights of one who would otherwise be a subordinate *Zemindar*, that the *talookdar* should have some pecuniary interest in the sub-tenure. Those rules, and some expressions in the letters, no doubt, contemplate that in the ordinary case of a sub-tenant he would pay something to the superior lord. Their Lordships, however, do not find that those provisions are exhaustive, or that there are any negative words which say that there shall not be a sub-settlement of a subordinate *zemindary* included in a *talook*, unless the *Zemindar* is bound to pay some substantial rent to his superior.

It might be open to consideration whether, if this were not in the strict sense of the term a sub-proprietary interest, the case in Law Rep. 4 Ind. Ap. would not have justified a sub-settlement of it. It is not necessary, however, for their Lordships to go that length in the present case. It is sufficient for them to say that upon the whole they think this grant of the *birt zemindary* interest should be treated as the conveyance of a subordinate *zemindary* interest; that the villages were at the time of the settlement properly treated as still included in the *talook* of *Tulsipore* settled with the Respondent, and therefore that the judgment of Mr. *Capper* declaring the right of the Plaintiff is correct.

The only doubt their Lordships entertain is, whether that decision has fully and completely satisfied the terms of Act XX. of 1866 by giving to the *Maharajah* the right which that Statute seemed to contemplate that the *talookdar* shall always have, viz., that of receiving a *malikanah* of not less than 10 per cent. That *malikanah* was given in the former case to which their Lordships have already referred. It is not very clear whether Mr. *Capper* assumed that the amount of this *malikanah* would be afterwards fixed when the interest of the Plaintiff should cease to be a mortgage interest, and be perfected by foreclosure.

Their Lordships think that in recommending to Her Majesty (as they propose to do) to allow the appeal and to confirm the decision of Mr. *Capper*, they should also recommend that the order should declare that it is without prejudice to the right, if any, of the *Maharajah* to *malikanah* at a rate not less than 10 per cent., and that he is to be at liberty to apply to the Courts below for the settlement of such *malikanah* as he may be advised. The costs of the appeal must follow the result.

21st and 22nd November, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon Sir James William Colvile, the Right Hon Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Allahabad.

SAHIBZADA ZEINULABDIN KHAN, (Defendant)*... } *Appellant,*

versus

SAHIBZADA AHMED RAZA KHAN, and others, (Plaintiffs) ... } *Respondents.*

Act VIII. of 1859 secs. 111 and 119—Appeal against Ex parte decree by Defendant who had once appeared, allowed.

The words "who has not appeared," as used in section 111 of Act VIII. of 1859 mean "who has not appeared at all," and do not apply to the case of a Defendant who has once appeared, but who fails to appear on a day to which the case has been adjourned, and who therefore is held not precluded from his right of appeal against the *ex parte* decree passed against him, by sec. 119.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The question in this case is whether the first part of sect. 119 of Act VIII. of 1859 applies to a case which has been decided under the provisions of sect. 147 of the same Act. That part of sect. 119 is in the following words: "No appeal shall lie from a judgment passed *ex parte* against a Defendant who has not appeared." Sect. 119 must be read together with sects. 109, 110, and 111. Sect. 109 says: "On the day fixed in the summons for the Defendant to appear and answer, the parties shall be in attendance at the Court House in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." Sect. 110 says: "If on the day fixed for the Defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear either in person or by a pleader when duly called upon by the Court, the suit may be dismissed." There the words are "If on the day fixed for the Defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned." Then comes sect. 111, which says: "If the Plaintiff shall appear in person;"—it does not say "on the day fixed, or on any subsequent day," but simply "If the Plaintiff shall appear in person or by a pleader, and the Defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex parte*." Sects. 109 and 111, taken by themselves, clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit. The 146th and 147th sections are enactments relating to adjournments. Sect. 147 enacts that "If on any day to which the hearing of the suit may be adjourned, the parties, or either of them, shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in sect. 110, sect. 111, or sect. 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case." There is no enactment in that section that, in case the Court disposes of the suit in the manner specified in sect. 111 (the section which applies to the present case), the first part of sect. 119 shall apply to such a judgment. Under Act VIII. of 1859, the general rule is that an appeal lies to the High Court from a decision of a civil or subordinate Judge, and a Defendant ought not to be deprived of the right of appeal, except by express words or necessary implication. Looking at all the sections together, their Lordships are of opinion that the words

* 5 Cowell's I. A., p. 233.

"who has not appeared," as used in sect. 111, mean, "who has not appeared at all," and do not apply to the case of a Defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in *Calcutta*. *Marshall's* Reports, p. 32; 3rd *Bengal* Law Reports, Appendix, p. 121; and 6th *Weekly Reporter*, p. 86.

Two cases were referred to by the learned Judges who decided this case,—a case in 6th *Bengal* Law Reports, p. 689, and one from the North-Western Provinces Reports of 1869, p. 59. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th *Bengal* Law Reports, p. 689, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, p. 59, is certainly in conflict with the several decisions in the High Court at *Calcutta* to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The Respondent must pay the costs of this appeal.

22nd and 23rd November, 1878.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

CHOTAY LALL, (Defendant*) ... } *Appellant*,

versus

CHUNNO LALL and others, (Plaintiffs) ... } *Respondents*.

Hindu Law—Jain Customs—Daughter's Estate.

In the absence of proof of special custom varying the ordinary Hindu law of Inheritance, that law is to be applied to *Jains*.

According to the law of the *Mitakshara*, a daughter's estate inherited from her father is, like that of a widow inherited from her husband, a limited and restricted estate, and does not, on her death, pass as *stridhan* to her heirs, but reverts to the heirs of her father.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE EDWARD SMITH:—

This suit was brought by the Respondents, the Plaintiffs below, to try the right to considerable moveable property which was taken into the hands of the Administrator-General on the death of *Luckhy Bibee*, the wife of the Appellant, who was the Defendant below. The property in suit was the self-acquired property of *Thakoordass Baboo*, who died at *Calcutta* on the 13th of February, in the year 1860,* without any male issue or widow, but leaving an only daughter, *Luckhy Bibee*. This daughter was married in November, 1865, to the Defendant, and died on the 4th of September, 1872, without issue, her husband, the Defendant, surviving her.

* 6 Cowell's I. A., p. 15; 4 I. L. R., Cal., p 744.

The Plaintiffs are grandsons of a brother of *Thakoordass*, and it is admitted that they would have been the heirs of *Thakoordass* if he had left no issue. The question now is, whether they or the Defendant as the husband of *Luckhy Bibee* became entitled to the property in question upon her death.

The first question which has been argued relates to the law which governed *Thakoordass* and his family at the time of his death. *Thakoordass* was a native of the *North-Western Provinces*, and came to reside in *Calcutta* in 1814, and lived there until his death. It is the common case of both parties that he retained the personal law of the place of his birth. He appears to have belonged to the sect of *Jains*; and the first contention of the learned counsel for the Defendant is that the right of succession must be determined by the customs of the *Jains*, —that those customs have not been ascertained, and that the suit ought to be remanded for the purpose of ascertaining them.

The proceedings in the suit as to an inquiry into these customs certainly assume a somewhat singular shape, and the parties have apparently changed sides with regard to it in the course of the suit. The plaint in the first paragraph thus describes *Thakoordass*: "One *Thakoordass Baboo*, of the race or sect of *Jains*, and a resident in the North-West Provinces of *India*, in or about the year of *Christ* 1814 came to *Calcutta*, and there remained until his death, retaining and following the usages of his said sect." The written statement of the Defendant in the 9th paragraph contains this passage: "The said *Thakoordass Baboo*, deceased, was, and the Plaintiffs and the Defendant are, governed by the *Mitakshara* law of inheritance which obtains at *Behar* in the North-Western Provinces of *India*." That is a distinct and simple assertion that the family was governed by the law of the *Mitakshara*. There is no allegation that that law was modified by any custom of the *Jains*. This being the original allegation of the Defendant, now that the right has been decided according to the law of the *Mitakshara* which he had invoked, he turns round and alleges that this is wrong, and that the succession ought to be determined by the usage and custom of the *Jains*. Mr. *Cowell*, who very ably argued the case, has done all that possibly could be done to find a foundation for the contention, but the case does not really afford, when it comes to be examined, sufficient materials for the purpose.

The point arises in this way: Issues were settled, the first and second of which were—"First, was *Thakoordass* a *Jain?* if so, what is the law of succession applicable to *Jains?*" At the hearing of the cause before Mr. Justice *Pontifex*, the advocates of both parties proceeded to consider the effect of the *Mitakshara* law as bearing upon the trial of these issues, and the contention was stated by the Judge in his judgment thus:—Having stated the issues: he says, "But Mr. *Kennedy*, on behalf of the Plaintiffs, insists that under *Mitakshara* law, apart from any peculiar law of inheritance affecting the succession to property among *Jains*, the deceased *Lukhy Bibee* took only a qualified interest in the property in dispute, which interest was not transmissible to her heirs; but upon her death the property reverted to the next heirs of her father; and it was not disputed, on behalf of the Defendants, that the Plaintiffs would be entitled to the property in question in this suit if it was established that under the *Mitakshara* law a daughter does only take a qualified estate in her father's descended property similar to the qualified estate of a widow." It is important to observe what was then not disputed by the Defendant's advocate. The judgment proceeds as follows: "Mr. *Evans*, on behalf of the Defendants, nevertheless insisting that under the *Mitakshara* law the daughter takes an absolute interest in property descending to her from her father, which interest on her death descends to her own heirs and not to the heirs of her father. Under these circumstances of the case I consider it right that the question of inheritance and *Mitakshara* law should be argued before trying the issues above referred to." In consequence of the line thus taken by the advocates of the parties, Mr. Justice *Pontifex*, having heard

their arguments on this question, decided that by the law of the *Mitakshara* the daughter took a restricted estate only. The Defendant appealed to the High Court from that judgment. Their Lordships have looked through the memorandum of appeal, and they find no objection or complaint on the ground that Mr. Justice *Pontifex* had not tried the issues as to the customs of the *Jains*. When the case came before the High Court it directed the case to be remanded for the trial of these issues. The reasons for this judgment do not appear upon the record. The Court probably acted on its own motion, desiring to be informed upon those issues; for the remand was certainly not warranted by any objection appearing in the grounds of appeal.

On the trial of these issues two witnesses only were called. Neither side appears to have gone into evidence as to the customs of the *Jains*, or to shew that the rule of inheritance amongst the sect of *Jains*, to which *Thakoordass* and his family belonged, was different from the ordinary law. Mr. Justice *Pontifex*, who heard the evidence, found upon it that, although the father was a *Jain*, the case was governed by the law of the *Mitakshara*, and the judgment of the High Court, now appealed from, has proceeded upon that finding.

The Plaintiffs objected to the finding on the above issues. Their objection was that the learned Judge in the Court below was wrong in holding that the case was governed by the *Mitakshara* law, and that he ought to have held that the case was governed by the Hindu law of the *Bengal* school; and secondly, that if it were not so governed, it was governed by the Hindu law of the *Benares* school. Those objections were taken by the Plaintiffs in the belief that the law of the schools they referred to would be more favourable to them than the law of the *Mitakshara*; but what is material on the present point, and why attention is now called to these objections, is, that the Defendant did not object to the finding of the Judge upon the ground that the Judge ought to have gone into the evidence as to the laws and customs of the *Jains*. By the *Code of Procedure*, sect. 354, if the Defendant meant to insist that the laws and customs of the *Jains* had not been ascertained, he ought to have objected at that time. The section is clear: "Either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding, and after the expiration of the period so fixed the Appellate Court shall proceed to determine the appeal." The Defendant, having that opportunity of objecting, did not think fit to do so, and accordingly the High Court proceeded to consider the case upon the law of the *Mitakshara*.

Mr. *Cowell* ultimately argued the case as if it was to be presumed that all *Jains* were governed by customs with regard to inheritance differing from the ordinary law, and he suggested that a case, which was recently before this tribunal, supported that view. The case he referred to is *Sheo Singh Rai* v. *Mussumat Dakho and another* (1); but their Lordships think that that case does not support it. On the contrary, the effect of that case is that the customs of the *Jains*, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail. If Mr. *Cowell's* argument is right it would be only necessary that a man should be found to be a *Jain* to establish the conclusion that the ordinary law did not apply to him. The contrary is certainly to be inferred from the decision of this Board.

As this argument was rather strongly pressed by Mr. *Cowell* it will be well to refer to some passages in the judgment in that case. In page 107, in commenting upon the judgment of the High Court, it is said: "The Judges then proceed to an elaborate review of the decisions in *India* in which the laws and customs of the *Jains* have been considered. It appears to have been contended before them—to use the words of the Court—that the applicability to *Jains* of the laws of the *Brahminical Hindus*, or what is generally termed Hindu law, had been established

(1) Law Rep., 5 I. A. p. 87; *Ante*, p. 807.

by so many rulings that the Court was bound to apply it to this case; and further, that no uniform and consistent body of customs and usages existed among the *Jains* which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the *Jains* to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the *Jains* might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved, effect ought to be given to them. The learned counsel for the Appellant who argued the case at their Lordships' bar felt himself unable to dispute the correctness of this conclusion." Their Lordships proceed to say: "It would certainly have been remarkable if it had appeared that in *India*, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether *Hindu* or *Mahomedan*, the Courts had denied to the large and wealthy communities existing among the *Jains* the privilege of being governed by their own peculiar laws and customs, when those laws and customs were by sufficient evidence capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise." The result of the decision is stated in the following passage: "In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit." This decision did no more than adopt and affirm the law, to be deduced from a long roll of cases in *India*, that when the customs of the *Jains* are set up they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them.

The result of a review of the proceedings in the present case is, that the Defendant cannot now impeach the judgment appealed from on the ground that the customs of the sect of *Jains*, to which this family belong, have not been ascertained.

The remaining question is, whether the High Court has taken a correct view of the law, which is now assumed to be that of the *Mitakshara*, in holding that *Luckhy Bibee's* right was a qualified right only, and not an estate of the nature of *stridhan*.

The law of inheritance in the case of women has been recently declared in the case of a widow by two decisions of this Board. Both are to be found in the 11 *Moore's* Indian Appeals. The first is *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram and others* (1), and the other is *Bhugwandeen Doobey* v. *Myna Baie* (2). After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, this tribunal decided that under the law of the *Mitakshara* a widow's estate inherited from her husband is a limited and restricted estate only.

After these decisions the question is reduced to the point whether a daughter inheriting from her father stands in a higher and different position from that of a widow? Reliance has been placed on the often cited text in the *Mitakshara* relating to woman's property. The words most relied upon are contained, not in the text, but in an interpretation of the text. The 11th section of the 2nd chapter, paragraph 1, defines what is woman's property. The important part of the paragraph is: "The author now intending to explain fully the distribution of woman's property, begins by setting forth the nature of it. 'What was given to a woman by the father, the mother, the husband, or a brother or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property.'" It seems that the

(1) Page 139; 2 P. C. J., p. 281.
(2) Page 487; 2 P. C. J., p. 327.

word in the original text "any other" is "*adya*," and that the proper translation of the word would be "or the like," so that the passage ought to be read "or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, *or the like*." The interpretation gives a more specific definition, and instead of "or the like," there are given the words which have been so often cited, and have given occasion to so much discussion. "Also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by *Menu*, and the rest, woman's property." The original text does not afford any foundation for the argument in favour of the right of the widow and daughter to the entire interest in land acquired by inheritance; the interpretation, no doubt, does. No decision of this tribunal has been referred to with regard to the estate taken by the daughter inheriting from her father, but the arguments which were pressed at the Lordships' bar in the present case by Mr. *Cowell* were presented and fully developed in the former cases before this tribunal relating to widows. The reasons by which these arguments were answered in the judgment of the Court—reasons which it is not necessary to repeat—are, for the most part, applicable to the case of a daughter.

But their Lordships cannot regard the question of the daughter's estate as "*res integra*." It has been the subject of numerous decisions in *India*. The Indian authorities are carefully collated in the judgment of Mr. Justice *Pontifex* and of the Judges of the High Court. The result appears to be that the Courts in *Bengal* and *Madras* have determined in a series of decisions that the daughter takes a qualified estate only. No doubt in the Courts of *Bombay* there have been rulings and *dicta* in favour of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases. They agree in the conclusion of the High Court, which affirms that which was stated many years ago to be the law by Sir *William Macnaghten* in his Treatise on Hindu Law, p. 22, in these terms: "But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death in default of issue male. According to the law, as received in *Benares* and elsewhere, it does not go as *stridhan* to her husband or other heir, and according to the law of *Bengal* also it reverts to her father's heirs."

With regard to the case most relied upon in the High Court of *Bombay*, it would seem to have been there admitted, that after the decisions which have taken place, the daughter's estate, according to the *Benares* school, was only a restricted one. The family of *Thakoordass* is apparently governed by the law of that school. Certainly it is not governed by the law of the *Mayukha*, which was held to be the governing law in the *Bombay* case.

Their Lordships may observe that the authorities are collected and discussed in Mr. *Mayne's* learned Treatise on Hindu Law.

Their Lordships think that after the series of decisions which have occurred in *Bengal* and *Madras*, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of the law of the *Mitakshara*; on the contrary, it appears to them to be in accordance with them. The result is that they will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss this appeal with costs.

5th and 6th December, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DOOLAR CHAND SAHOO and others, (Defendants)* ... ... } *Appellants,*

versus

LALLA CHABEEL CHAND, (Plaintiff) ... } *Respondent;*

and

DOOLAR CHAND SAHOO and others, (Defendants) ... ... } *Appellants,*

versus

LALLA BISHESHUR DYAL and others, (Plaintiffs) } *Respondents.*

Execution sale—Notification not under sec. 59 of Act VIII. of 1869 but under sec. 246 of Act VIII. of 1859—Effect of.

Held, that although under section 59 of Act VIII. of 1869 the decree-holder if he had liked might have sold the tenure, in which case the auction-purchaser might have acquired it, free from all incumbrances unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement, the decree-holder had also a right to proceed against the property of the Defendant, and as in this case the sale notification was issued not under section 59 of Act VIII. of 1869, but under section 246 of Act VIII. of 1859, for the sale of the rights and interests of the judgment-debtor, and the certificate also shew the same, the auction purchaser must be held to have purchased the rights and interests of the judgment-debtor and not the tenure itself. Had the tenure been advertised for sale, the Defendant might have protected the tenure by paying off the the decretal amount.

* 6 Cowell's I. A., p. 47.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

In these two cases the property in respect of which the actions were brought was the *mouzah* called *mouzah* "*Inglis*" in the district of *Shahabad*. That *mouzah* many years ago was granted to *Gooran Khan*, an invalided *havildar*, under the provisions of the 33rd section of Regulation XLIII. of 1793. By virtue of that section *Gooran Khan* held the property free of revenue and free of rent during his life as a *jageer*, but upon his death the property became liable to be assessed, and by virtue of the section, to which allusion has been made, the assessment would be in the nature of rent payable to the *Zemindar* of the estate in which the *mouzah* was situate. The *Zemindar* in question was the *Maharajah* of *Domraon*. Upon the death of *Gooran Khan*, *Bachoo Khan*, his son and heir, came in as his representative, and the property then being liable to assessment, he entered into a settlement with the *Maharajah* in September, 1827, upon which a rent was reserved to the *Maharajah* in respect of the tenure. *Bachoo Khan* died in October, 1860, a period within twelve years before the commencement of the suit. He left a widow, *Nazirun*, and a son, *Gooder Khan*, and three daughters, *Nazeerun*, *Saheebun*, and *Peerzadi*. The son was entitled to a share of 5*a*. 7*p*. 4*k*., and the three daughters were entitled to shares amounting together to 8*a*. 4*p*. 16*k*., of the *mouzah*. The widow appears to have given up her share altogether, and it may be assumed for the purpose of this decision that the son took the widow's share, which together with his own share of 5*a*. 7*p*. 4*k*., gave him an interest to the extent of 7*a*. 7*p*. 4*k*. That interest added to that of the daughters, makes up the whole amount of the 16 *annas* of the *mouzah*.

After the death of *Bachoo Khan*, his son *Gooder Khan*, was sued in respect of a loan which had been made to *Bachoo Khan*. Proceedings went on, and a decree was ultimately obtained under arbitration

against *Gooder Khan*. *Gooder Khan*, in order to raise money to satisfy that decree, borrowed a sum of money from *Ram Jeawan Singh*. *Gooder Khan* was sued by *Ram Jeawan Singh* in respect of the money so borrowed; and although *Gooder Khan* had mortgaged a 12 *annas* share of the *mouzah* to *Ram Jeawan* as a security for the loan, the action against *Gooder Khan* was treated merely as one for an ordinary debt, and *Ram Jeawan* obtained a decree against him for the money due, and interest. Upon that an execution was issued. *Bisheshur* purchased under that decree not the 12 *annas* share, which had been mortgaged, but merely the right and interest of *Gooder Khan*, which, as already stated, amounted to *7a. 7p. 4k.* The *Maharajah* also brought a suit against *Gooder Khan* for three year's rent, which was due under the settlement made with him. That suit was brought under the provisions of Act VIII. of 1869 of the Government of *Bengal*. In that suit it was ordered that an *ex parte* decree be passed in favour of the Plaintiff, that the Plaintiff do recover the amount claimed, with costs, and interest at the rate of 6 per cent. per annum up to the day of realization from the Defendant. The *Maharajah* proceeded to execute that decree against *Gooder Khan*. On the 31st of March, 1872, he applied to have it executed. He gave the names of the parties, and then he stated what redress he sought from the Court. He stated under that head, "The attachment and sale of the property belonging to the judgment-debtor,"—that is, the property belonging to *Gooder Khan*. The petition ran in this way: "The decretal money due to your petitioner is payable by the judgment-debtor under a decree mentioned above. Your petitioner, therefore, begs to file this petition along with an inventory of the property belonging to the judgment-debtor, and prays that by attachment and sale of the judgment-debtor's property the decretal amount, together with costs and future interest up to the day of realization, be ordered to be recovered from the judgment-debtor." An inventory was attached to that petition in the following words: "Inventory of the invalid lands, being the *kasht* (cultivation) of the judgment-debtor, situated in *mouzah Rampore, pergunnah Bhojepore*, for the recovery of the arrears of rent whereof the present decree is passed, amounting to 120 *bighas*." It therefore appears clear that that application was merely that by attachment and sale of the judgment-debtor's property the decretal amount might be realized. By virtue of the 59th section of the said Act VIII. of 1869, the *Maharajah*, if he had pleased, was authorized to apply for the sale of the tenure. By that section it is enacted that, "Whenever a decree shall be passed for an arrear of rent due in respect of an under-tenure, which by the title deeds or the custom of the country is transferable by sale, and the judgment-creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the buildings in which the Collector and Judge of the district within which the land comprised in such under-tenure is situate, and to be fixed on some conspicuous place on such land, and on some conspicuous place in the town or village in or nearest to which such land is situated, a notice for the sale of such under-tenure on some fixed date, not less than twenty days from the hanging up of such notice in such Court." By sect. 34 of the same Act it is enacted that, "Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the *Code of Civil Procedure* passed by the Governor-General in Council, being Act No. VIII. of 1859, and by such further and other enactments of the Governor-General in Council in relation to civil procedure as now are or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits." It appears therefore that although the *Maharajah* might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed

against the property of the Defendant. It has already been shewn what the application of the *Maharajah* was. He asked that the decree might be realized by the sale of the property of the judgment-debtor. Upon that application the *Moonsiff* issued a *purwannah* described as a "*purwannah* for execution of decree under sect. 238 to sect. 238, Act VIII. of 1859." If he had considered that the application was an application to sell the tenure under sect. 59 of Act VIII. of 1869, it would have been described as a procedure under that section, and not under the sections of the *Civil Procedure Code* to which the *Moonsiff* refers in his *purwannah*. The *Purwannah* issued to the officer was as follows: "Pursuant to an order of this day, you are required to attach the under-mentioned properties, under the provisions of Act VIII. of 1859, as they may be pointed out by the decree-holder, and submit the inventory of the property attached, with your report, within a week." Then he describes the property "invalid land held in cultivation," and he gives the boundaries of the land. So that the *purwannah* was merely to attach that property under the provisions of Act VIII. of 1859. Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in an ordinary leasehold interest, under Act VIII. of 1859, you can only attach and sell the right, title, and interest of the judgment-debtor; but if you proceed to sell a tenure under sect. 59 of Act VIII. of 1869, then you sell the tenure; and by virtue of sect. 66 of the same Act, the purchaser, under the provisions of sects. 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of sect. 59, the sale would have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all incumbrances, in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for the arrears of government revenue. Having issued that *purwannah* to the officer to execute the decree, notice of the intended sale was given. It is headed "sale notification," not under sect. 59 of Act VIII. of 1869, but "a sale notification under sect. 246 of Act VIII. of 1859;" and it proceeds: "Auction sale of the rights and interests in the under-mentioned properties for the realization of the amount covered by the decree." And then it states: "Notice is hereby given to the public that *Sahib Ram* filed, on the 31st of March, 1872, an inventory of the under-mentioned property, praying for their auction sale for the realization of the decretal money; therefore this proclamation is issued for the information of the public, to the effect that on Friday, July 19th, 1872, A.D., corresponding with 28th *Asar* 1279 *Fusli*, the auction sale of whatever rights and interests *Gooder Khan*, the judgment-debtor, has in the property detailed below will be commenced at noon in the place where the property is situated in *purgunnah Bhojpore, Zillah Shahabad*. If any one wishes to purchase the said rights, he ought to appear at the aforesaid time and place, either personally or through his *mokhtear*, and purchase it. The rights and interests of other persons in the said property will not be sold by auction beside that of the judgment-debtor." So there was an express notice that under the sale in execution of the decree only the rights and interests of the debtor were to be sold; and it was also expressly pointed out that the rights and interests of other persons in the said property, other than those of the judgment-creditor, would not be sold. Under that notification *Doolar Chand* and others, the Defendants in the two suits out of which this appeal arises, purchased. The sale to them was confirmed, and they were put into possession and obtained a certificate of sale. The certificate which they obtained was as follows: "On a petition having been filed for execution of a decree of the Civil Court passed by the *Moonsiff* of *Buxar, Zillah Shahabad*,

dated the 2nd of December, 1871, A.D., in suit No. 16, against the judgment-debtor, and for the sale of his property, a sale notification was, under the order of this Court, issued, and the property sold at auction on the 25th of July, 1872. Whatever rights and interests the judgment-debtor had in the said property were purchased by *Doolar Chand*," and so on. Those are the Defendants. "Hence, this certificate being made over to *Doolar Chand Baijnath* and *Ram Saran Sahoo*, &c., the auction purchasers, it is proclaimed that whatever rights and interests the said judgment-debtors have in the property aforesaid have ceased to exist from the 25th of July, 1872, the date of the auction sale, and become vested in the auction purchasers, *Doolar Chand Baijnath Sahoo* and *Ram Saran Sahoo*." Nothing then can be clearer than that both the *purwannah* and the notice of sale, as well as the certificate, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them, save and except the rights and interests of the judgment-debtor.

Here it may be observed that if the notice of sale had stated that the tenure was to be sold under the provisions of Act VIII. of 1869, the three sisters of *Gooder Khan* might have protected the tenure from sale, by satisfying, in accordance with the provisions of that Act, the decree of the *Maharajah*. The purchasers having been let into possession, *Chabeel Chand*, one of the Plaintiffs, purchased the interests of the three sisters. They were entitled to 8*a*. 4*p*. 16*k*. in this tenure, and the Plaintiff, *Chabeel Chand*, purchased that right, and he contended that under his purchase he was entitled to recover from the auction purchasers, under the *Maharajah's* decree, the 8*a*. 4*p*. 16*k*. which he had purchased from the sisters. *Lallah Bisheshur Dyal*, who had purchased under the decree of *Ram Jeawan Singh*, also claimed that he was entitled to recover possession of what he had purchased under *Ram Jeawan Singh's* decree, and that he had purchased under *Ram Jeawan Singh's* decree the right, title, and interest of *Gooder Khan* previously to the sale under the *Maharajah's* decree. The Judges of the Lower Courts dismissed the claims both of *Bisheshur* and of *Chabeel Chand*. But the High Court reversed those decisions, upon the ground that *Dooli Chand* and others had purchased under the *Maharajah's* decree only the right, title, and interest of *Gooder Khan*. If they purchased the tenure they would have been entitled to retain possession, and the Plaintiffs would have failed in their suit. On the other hand, if they purchased merely the right, title, and interest of *Gooder Khan*, then in the one case *Chabeel Chand* was entitled to recover the 8*a*. 4*p*. 16*k*. share of the *mouzah* which he had purchased from the sisters, and *Bisheshur* was entitled to recover the other portion of the estate which he had purchased as the right, title, and interest of *Gooder Khan*. It has already been shewn what the nature of the sale in execution of the *Maharajah's* decree was, and their Lordships think that the High Court were right in the conclusion at which they arrived, that *Doolar Chand* and others, the Defendants in the suits, had purchased merely the right, title, and interest of *Gooder Khan*, and not the whole tenure free from all incumbrances and the rights of others who were interested therein.

Under these circumstances they are of opinion that the High Court was right in holding that *Chabeel Chand* was entitled to recover the 8*a*. 4*p*. 16*k*., and that *Bisheshur Dyal* was entitled to recover the interest which he purchased under the sale in execution of *Ram Jeawan Singh's* decree. The High Court however appear to have made a mistake. They appear to have been under the impression that *Gooder Khan*, instead of being entitled only to a 7*a*. 7*p*. 4*k*. share, was entitled to a 12 *annas* share in the property, and they accordingly gave *Bisheshur* a decree for a 12 *annas* share, as well as a decree to the other Plaintiff for an 8*a*. 4*p*. 16*k*. share. It is impossible that those two decrees can stand, because that would give a right to the two Plaintiffs to recover against the Defendant 20*a*. 4*p*. 16*k*. out of 16 *annas*. It is clearly an oversight, and Mr. *Doyne*, the learned counsel for *Bisheshur*, has admitted that the decree in *Bisheshur's*

case was erroneous, and that instead of a 12 *annas* share it ought to have been a 7*a*. 7*p*. 4*k*. share.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court in *Chabeel Chand's* suit be affirmed, and that in *Bisheshur's* case the decree be amended by ordering that he shall recover a 7*a*. 7*p*. 4*k*. share of the estate from the Defendants.

Thir Lordships are also of opinion that the Respondents in both appeals are entitled to their costs.

11th, 12th and 13th December, 1878.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court at Bombay.

GULAB DAS JUGJIVAN DAS and others, (Plaintiffs)* ... } *Appellants*,

versus

THE COLLECTOR OF SURAT and another, (Defendants) ... } *Respondents*.

Jaghire—Estate conferred by Grant in.

A *Jaghire* must be taken, *primâ facie*, to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

This case, which has been argued necessarily at considerable length, in their Lordships' opinion resolves itself into the construction of a single document; but in order to make the question which arises intelligible a short statement of facts is necessary.

In the year 1800, on the cession of *Surat* to the *East India Company*, the then governor of *Bombay* granted a *sunnud* to *Najamooddin Khan*, who was the commander-in-chief of the forces of the *Nawab*, and was called the *Buckshee*. That document was dated the 22nd of June, 1800. Their Lordships think they are bound to accept the only translation of it in the record which appears to be properly authenticated, although a somewhat different version of a passage in it is to be found in the judgment of the subordinate Judge. After reciting that whereas by virtue of a compact and a convention made between the Government of the *East India Company* and the then *Nawab*, dated the 12th of May, 1800, to which also the seal of *Najamooddin Khan* had been affixed by way of attestation—*Najamooddin* being the person above referred to as the *Buckshee*—the management and collection of the land revenue, &c., of *Surat*, and the administration of the city, has been delivered over to the *East India Company*, the *sunnud* proceeds as follows: "Under these circumstances it has appeared incumbent and proper, in the view of the chief authority *(Hoozoor)*, that some suitable provision should be made as a subsidy for the expenses of the above-named *Mir Najamooddin Khan* and his descendants; that is to say, by reason of close relationship, and being descended from the same ancestors as those of the *Nawabs* of the maritime city of *Surat*. Therefore, this has been settled by the instrumentality of the governor, who is the ruler of the maritime city of *Bombay*, &c., as follows:—That *Mir Najamooddin*, with his children or descend-

* 6 Cowell's I. A., p. 54; 3 I. L. R., Bom., p. 186

ants, after the deduction of the income of the *jaghire* according to the particulars given at the foot hereof, that is now in the possession of the above-mentioned *Khan*, shall receive from the viliant English Company's Government the sum of Rs. 24,000 per annum by four equal instalments, commencing from the 15th of the month of May, corresponding with the 21st of *Zilhaj* in the above-mentioned year. Hereafter should it be necessary for the Government to resume the above-mentioned *jaghire*, given on account of maintenance or otherwise, the amount of the income thereof shall be received by the above-mentioned *Khan*, and his children or descendants, from the Treasury of the valiant English Company." There is a further provision that "on account of the merit and laudable qualities of the above-mentioned *Khan*, he is to receive during his lifetime Rs.6000 per annum by four equal instalments;" and then are appended the particulars of the *jaghire*, consisting of nine *mehals*, the revenue from which altogether amounts to Rs.6264. 4*a*. It has been said that another *sunnud* or other *sunnuds* of the same kind were given at the same time relating to other *jaghires*. That may have been so, but in their Lordships' view the question to be considered would not thereby be altered.

Najamooddin on his death was succeeded by his son *Sudrooddin*. *Sudrooddin* on his death, in the year 1826, was succeeded by his son *Mohinooddin*, at that time sixteen years of age. *Fatima*, one of the sisters of *Mohinooddin*, was seven years old. There were also other minor children, and sisters and a widow of *Sudrooddin*. In 1828, *Mohinooddin* executed a mortgage to a banking firm—whose representative is the Plaintiff in the present action—of some of the *mehals* in the schedule to the *sunnud*, on behalf not only of himself but of his brother *Amesnooddin*, a minor aged eleven years (who died soon after), "and on behalf of his minor sisters on his father's side" (including *Fatima*), "and as agent having full power in respect of all matters below-mentioned on behalf of his step-mother and step-sisters, and other heirs" of *Sudrooddin*. The mortgage was to secure re-payment of an advance of Rs. 39,000. There is a power of redemption at the end of five years, and other stipulations customary in mortgages of this kind, and a provision that the banking firm shall receive the proceeds of the *mehals* either through the *sircar* or by collecting them themselves. In the year 1845 *Mohinooddin* executed another mortgage, professing to act on his own behalf only, confirming the previous mortgage of 1828, and further charging the property mortgaged for the re-payment of another sum of Rs.1000, which he then borrowed. It would appear that the banking firm up to the year 1840 themselves collected the rents of the villages; but in 1840 the Government made an order whereby they took the collection into their own hands, paying over the rents—with some interruptions which it is not now material to consider—to the banking firm under a *mooktearnamah* so directing executed by *Mohinooddin* until the year 1857, when they ceased making the payments upon receiving a letter from *Mohinoooddin* stating that the mortgage had been satisfied, and prohibiting any further payments being made. In the year 1860 *Mohinooddin* died, and was succeeded by his sister *Fatima*, who received the income of the *jaghire*, and was recognised as *Buckshee* by the Government.

In the year 1866 the present action was brought by the then representative of the banking firm against the Collector of *Surat*, *Fatima*, and three other persons, descendants of the sisters of *Mohinooddin*, of whom one has died and two have disclaimed, and with regard to whom therefore no question arises. The claim is in substance for an order against the collector, that he do pay the revenue of the villages to the Plaintiff, as mortgagee, the contention being that the mortgage bound the property in the hands of *Fatima*; and against *Fatima* for the payment of a *lac* of rupees minus one, alleged to be due for interest and principal upon the mortgage. The answer of the Collector is that he has a sum in his possession which he pays into Court, and that this is all which he had in the lifetime of *Mohinooddin*, after satisfying certain other

creditors, and he denies his liability to make any payments to the Plaintiffs after the death of *Mohinooddin*.

Fatima answers, among other things, that *Mohinooddin* had only a life estate in the property, and therefore could not charge it beyond the term of that estate, and it is upon that answer of *Fatima* that the question in the cause arises. Both of the Courts in *Bombay* have found in favour of the Defendant, that *Mohinooddin* had only a life estate. The same finding has also been come to in another suit brought by other creditors against *Fatima*, in the High Court of *Bombay*, decided in 1874, in which the same question arose, and which has not been appealed against. The Appellants now contend that all these decisions are wrong, and that *Mohinooddin* took an absolute estate.

This question depends upon the construction of the *sunnud*; but that construction may be aided by a consideration of the surrounding circumstances, and of the occasion on which it was granted. The circumstances under which it was granted appear to be clearly and sufficiently set out in a minute of the then Governor of *Bombay*, which is referred to in the judgment of Mr. *Kemball*, the subordinate Judge, and is in these terms:—"Besides these official advantages, the *Buckshee* had for many years past been in the possession of various *jaghires*; that his relations, the *Nawabs* of *Surat*, at different times (but all above twenty years ago), alienated in his favour from various parts of the *mogullae* or assigned revenues on the neighbouring *pergunnahs* for the support of the *Nawabship*, in like manner as they have (as far as depended on them) done to various other individuals. These estates or assignments, which the *Buckshee* appeared to be very desirous of retaining, amount yearly, according to the valuations expressed in the *pergunnahs* or grants, to Rs. 16,810, respecting which the present *Nawab* declared, on being separately consulted, that he considered them as having from the original grants and the length of possession become the *Buckshee's* property; on all which grounds I have settled that, including the said *jaghires*, the *Buckshee* shall receive from the Company an annual stipend of Rs. 30,000, to be continued to his children and family after his decease at the reduced rate of Rs. 24,000, with a clause inserted in the grant in conformity to the instructions to that effect from the most noble the Governor-General in Council; that in event of its becoming expedient for Government to resume the *jaghires* the parties shall be satisfied to receive their value of produce from the Treasury in like manner with the residue of their pension."

The terms of the *sunnud* are in accordance with this minute. It appears to their Lordships that it was the intention of the *East India Company* not merely to give a reward to the *Buckshee* for any personal services which he had rendered (a reward which he would be able to dispose of as he thought fit), but to make a permanent provision for the maintenance of an important family in *Surat*. This object is indicated by the expression "by reason of close relationship and being descended from the same ancestors as those of the *Nawabs* of the maritime city of *Surat*." The specific benefit given to the individual for his own services is subsequently stated as Rs. 6000 per annum, in addition to that which was intended for the permanent maintenance of the family.

It has been argued on the part of the Appellants that this *sunnud* was not a grant of a *jaghire*, but merely a confirmation to the *Buckshee* of a *jaghire* which he before held by hereditary tenure, and had power to alienate; and that this grant ought not to be construed as cutting down his rights. But it appears to their Lordships that the foundation of this argument fails the Appellants. They agree with the High Court that a *jaghire* must be taken *primâ facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary. There is no evidence that the *jaghires* held by the *Buckshee* had come to him from his ancestors or were hereditary. On the contrary, they appear to have been granted to himself, although more than twenty years before the date of the *sunnud*, and there is no statement that they were granted on terms which

would make them hereditary. It is true that the *Nawab* speaks of them having belonged to the *Buckshee* so long that they might be considered as his property, but their Lordships cannot regard this statement as anything more than a recognition that in all probability upon his death the *jaghires* might, as no doubt was often the custom, have been continued to his heirs or to some of his successors by the native government, possibly on the payment of a fine; and they agree with the High Court, that, so far from the presumption being that the *Buckshee* had an hereditary and alienable estate, the presumption is the opposite.

That being so, their Lordships do not regard the grant as cutting down his right, but as extending it so that his successors would be necessarily treated as the owners of the *jaghire* unless and until resumed; but having regard to the object and terms of the grant, they have come to the conclusion that each of the descendants of the *Buckshee*, who took the *jaghire*, took it for life only.

It should be observed that the main object of the grant is to secure a pension (that is the proper term for it) of Rs. 24,000 per annum to this family. A portion of that pension is to be paid out of the revenues of certain *mehals* constituting the *jaghire* stated in the schedule; the proceeds of the *jaghire* are thus in effect but a part of the pension. It has been scarcely contended on the part of the Appellants that the pension was alienable. But, if the pension was unalienable, and the *jaghire* was alienable, this conclusion would appear to follow. If the *jaghire* had been sold, and the Government had at any time chosen to resume it, as they expressly reserve to themselves power to do, they would have been obliged to pay to each of the purchasers of the *mehals* constituting the *jaghire*, who would be strangers, and to their successors in perpetuity, a portion of the pension of Rs. 24,000 per annum granted especially for the support of the family of *Najamooddin*. It appears to their Lordships that this result cannot reasonably be supposed to have been contemplated at the time the *sunnud* was entered into, unless it was contemplated that the whole of the Rs. 24,000 by way of pension should be alienated, a supposition wholly inadmissible.

On the whole, therefore, their Lordships, having regard to the peculiar character of this grant from the Government under the circumstances which have been related, and with the objects which it expresses, have come to the conclusion that the Court of *Bombay* was right in treating it as conferring upon the descendants of *Najamooddin*, who would be entitled under it, an estate for life and for life only.

Their Lordships having come to this opinion on the grounds above stated, do not think it necessary to refer at length to some cases which have been quoted, having little bearing upon the present. They may observe that the case which was referred to, *Rajah Nursingh Deb* v. *Roy Koylasnath and others* (1), decided no more than that where a *Zemindar* had made a grant vesting property in the grantee and his descendants from generation to generation,—terms well known in *India* as conferring an hereditary estate, that hereditary estate was not cut down and made unalienable merely by a direction that certain persons should be maintained. Their Lordships may observe that this was a grant from a private individual, and they are not prepared to affirm that all the considerations applicable to grants from private persons apply to grants from the State. It should be borne in mind that the present is not the case of the State merely granting a *jaghire*, and declaring that that grant shall be hereditary, but it is a grant of a *jaghire* accompanied with the grant of a pension, under circumstances which indicate that the intention was that the grant of the *jaghire* and the grant of the pension should be subject to the same conditions.

A case has also been referred to, decided in the North-Western Provinces, of *Bithul Bhut* v. *Lalla Raj Kishore and others* (1), with reference to which their Lordships think it enough to say that the decision there turned upon the construc-

(1) 9 Moore's Ind. App. Ca. 55; 1 P. C. J., p. 842.
(1) 2 Agra Rep. A. C., 284.

tion of regulations which had force in the North-Western Provinces, but have no application to *Bombay*, and further, that the grant in that case was the grant of a private person.

The only further question which has been argued is whether *Fatima* ratified the execution of the mortgage by her brother *Mohinooddin* after she became of age, and if so, what is the effect of that ratification. Upon this subject their Lordships think it enough to say that they see no reason for differing from the conclusion which the High Court have come to, upon what is in a great measure a question of fact, viz., that she did not ratify that execution with knowledge of her rights, and that therefore she cannot be bound thereby.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and this appeal dismissed with costs, such costs to include the costs of both Respondents.

AN

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TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

IN THREE PARTS:

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PART I.—GENERAL.

ACCOUNT.

An agreement between a principal and his agent commenced with an admitted balance, and clearly contemplated the existence of an account current containing mutual items of debit and credit. The agreement contained a stipulation that on the adjustment of the accounts the principal should be bound to pay such balance as might be found due from him. The account was kept accordingly as a continuous account, and contained several items which brought down the mutual dealing to March, 1868. The agent sued in February, 1871, to recover the balance due to him on the account :—

Held, that the case fell within the 8th section of Act XIV. of 1859, and was not barred by limitation, even as to the items which were dated more than three years before the institution of the suit.

In a suit for an account it was ordered by consent of the parties that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of certain merchandise, or the value of such merchandise, delivered, or otherwise, with full powers for the purposes of the investigation ; and that if questions of law should arise and could not be settled or disposed of before the commissioner, they were to be submitted to the Court :—

Held, that this reference was different from the ordinary reference to a commissioner to examine accounts under Art. 181 of the *Code of Civil Procedure*.

Whether it would be competent to the Court to re-open a question of account against a clear finding upon a question of fact relating to the account and made by the commissioner upon the evidence properly before him, *quære*. [*Watson* v. *Aga Mehedee Shirazee*] 384

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Where lands submerged by a river reform, and can be identified as having formed a part of a particular estate, they belong to the owner of that estate, whether his estate consists wholly of permanently settled lands, or whether it has been partly acquired as an alluvial accretion under temporary settlements made by Government with him as

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ACT I. OF 1845.

A purchase at a sale for arrears of revenue under Act I. of 1845 made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act; and the members of the joint family can sue to enforce rights acquired by them under such a purchase, as against the managing member, though he is the sole certified purchaser.

Where, after appeal brought, the Court below has passed a judgment in review in the same case, which has been sent up and notified to Her Majesty in Council, and put on record in the appeal case, it is open to the Judicial Committee to pass judgment on the appeal, without prejudice to the subsequent judgment which was passed on review. [*Toordun Singh* v. *Pokhnarain Singh*] 390

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ACT X. OF 1859.

Where in a perpetual lease there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void: *Held* that in a suit under cl. 5, s. 23 of Act X. of 1859, for cancellation of the lease on account of a breach of the condition, the lessee was entitled to the benefit of s. 78, even though the defence set up was false in fact. [*Duli Chand* v. *Meher Chand Sahu*] ... 215
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ACT XXIII. OF 1861.

The decree of the High Court affirmed under the circumstances of the case, but *held* (contrary to the opinion of the majority of a Full Bench):—Where a decree against a person in a representative capacity has been properly passed, and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of Act XXIII. of 1861, s. 11. [*Chowdry Waked Ali* v. *Mussumat Jumaee*] 139

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ACT XX. OF 1866.
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ACT I. OF 1869.

In a suit against the Respondent pending the regular Settlement of *talook Sessendee* to establish Plaintiff's right to a direct settlement with her of four villages, and of a one-third share in seven others out of the twenty-six villages of which the *talook* was composed; it appeared that the Respondent had before judgment obtained a *sunnud* of the whole *talook*, his name being entered in the second schedule to Act I. of 1869, and further that he had admitted himself to be trustee for the Plaintiff as respects the said one-third

share of seven villages. It also appeared that the Plaintiff was entitled to a sub-settlement of the said four villages:—

Held (1), that the Plaintiff could not establish *talookdary* rights, for, having no interest in many of the villages, in order to make her a *talookdar* it would be necessary to reform the *sunnud* and break up the existing settlement and resettle the estate in three different portions.

Quære, whether the *sunnud* could be reformed after Act I. of 1869, without a special Act of the Legislature.

(2) The Plaintiff could not under the summary settlement and the order of the 10th of October, 1859, acquire proprietary rights as against the Respondent, who was sole hereditary proprietor of the *taluok* before the summary settlement, and whose rights were reserved under the Proclamation.

(3) The summary settlement not having been made with the Plaintiff *as talookdar*, neither it nor the order of 1859 conferred *talookdary* rights upon her.

Held, lastly, that the Plaintiff was entitled to a Hindu widow's estate of inheritance in the said four villages and in a one third share of the profits of the said seven villages, and to have a sub-settlement of the four villages on terms of paying to the *talookdar* the government demand *plus* 10 per cent.

Quære, whether the effect of the letter of October, 1859, and the subsequent legislation is to relieve a Hindu widow, though a *talookdar*, from the disabilities imposed upon her by the general law. [*Widow of Shunker Sahai* v. *Rajah Kashi Pershad*] 289

2. In a suit brought in 1867 to establish Plaintiff's right to a *talookdary* in *Oudh*, as grandmother and heiress to a deceased infant *Rajah*, with whom a summary and temporary settlement thereof had been made; it appeared that the *taluok* had been, after the death of the infant *Rajah*, and before the letter of the 10th of October, 1859, resumed by the Government:—

Held, that the Plaintiff as heir of a *talookdar* who had been permitted to engage for the revenue, but who had died before the letter of the 10th of October, 1859, was not entitled to the permanent hereditary and transferable proprietary right described thereby, but which had never vested in the deceased *Rajah*.

Act I. of 1869 did not apply to the case. [*Ranee of Chillares* v. *The Government of India*,] 298

3. Under Act I. of 1869 a suit for redemption is not barred where the instrument of mortgage fixes a term within which the mortgage might be redeemed, and such term did not expire before the 13th of February, 1856.

In a suit for redemption, the mortgage deed, dated the 21st of July, 1840, having been lost, the Judicial Commissioner held that the *onus* lay, not upon the mortgagor to prove that the term did not expire before the 13th of February, 1856, but upon the mortgagee to prove that it did:—

Held by their Lordships, that the burden of proof was *primâ facie* on the mortgagor, regard being had, as respects the *quantum* of evidence required to the opportunities which each party might naturally be supposed to have of giving evidence. [*Rajah Kishen Dutt* v. *Narender Bahadoor Singh*,] 570

4. An *Oudh taluok* standing in the name of *J. S.*, as *kabuliatdar*, having been confiscated under Lord *Canning's* proclamation of March 1858, was summarily settled with *J. S.* on the 24th April following. A *taloukdary sunnud* was granted to *J. S*, and he was subsequently registered as *talookdar* under the provisions of Act I. of 1869.

In a suit against *J. S.*, by persons alleging themselves to be joint in family and estate with him, to have their interest in the *taluok* declared, held by the Commissioner of *Sectapore* in *Oudh*, confirming the decision of the settlement Officer, that, under Act I. of 1869, the Defendant was protected by his *Sunnud* against any claim of the Plaintiffs in respect of the *taluok*. *Held* by the Privy Council on appeal, that as a person who has been registered as a *taloukdar* under Act I of 1869, and has thereby acquired a *taloukdary* right in the whole property, may, nevertheless, have, made himself a trustee of a portion of the beneficial interest in lands comprised within the *taluok* for another, and be liable to account accordingly; the suit must be remanded for trial as to whether the Defendant had agreed, or become bound, to hold the villages comprised in the summary settlement and *sunnud*, the rents and profits thereof, in trust for the Plaintiffs.

The cases of *Mussumat Thukrain Sookraj* v. *The Government of India* (1) and *The Widow of Shunker Sahai* v. *Rajah Kashi Pershad*. (2) approved.

The words "Court of highest civil jurisdiction in any province" in Act II. of 1863, have reference to the general jurisdiction of the Courts, and not to the family of their decisions in particular cases. A Court which, under the provisions of Act XXXII of 1871, is a subordinate Court, has no authority, under Act II. of 1863, to admit an appeal to Her Majesty in Council even where its decision is final. [*Thakoor Hurdeo Bux*, v. *Thakoor Jawahir Singh*] 704

5. Where an *Oudh talookdar*, not having male issue, is shown to have so exceptionally treated the son of a daughter, as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son of his own if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment of the 4th clause of s. 22, Act I. of 1869.

Circumstances affording evidence of such an intention considered.

The will of a *Hindu* may be revoked by parol, and where definite authority is given by him to destroy his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed. [*Maharaj Pertab Narain Singh*, v. *Maharanee Subhao Kooer*] 740

6. A *taluok* in *Oudh* having been confiscated by

Government by Lord *Canning's* Proclamation, was granted to the widow of the last owner, a *Hindu* by a *sunnud*, with right of alienation, and of succession to her male heirs.

Held that after the death of the widow, her heirs, and not the heir of her husband should succeed.

As regards succession, the limitation in the *sunnud* was wholly superseded by Act I. of 1869, sec 22.

Under cl. 11 of that section, the inheritance would devolve on her daughter whose right is preferred to that of the son of a rival widow's daughter. [*Brij Indar Bahadoor Singh*, v. *Ranee Janki Kooer*] 763

7. Although a *sunnud* granted by the Government of *India* subsequent to the proclamation of March 1858, of an estate in *Oudh*, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party.

Where the lower Courts, on the ground that the Defendant's title under a *sunnud* was absolute, declined to consider evidence which the Plaintiff relied on as showing that the Defendant really held for him as a trustee, the case was remanded by the Judicial Committee in order that such evidence might be received and considered. [*Thakoor Sheer Bahadoor Singh*, v. *Thakurain Dariao Kooer*] 769

8. An estate in *Oudh*, which has been confiscated under Lord *Canning's* proclamation of the 15th March 1858, was granted to *B.* as *talookdar*. *G. S.*, who at the date of the proclamation was in possession of the estate as mortgagee "with *birt zemindary* rights," under a conditional deed of sale from the former owner, was thereupon dispossessed, and *B.* put into possession. Failing in other attempts to recover possession, *G. S.* brought a claim, in which he asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him.

The claim was dismissed by the settlement Officer as being for a direct settlement of a superior proprietary right, and as such barred by the *Oudh Estates Act*, No. I. of 1869.

On appeal to the Commissioner the claim was modified into one for a sub settlement of an under proprietary right, and a decree was made declaring the Plaintiff's under-proprietary *zemindary* title, and awarding him possession under the terms of the deed of conditional sale, till such time as the mortgage should be redeemed, or the title perfected by foreclosure.

On the appeal to the Judicial Commissioner, this decree was reversed and the claim dismissed on the ground that the effect of the mortgage deed was to convey to the Plaintiff on the mortgage becoming absolute, the full proprietary title, and not merely a subordinate one.

Held by the Judicial Committee of the Privy Council, that the "*birt zemindary* rights" which the mortgage purported to convey, implied a merely subordinate *zemindary* interest, and that the claim of the Plaintiff to a sub settlement was valid.

Quære—Whether, even if the interest intended to be conveyed by the mortgage was not in strictness sub-proprietary, a sub-settlement might not have been supported.

Quære—Whether, under Act XX. of 1866, *B.* as *talookdar* was entitled to *malikanah*. [*Gouri Shunker* v. *The Maharajah of Bulrampore* 873

ACT IV. OF 1869.

See DIVORCE.

ACT IX. OF 1869.

See LIMITATION 6.

ACT VIII. OF 1871.

See PRACTICE 2.
— REGISTRATION 3, 4.

ACT XXIII. OF 1871.

See REGISTRATION 3.

ACT XXXII. OF 1871.

See ACT I. OF 1869.

ACT XXXIII. OF 8871.

See PENSION ACT.

ACT OF STATE.

1 The status of the King of *Delhi* was that of a King recognized by the British Government; and the confiscation of his territories in 1857 was an act of State, and not an act done under color of any legal right of which a Municipal Court could take cognizance. His tenure of the territories assigned him by the Government was a tenure merely *durante beneplacito*, and no power was conferred upon him of creating incumbrances which would survive his deposition.

The word "confiscation" does not necessarily import that the appropriation is to be made as a penalty for a crime, nor when used in that sense does it necessarily imply that the forfeiture has accrued upon conviction, but it may also be properly used as applicable to appropriations of property by Government as an act of State

The circular Orders, as to the liability of Government for debts of rebels, issued by the Judicial Commissioners of the *Punjab*, were not laws within the meaning of 24 & 25 Vict., c. 67.

The cases of *Forester* v. *The Secretary of State* (1) and *Lalla Narain Doss* v. *The Estate of the ex-King of Delhi* (2) distinguished. [*Rajah Saligram* v. *The Secretary of State*] 191

2. Where an estate is seized by the Crown by its right of conquest, and not by virtue of any legal title, such seizure must be regarded as an act of state and is not liable to be questioned in a municipal Court.

Secretary of State for India in Council v. *Kamachee Boys Sahaba* (1) followed. [*Sirdar Bhagwan Singh* v. *The Secretary of State*] ... 413

See EVIDENCE 1.

ACKNOWLEDGMENT.

See LIMITATION 4.

ACTION BEFORE ATTACHMENT.

See DECREE.

ACTION FOR IMPROPERLY PUTTING THE LAW IN MOTION.

See CHAMPERTY 2.

ADVERSE POSSESSION.

See ALIENATION 4.

AGREEMENT.

1. Where it was agreed between *A* and *B* that, in consideration of certain proceedings to be instituted jointly by *A* and *B*, and payments to be made by *B*, for the recovery of certain property claimed by *A*, against *C*, *A* would make over the half of the property recovered to *B*; but A, contrary to the terms of the agreement, without the consent of *B*, compromised his claim with *C*, and obtained possession,—*Held*, the agreement did not operate as a transfer of the property to *B*; she could not sue to eject A.

Semble.—*B's* proper remedy was a suit for specific performance or for damages for breach of the contract, to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by *A*. [*Ranee Bhobo Soonderee* v. *Isur Chunder Dutt.*] ... 136

See ACCOUNT
— CHAMPERTY 2.
— COMPROMISE 2.
— CONTRACT 1.

ALIENATION.

Certain property was attached in execution of a decree, and while the attachment was in force *pattahs* were granted to certain persons by the judgment-debtors. Twelve years after the attachment, no further steps having been taken in the matter, the execution case was struck off the file, and the property was afterwards mortgaged by the judgment-debtors to *R*. Subsequently a fresh attachment was issued at the instance of the heirs of the former attaching creditor, under which the property was put up for sale subject to *R's* mortgage, and *R* herself became the purchaser. In a suit by *R* to set aside the *pattahs* granted during the continuance of the first attachment, *Held* that the prohibition against alienation of property under attachment avoids such alienation only as against the execution-creditor or persons entitled to claim under him.

A Conveyance executed by the judgment debtor after an attachment has been removed, and before a fresh attachment is issued, is valid, though the second attchment is under the same execution as the first.

Quære.—Whether an alienation of property under attachment void as against the execution-creditor becomes valid by relation when the attachment is removed?

Semble.—It may be presumed that an execution, long neglected and finally struck off, has ceased to be operative, and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain. [*Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* 208

See CIVIL PROCEDURE CODE 1.

ALLEGATIONS.

See AGREEMENT.
—TRUSTEES.

ALLUVION LANDS.

1. In a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian river, concerning certain *churs* formed in the course of that river, each landed proprietor maintaining that he was entitled to those *churs* as appertaining to his estate. *Held*, that no sufficient explanation had been given of a very long delay on the part of the Plaintiff in instituting the suit. That if some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. That the hardship might be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away, or witnesses may have died. That in this case there had also been a delay of nearly ten years wholly unexplained in the prosecution of the appeal. That Plaintiff had failed to prove his case. That he had not proved the lands which had reformed, if lands had reformed in the bed of the river, to have been the same as those which belonged to his predecessors, and had been diluviated, and that he had failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he was in possession.

Whether the 2nd Clause of the 4th Section of *Bengal* Regulation XI. of 1825, applied, or, whether the 5th Clause of the same section applied, it was equally essential to the maintenance of the Plaintiff's case that he should establish the identity of the land which he had lost. [*Sham Chund Bysack*, v. *Kishen Pershad Surma*] ... 113

2. The Plaintiffs sued to obtain possession of land on the ground of the existence of a custom in the district that where land which had once been alluvial lies between two branches of a river (or two rivers,) and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the land owner on the side of the channel which at any given time is fordable. *Held* (without deciding whether such a custom falls within s. 2, Reg. XI. of 1825) no clear and definite usage had been established.

A fluctuating boundary between *zillahs* does not necessarily affect the rights of landed riparian proprietors.

An *ikrarnamah* between two *Zemindars* as to the mode of determining the boundaries of their estates in the event of changes in the channel of a river, cannot bind persons claiming under one with whom the perpetual settlement was subsequently made as to the lands in his possession, he being a stranger to that *ikrarnamah*. [*Baboo Bissessur Nath*, v. *Maharajah Mohesur Buz Singh*] 147

3. Where a *chur* formed in the middle of a river, and was settled with *A*, and by the recession of the river new land appeared, which was really a deposit on the ancient site of *B's* land though adhering to the *chur*, it was held to be *B's* land.

The first rule established by s. 4, Regulation XI. of 1825, does not apparently contemplate land other than that commonly known as alluvion, *viz.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the civil law. There is no express provision in the Regulation for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears on the recession of the sea or river, and there is nothing to take away or destroy the original proprietor's right; such a case is to be determined by the general principles of equity and justice under the 5th rule contained in s. 4.

A title founded on the original ownership and identification of land re-appearing is to be confined *primâ facie* to the reformation on that site. [*Nogender Chunder Ghose*, v. *Mahomed Eesf*,] 151

The doctrine in *Lopez's Case* that diluviated lands, re-forming on their old site, remain the property of their original owner, does not apply to lands in which after their re-formation an indefeasible title has been acquired by long adverse possession, or otherwise.

Where a Plaintiff relies on an alleged adverse possession of lands for more than twelve years after their re-formation, the question to be decided is whether he has had such possession for twelve years. [*Radha Pershad Singh*, v. *Ram Coomar Singh*] 776

APPEAL CIVIL.

1. Upon a case being remanded to the District Judge with certain directions, the Judge referred the case to arbitration with the consent of the parties. The award was accordingly made, but was signed by the arbitrators separately. It was then filed in the *Zillah* Court and a decree was passed in conformity with it, which was subsequently set aside on appeal apparently on two grounds,—(1) that the award was informal, being separately signed by the arbitrators and (2) that the Judge proceeded irregularly in passing the decree without allowing ten day's time for bringing in objections to the award; and the case again remanded to the Judge to have the award put into a formal shape and regularly filed. The Judge acted accordingly, inducing, however, one of the arbitrators to withdraw his resignation and sign the award in the presence of the other.

Upon appeal against the judgment in conformity with the award:—

Held, that the judgment being in accordance with the award, was under sec. 325, Procedure Code, final, and that being so, no appeal lay against it to the High Court; and that *a fortiori*, the appeal from the judgment of the High Court to the Privy Council, could not be maintained.

Held, further, that the award was formal, the mere tender of the arbitrator's resignation afterwards withdrawn not affecting in; that there had been adjudication as to its validity and that that adjudication was final. [*Maharajah Joymangal Singh*, v. *Mohan Ram Marwaree*] ... 493

2. Their Lordships refused to reverse a decision of the High Court upon a question of fact in which that Court had before it the documents and the evidence of the witnesses, and had an opportunity of judging of the demeanour of the witnesses. [*Rojah Juggeebun Lall* v. *Kartick Chunder Bondopadhya*] 559

See ACT I. OF 1869, 4.

APPLICATION.

See REVIEW.

ARBITRATION.

See APPEAL, 1.

— CIVIL PROCEDURE CODE, 4.

ARBITRATION, CONSULTATION OF EXPERTS BY

See CIVIL PROCEDURE CODE, 4.

ATTACHMENT.

See ALIENATION.

— SALE 2, 4.

AUCTION PURCHASER.

An auction-purchaser at a revenue sale of a permanently settled estate is remitted to all the rights possessed by the original settler at the date of the settlement. In order to abolish tenures and incumbrances subsequently created, his cause of action dates from his purchase. The existence of such tenures at the date of the permanent settlement must be proved by their holders; the presumption in favor of a purchaser resting upon the principle that every *bigha* of land sold must contribute to the public revenue, unless specially exempted. The tendency of recent legislation and decision has been to give force to the contrary presumptions arising from long and undisturbed possession.

In a suit by an auction-purchaser of a permanently settled estate to recover certain *julkurs* of which the Defendants had been admittedly in possession for nearly fifty years, and which they claimed as incidents to a tenure which existed before the date of the permanent settlement, it was held that the onus was on the Plaintiff to prove his title affirmatively.

The Judicial Committee refused to entertain an objection taken in the grounds of appeal, which had not been taken on appeal to the High Court.

Julkar, or the right of fishery, may exist in *India* as an incorporeal hereditament, and as a right to be exercised upon the land of another [*Forbes* v. *Meer Mahomed Hossein*] ... 204

See DECREE, 2.
— PRESUMPTION.
— PRACTICE PRIVY COUNCIL, 1, 2.
— M. L. GIFT, 2.

AWARD.

See APPEAL 1.
— CIVIL PROCEDURE CODE, 4.

BAI-BIL-WAFA.

See MORTGAGE 2.

BARRISTER.

An order of a High Court suspending a barrister from practice for five years set aside on the ground that, although there had been grave irregularity, there was no *malus animus* to show an intention to commit a fraudulent act. [*Newton* v. *Turner and others*] 15

BENAMEE.

See CIVIL PROCEDURE CODE, 2.
— H. L. INHERITANCE, 1.

BENEFICIAL INTEREST.

See ACT I. OF 1869, 4.

BENGAL REGULATIONS

The provisions of cl. 2, s. 8, Regulation VIII. of 1819, with regard to the notification of the sale of a *putnee talook* for arrears of rent under that Regulation, that the serving peon shall "bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot," are merely directory, and where there is proof that the notice was in fact served, the sale will not be vitiated by non-compliance with any of these provisions, *e. g.*, as where one of the witnesses attesting the service of the notice turns out not to be "substantial."

A respectable man, of good character, living and well known in the neighbourhood, may properly be considered a "substantial person," within the meaning of cl. 2, s. 8, of the Regulation: it is too limited a construction of that clause to hold that the word "substantial" must be taken to mean a wealthy man, from whom damages could be recovered by the *putneedar* supposing the attestation to be false.

Where special leave to appeal to the Privy Council is granted upon a petition in which material mis-statements are made, objection should be taken by the Respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on. Where it was not clear that the material mis-statements in the petition had been made with an intention to deceive, and the objection to the appeal was only taken at a late stage of the hearing, the Judicial Committee declined to dismiss the appeal, but refused the Appellant the costs of the appeal. [*Ram Sabuk Bose*, v. *Monmohini Dossee*] 442

BENG. REGULATION III. OF 1793.

See M. L. DOWER, 2.

BENG. REGULATION VIII. OF 1793.

See ENHANCEMENT OF RENT.

BENG. REGULATION X. AND XXVI. OF 1793.

See ADOPTION, 4.

BENG. REGULATION XI. OF 1793.

See FAMILY CUSTOM.

BENG. REGULATION XV. OF 1793.

See MORTGAGE, 1.

BENG. REGULATION XLIV. OF 1793.

See RESUMPTION.

BENG. REGULATION VIII. OF 1799.
See SALE 1.

BENG. REGULATION X. OF 1800.]
See FAMILY CUSTOM.

BENG. REGULATION XVII. OF 1806.
See MORTGAGE 6.

BENG. REGULATION V. OF 1812.
See ENHANCEMENT OF RENT.

BENG. REGULALION VIII. OF 1819.
See SALE, 5.

BENG. REGULATION I. OF 1824.
See SALE. 1.

BENG. REGULATION XI. OF 1825.
See ALLUVION 1, 2, 3.

BENG REGULATION VIII. OF 1831.
See SALE 1.

BIGNAMY.
See CUSTODY OF CHILD.

BOUNDARY.
See ALLUVION, 2.
— EVIDENCE 3.

BREACH OF CONDITION.
See H. L. WILL 2.

BREACH OF CONTRACT.
See AGREEMENT.

BRITISH TERRITORY.
See CESSION OF TERRITORY.

BURDEN OF PROOF.
See AUCTION-PURCHASER.
— COMPROMISE 1.
— ONUS PROBANDI.
— PURDA NASHIN WOMAN.
— H. L. DEWUTTUR 3.

BUTWARA.
See MORTGAGE 3.

CAUSE OF ACTION.
See COMPROMISE 2.
— MORTGAGE 5.
— PLAINT 3.
— RES-JUDICATA 4, 5.

CERTIFIED PURCHASER.
See CIVIL PROCEDURE CODE 3.

CESSION OF TERRITORY.

Semble that the general and abstract doctrine laid down by the High Court at *Bombay* that it is beyond the power of the British Crown, without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in *India*, in time of peace, to a foreign power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part of the Government of *India* purporting to transfer uncertain villages forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a native State, does not constitute a cession of territory.

A re-arrangement of jurisdiction within British territory in *India* by exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control, cannot be carried out except by legislation under the provisions of the Imperial Statutes 3 and 4 Will IV., Cap. 85, Section 48, 24 and 25 Vic., Cap. 67., Section 22, and 24 and 25 Vic., Cap. 104, Section 9.

The Governor-General in Council being precluded by the Act 24 and 25 Vic., Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in *India*, or as to the allegiance of British Subjects, cannot by any legislative Act (e. g. by "The Evidence Act of 1872," Section 113) purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of the cession.

Where the foundation of the jurisdiction of the British Court over the subject-matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised whatever be the stage or condition of the litigation

at the time of such cession. [*Damoodhar Gordhan*, v. *Deoram Kanji*] 543

CHAMPERTY.

1. The three childless widows of a *Zemindar* instituted a suit against the rightful heir to their husband's estate, in which they unsuccessfully disputed his legitimacy. Previously thereto they had obtained advances of money from the present Plaintiff, and executed to him favor an agreement and a bond, whereby they secured to him the payment of large sums in case they recovered their husband's estate, and virtually gave to him the entire control of their suit. Subsequently they agreed with the rightful heir to compromise the suit, which compromise however was never acted upon, partly owing, it was alleged, to the subsequent conduct of the heir. At the date of the compromise the heir, who had just attained his majority, and was without proper counsel or assistance, and acted under threats from the Plaintiff, a powerful and wealthy banker, that he would carry on the litigation against him *per fas aut nefas*, was induced contrary to his own judgment and sense of right, and without any evidence that the sum claimed was really due to the Plaintiff, to execute a bond in his favour, whereby he bound himself to pay a large sum of money claimed by the Plaintiff as being due from the widows; the Plaintiff on his part agreeing that he would treat such payment as a satisfaction of his claim against the widows, but meanwhile that he would retain the securities which he held from them.

In a suit brought by the Plaintiff against the heir to enforce the last mentioned bond, —*Held* that the bond was wholly invalid and fraudulent as against the Defendant, and that as there was no privity of contract between the Plaintiff and Defendant independently of the bond, it could not stand as a security for anything which might be justly due from the widows.

Semble.—The transaction, even if valid, did not amount to a novation; for the Plaintiff never abandoned his claim against the widows, but only agreed to abandon his remedy against them, in case he obtained satisfaction of his claim from the heir.

Quære.—Whether the Plaintiff could have recovered from the widows, if they had been successful against the heir, the large sums of money secured by their bond and agreement?

The law of champerty and maintenance is not the same in *India* as in *England*. The English Statute with regard to champerty is not applicable in the *mofussil* in *India*. The Indian Courts in every transaction must decide upon the facts whether it is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. [*Chedambara Chetty* v. *Runga Krishna Muthu Vira Puchaiya Naicker*] 373

2. The English laws of maintenance and Champerty are not of force as specific laws in *India* either in the *mofussil* or in the Presidency towns. The ground on which contract of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is that they are contrary to public policy.

An agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not necessarily opposed to public policy, since cases may easily be supposed in which it would be in furtherance of right and justice, that a suitor who had a just title to property, and no means to support it, should be assisted in this way. But agreements purporting to be made to meet such cases, when found to be extortionate and unconscionable, so as to be inequitable, or to be entered into for improper objects, as for the purpose of gambling in litigation, or of injuring others by encouraging unrighteous suits, are contrary to public policy, and ought not to have effect given to them.

Since by the law of *India* a champertous agreement does not constitute a punishable offence, an action in that country, founded on alleged champerty, to recover losses and costs incurred in litigation, cannot be sustained on the ground that a remedy by action accrues where an indictable offence has been committed.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it has been done maliciously and without reasonable or probable cause. In the absence of such proof, an action for losses and costs incurred in defending a suit will not lie as against a person who is alleged to have been a mover in that suit, and to have had an interest in it, but who had not been made a party to the record; since such a state of things creates no legal privity from which a promise can be implied on which an action on contract can be founded, nor does it, *ex hypothesi*, constitute a legal wrong.

Where it appears that the Plaintiff in a suit is in fact suing on help of another per-

on who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given.

The rejection by the Court of an application under Act VIII. of 1859, s. 73, to have a stranger, who has an interest in the suit, made a co-Plaintiff on the record, cannot give a ground for an action against such stranger for costs incurred in the suit, which would not otherwise lie.

The cases in which persons other than parties to the suit have been held liable to costs in *England*, relate to applications either in the cause itself, or to the deciplinary and summary jurisdiction of the Courts. They give no support to the contention that an independent action will, under such circumstances, lie. [*Ram Coomar Koondoo* v. *Chunder Cant Mookerjee*] 654

CHARITABLE GIFT.

See WILL.

CHRISTIAN.

See "CUSTODY OF CHILD."

CHUR LANDS.

See ALLUVION, 1, 2, 3, 4.
— DECREE,

CIRCULAR ORDER

See ACT OF STATE.

CIVIL PROCEDURE CODE ACT VIII. OF 1859.

1. The prohibition against private alienation of attached property contained in s. 240, Act VIII. of 1859, relates only to alienation which would affect the creditor who obtained the attachment. [*Anund Lall Dass*, v. *Jallodhur Shaw*] 81

2. A *talook* in possession of a mortgagee was put up for sale under an execution against the mortgagor, and was bought by A in his own name, but *benámi* for the mortgagee. A obtained a certificate as purchaser, and was put formally in possession, the mortgagee remaining in actual possession. *Held* (reversing the decision of the High Court) that s. 260 of Act VIII of 1859 is to be construed strictly, and that no suit would lie by A against the mortgagee to redeem. [*Mussumat Buhuns Kowar*, v. *Lalla Buhooree Lall*] 69

3. Sect. 260 of Act VIII. of 1859 must be construed strictly and literally, and is applicable only to a suit brought against a certified purchaser to assert a *benámi* title against him. Where the certified purchaser is a Plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, may shew in defence that the holder of the certificate is a mere trustee. [*Lokhe Narain Roy*, v *Kaly Puddo Bandopadhya*] 472

4. According to the true construction of Act VIII. of 1859, the earlier sections are not incorporated into the 327th section as they are expressly incorporated into the 326th; and the words "sufficient cause" should be taken to comprehend any substantial objection which appears upon the face of the award, or is founded on the misconduct of the arbitrators, or in any miscarriage in the course of the proceeding or upon any other ground which would be considered fatal to an award on an application to the Courts in *England*.

The mere fact of the arbitrators consulting an expert was not a valid objection to their award. On an objection that the award was invalid because the will referred to the arbitrators referred to another will, which was not produced before them by the Plaintiff.

Held that although the objection might have been sufficient if the Defendant had objected to the arbitrators proceeding to make an award, the Defendant was no longer entitled to object to the validity of the award as notwithstanding the knowledge of the suppression he did submit to take his chances of the arbitration. [*Chowdhry Murtazee Hossein*, v. *Mussumat Bibee Bechunnissa*.] 663

5. The words "who has not appeared," as used in section 111 of Act VIII. of 1859 mean "who has not appeared at all," and do not apply to the case of a Defendant who has once appeared, but who fails to appear on a day to which the case has been adjourned, and who therefore is held not precluded from his right of appeal against the *ex parte* decree passed against him, by *sec.* 119. [*Sahibzada Zeinulabdin* v. *Sahibzada Ahmed Raza Khan*] 879

——— ART. 181.

See "ACCOUNT."

——— S. 203.

See ACT XXIII. OF 1861.

ACT VIII. OF 1859, S. 325.
See APPEAL CIVIL.

——— S. 73.
See CHAMPERTY 2.

COMMISSIONER TO EXAMINE ACCOUNTS.
See ACCOUNT.

COMMISSIONER'S CLEAR FINDING OF FACT UPON A QUESTION OF ACCOUNT HOW FAR WITHIN THE COMPETENCY OF COURT TO RE OPEN.
See ACCOUNT.

COMPANY.
See POWER TO DIRECTORS.

COMPROMISE.

1. It is not incumbent upon a guardian to contest every claim made against the infant's estate.

The Judicial Committee, reversing the finding of the Courts below, refused to set aside a compromise (confirmed by a decree of Court) by the former guardian of the Plaintiff of a claim against his estate for debt after sixteen years, the Plaintiff having failed to prove that the suit was fictitious, and the compromise fraudulent and collusive. [*Baboo Lekraj Roy* v. *Baboo Mahtab Chand*] ... 43

2. An agreement by way of compromise of disputed title to immoveable estate, under which shares are allotted to the parties thereto, gives to each party a cause of action founded not merely upon contract within the meaning of Act XIV. of 1859, s. 1, cl. 10, but upon the title which is acknowledged and defined by the agreement, and a suit brought to recover a share of the estate is governed by s. 1, cl. 12.

Those who rely upon a document as an estoppel must clearly establish its meaning; if their is any ambiguity the construction may be aided by looking at the surrounding circumstances. [*Ranee Mewa Kuwar* v. *Ranee Hulas Kuwar*]... 354

See M. L. DOWER 2.
— GIFT 2.

CONCURRENT JUDGMENT ON FACTS.
See DIVORCE.
— DECREE.

CONFISCATION.
See ACT OF STATE.

CONSENT.
See PLAINT 3.

CONSIDERATION.
See CONTRACT 2.

CONSOLIDATED SUIT.
See PRACTICE—PRIVY COUNCIL 3.

CONSTRUCTION OF ACT II. OF 1863.
See ACT I. OF 1869 4.

CONSTRUCTION, BENG. REG. VIII. OF 1819, SEC. 3, CL. 2.
See BENG. REG. VIII. OF 1819.

CONSTRUCTION OF BENG. REG. XI. OF 1825, SEC. 4.
See ALLUVION 3.

CONSTRUCTION OF WILL.
See H. L. WILL 1, 3.

CONTRACT.

1. *A* held debentures of *B*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B*; the rent of which lots was to be set off against the interest on the debentures. *A* notified to *B* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B* consented to *A's* proposal, and at the same time informed *A* that the selected lots exceeded the value of his debentures, and that he must pay the difference. *A* made no reply to this communication.

A afterwards sued *B* for interest on the debentures:—

Held, that *A* was not entitled to interest, the contract being complete, and the indication by *B* of the difference in quantity not amounting to an introduction of a new term into the negotiation.

A correspondence between *A* and *B* amounted to a contract for a purchase of a future interest in immoveable property :—

Held, that such correspondence did not require registration under the *Indian Registration Act* XX. of 1866. [*The Port Canning Land* v. *Smith*] 359

2. An estate was purchased by *A*, widow of a grand-uncle and predecessor as *Nawab Nazim*, of the Plaintiff. *A* died on January 21, 1858, leaving *M*, one of her half-brothers and heirs according to the *Mahomedan* law, who submitted an *Urzee* on February 10th, 1858, to the Plaintiff, disclaiming all right to the estate, left by *A*, and praying for some provision for his maintenance and that of his children ; and an order was passed upon it by the Plaintiff, on February 12 following, fixing a certain monthly stipend. To put what had been recited in the *Urzee* in a legal form, a *ladaveenamah* was executed by *M*, on February 24, 1858, in the terms of the *Urzee*, and, to secure the rights of *M*, it was followed by a *Perwannah*, executed by the Plaintiff, the very next day *M* also receiving on that day Rs. 2,000 on account of the allowance granted to him :

Held, that the *ladaveenamah* and the *perwannah* amounted to a valid contract by which the *Nawab* the (Plaintiff) and *M* were respectively bound.

That, even if *M* executed the *ladaveenamah* in ignorance of his strict rights, still, if the *Nawab* acted *bonâ fide* under the belief that he had succeeded to the property of the *Begum* and executed the *perwannah* upon the faith of the *ladavee* disclaimer, *M* and his heirs would be bound by them.

That, the *ladaveenamah* being founded on a sufficient consideration, *M* and his heirs could not assert any title to the property, without setting aside the document, and that they could not do, except upon returning the Rs. 2,000, paid in advance, on account of the allowance.

Held further that *M* and his representatives having subsequently repudiated the arrangement, the fact of the Plaintiff's not having continued to make the monthly allowance, according to the terms of the *Perwannah*, did not release *M* and his heirs from the *ladaveenamah*. [*Omrao Begum* v. *The Nawab Nazim of Bengal*] 514

See AGREEMENT.
— DURESS.
— PARTNERSHIP 2.
— INTEREST 3.

CONVERSION OF COINAGE.

See ENHANCEMENT OF RENT 2.

COST.

See CHAMPERTY 2.

COURTS ESTABLISHED BY ROYAL CHARTER.

See LIMITATION 10.

COURT OF WARDS.

See ADOPTION 4.

CUSTOM.

See ALLUVION 2.
— OUDH PROCLAMATION.
— TRUSTEES.
— H. L. MOHUNT.

CUSTODY OF CHILD.

A child, the offspring of a Christian marriage, was living after her father's death under the protection of her mother. A married man, a Christian, came to live with her mother, and, in order to legalize their intercourse, he and the mother became Mahomedans, and were married in Mahomedan form. About three years after, when the child had attained the age of fourteen, some of her relatives applied for and obtained an order, under Act IX. of 1861, that the girl be removed from the guardianship of the mother and her second husband and placed under a Christian guardian. The girl deposed that she wished to remain with her mother and to become a Mahomedan. Special leave having been given to appeal to the Privy Council, the order was upheld.

Quære.—Whether a marraige according to Mahomedan rites between a married Christian man and a Christian woman, both of whom became Mahomedans in order to effect the marriage is valid (1). [*Skinner* v. *Orde*]... 34

DAMAGES.

In an action for the wrongful conversion of certain timber, the Plaintiff claimed to recover as damages the market value of the

timber at the town of *Rangoon* to which it was being conveyed at the time of the conversion. *Held*, that the cost of carriage to *Rangoon* from the place where the wrongful conversion occurred must be deducted. [*Burmah Trading Corporation* v. *Mirza Mahomed Ally*] 823

DEBENTURE.

See CONTRACT 1.

DECREE

1. The concurrent judgments of the Courts below upon questions of fact *held* impossible to be reversed merely on the ground, that the *Ameen* had reported in a different way, when their Lordships had not the materials before them upon which the *Ameen* had formed his opinion.

In a suit to recover some *chur* lands alleged to have accreted to certain estates or parcels of estates, the lower appellate Court found the proprietary right of the Plaintiff to be admitted by the Defendants; but held that as the parcel was a Government *Khas Mehal* then under resettlement, the proprietary right to the land in front of it belonged to Government and the right to it would appertain to any party with whom the Govenment might settle. *Held* that, although the admission of the Defendants amounted to disclaimer of any title in themselves, yet it was not sufficient to entitle the Plaintiffs to a decree, unless he could show the other part of the finding wrong, that the finding should be taken together and that, if the judge was right, as he apparently was, in his conclusion of the property being *Khas Mehal* in the hands of the Government yet to be resettled, neither party could be entitled to a decree with regard to the *chur* land in front of that resumed property.

Where the Appellant was not disposed to accept a certain finding and there was no claim in respect of the property, the subject matter of the finding, in the plaint and the finding seemed to their lordships, therefore, not noticed by the High Court in appeal:—*Held* that the Appellant was not in a position to ask for a decree based upon the finding in that appeal before their lordships of the judicial committee. Under the circumstances of the case, however, the appeal was ordered to be dismissed without prejudice to any claim that the Appellant might have in respect of the subject-matter of the finding. [*Koer Poresh Narain Roy* v. *Watson & Co.*] 504

2. *C*, a *Hindu*, inherited from his father property charged, under the *Mitakshara* law, with the maintenance of *N*, his mother. *C* dying without issue, his property passed to *D*, his widow, who allowed the maintenance of *N* to fall into arrears. *N* brought a suit against *D* personally for the amount of the arrears, and obtained a money decree, in execution of which *D*'s right, title, and interest in the property, left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionery heir of *C*, after the death of *D*, to establish his right of inheritance to, and to recover possession of, *C*'s estate, *Held*, that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the Plaintiff was entitled to recover. [*Baijun Doobey v. Brij Bhookun Lall Awasti*] 541

3. Under the Civil Procedure Code 1859 as well as the English law, a judgment for moneys due on a debt does not vest in a judgment-creditor any portion of the property of his judgment-debtor.

Held, consequently, that the Plaintiff having merely obtained a money decree against *J* could not maintain a regular suit against the Defendants (whom he alleged to be in possession of *J*'s share in paternal property) for recovery of the unsatisfied portion of his money decree. Plaintiff had only the right to have the judgment executed according to the particular provisions of the Civil Procedure Code and not by action.

Where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed, and no other. [*Mirza Mahomed Aga Ali Khan*, v. *The widow of Balmokund*] ... 648

4. The question which, under s. 11, Act XXIII. of 1861, 'may be determined by a Court executing a decree, must be between parties to the suit in which the decree was passed, and must relate to the execution of the decree. A person who was not on the record when the decree was made, does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is, consequently, not one which the Court executing the decree is competent to entertain. A declaration by a Court in execution proceedings, that a person not a party to the suit applying for execution is legitimate, since it is made without jurisdiction, cannot, under s. 2, Act VIII. of 1859, be pleaded as a bar to a regular suit in which it is sought to establish the legitimacy of the applicant.

Ss. 102 and 103 of Act VIII. of 1859 relate only to proceedings prior to decree, and not to proceedings in execution.

S. 208 of the same Act does not apply where the person seeking to execute is not a transferee from the original decree-holder either by assignment or operation by law. The section does not apply to cases where the right to an equitable interest in a decree is seriously contested and was not intended

to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir.

Since proceedings under s. 208, Act VIII. of 1859, are by s. 364 of the Act, not liable to appeal, a suit would, probably, lie to reverse an order passed therein. [*Abedoonissa Khatoon*, v. *Ameeroonissa Khatoon*] ... 677

See ACT XXIII. OF 1861.
— INTER PARTIES.
— SALE 3.
— H. L. ALLIENATION.

DECLARATORY DECREE.

1. A declaratory decree cannot be made, unless the Plaintiff would be entitled to consequential relief if he asked for it. It is discretionary with a Court to grant a declaratory decree, and the Courts in *India* ought to be most careful in exercising such discretion.

A, widow of a Hindu, sued *B* as father and guardian of *C* to have it declared that the deeds executed by *A* and *B*, one of giving *C* in adoption, the other of receiving him in adoption, were null and void, on the ground that they were agreements to give and take in adoption, and that *B* did not give his son according to agreement. *Held*, (reversing the decision of the Courts below) that such suit was not maintainable.

Quære.—Whether religious ceremonies are necessary to make an adoption valid among *Sudras*? [*Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee*] 203

2. A declaratory decree may be made only where the declaration of right may be the foundation of relief to be got somewhere. Thus, a suit to establish a title to land, with a view to taking proceedings in the Collector's Court under Act X. of 1859 to enhance the rent, is one in which a declaratory decree may be made.

The Judicial Committee will not on light grounds interfere with the exercise by a High Court of its discretion in granting a declaratory decree, the suit being one in which a declaratory decree may be made. [*Sadut Ali Khan*, v. *Khajah Abdool Gunney*] ... 229

3. Where, in a suit for enhancement of rent, the Plaintiff failed to prove notice of enhancement, but the Court enquired into, and gave a declaratory decree as to, his right to enhance, such decree is decisive of the right in a subsequent suit for enhancement of the rent of the same tenure founded on a valid notice.

The decision in *Rakhal Doss Bose* v. *Sheikh Golam Surwar*(1) approved of. [*Nuffer Chunder Paul Chowdhry*, v. *Poulson*]... 235

4. The words of s. 15, Act VIII. of 1859, are to be interpreted as giving a right to obtain a declaration of title only in those cases, in which the Court could have granted relief if relief had been prayed for.

A suit by a party in possession for a declaration of title and to set aside, not any deed nor any act of the Defendant, but a mere allegation on his part that he holds under a certain tenure, is not maintainable. [*Rajah Nilmony Singh*, v. *Kalee Charn Bhuttacharjee*] 447

5. The words of s. 15, Act. VIII. of 1859, must be construed upon the principles and by the light of the decisions of the English Courts of Equity upon the 50th section of 15 and 16 Vict., c. 86, which is in similar terms.

The effect of these decisions, taken in conjunction with the decisions of the Privy Council, in construing the provisions of the Indian Act, is, that a declaratory decree is not to be made unless there is a right on the part of the Plaintiff to consequential relief, which, although not asked for, might, if asked for, have been given, or unless the declaration of right may be made the foundation of relief to be had in another Court.

The Plaintiff, purporting to be the next heir, brought a suit against the life tenant of a *zemindary*, and made another claimant to the succession to the *zemindary* a Defendant in the suit. The plaint prayed for a decree declaratory of the Plaintiff's right to succeed on the death of the *Zemindar*, and made allegations of waste, in respect of which he asked relief. *Held*, that even if the Plaintiff had proved the alleged acts of waste, which he had not done, there was not a right to consequential relief which would entitle him to a declaratory decree. [*Stremathoo Moothoo Vijia*, v. *Dorasinga Tiver*] 456

See FAMILY CUSTOM.

DEED OF GIFT.

See RES JUDICATA 3.

DEED OF SALE.

See AGREEMENT.

DELUVION.

See ALLUVION 3, 4.

DEPOSIT.

See LIMITATION 2.

DESHMUKH.

See PENSIONS ACT.

DISCLAIMER OF TITLE BY DEFENDANT, EFFECTS OF.

See DECREE 1.

DISSOLUTION OF PARTNERSHIP.

See PARTNERSHIP 2.

DECREE FOR MONEY.

See DECREE 3.

DECREE-HOLDER.

See DECREE 3, 4.

DIVORCE.

Act IV. of 1869, s. 1, cl. 16, does not apply to divorce suits.

A decree of a High Court confirming the decree by a District Judge for dissolution of marriage reversed, so far as it affected the co-Respondent and condemned him in costs. The circumstances of the case took it out of the general rule not to reverse the concurrent findings of two Courts on a question of fact. [*Hay*, v. *Gordon*] ... 185

DURESS.

An agent employed by the Plaintiff to purchase timber for him in the Siamese territory was imprisoned by an officer of the Siamese Government, on a charge brought against him by the Defendant of stealing timber. In order to obtain his release he contracted to purchase from the Defendant, for the Plaintiff, the timber which he was charged with stealing, at a price much beyond its value. *Held*, that the Plaintiff might repudiate the contract as obtained under duress.

In *England* the mere fact of imprisonment is not deemed sufficient to avoid an agreement made by one who is in lawful custody under the regular process of a Court of competent jurisdiction, where no undue advantage is taken of the situation of the party making the agreement. But in a country in which there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, imprisonment may in itself amount to duress such as will avoid a contract entered into by the prisoner with the view of obtaining release. [*Moung Shoay Att*, v. *Ko Byaw*] 597

EJECTMENT.

A Plaintiff in ejectment must give strict proof of his title. A valid lease cannot be granted by a lessor not in possession of the land leased, so as to confer on the lessee that which the lessor has not himself a present right to enter. [*Tiery* v. *Kristodhun Bose*] 312

See AGREEMENT.

ENDOWMENT.

See H. L. DEWUTTEE.

— ADOPTION 1.

ENGLISH LAW.

See PARTNERSHIP 1.

ENHANCEMENT OF RENT.

1. Where a *Zemindar*, a purchaser from a mortgagee, sued to enhance the rent of lands (part of the purchased *zemindary*) which were held on *ryoti kadimi* tenure, which had existed more than twelve years before the decennial settlement, but the holder of which had subsequently accepted a *potta* from the *Zemindar*, *held*, the acceptance of such *potta* did not debar the tenant from the right of exemption from enhancement to which he was entitled by reason of the nature of his tenure. Such a *potta* may be confirmatory only, and is not inconsistent with the presumption that a prior title existed (1).

Semble.—A claim to exempt a tenure from enhancement on the ground that it is a *ryoti kadimi* tenure does not fall within Regulation VIII. of 1793, s. 51.

Where substituted service is resorted to under Regulation V. of 1812, s. 10, the Courts should take care to be first satisfied that the person who ought to be served personally is keeping out of the way. [*Ramchunder Dutt* v. *Jugheschunder Dutt*] 249

2. In a suit for enhancement it appeared that the rent reserved under a *sunnud* of A.D. 1775 was 2599 *Aseemabadee* rupees, and that in lieu thereof from the time of the permanent settlement the sum of 2107 *Sicca* rupees had been paid until the year 1836, when the said *Sicca* rupees were converted into the statutable equivalent of 2248 Company's rupees:—

Held, that this amounted to an agreement between the parties from a period antecedent to the permanent settlement, that the rent paid was the equivalent of the 2599 *Aseemabadee* rupees, and there being no right of enhancement under sect. 15 of Act X. of 1859, such rent could not now be increased on the ground of error in the original calculation under which the 2599 *Aseemabadee* rupees had been converted into 2107 *Sicca* rupees.

Even if there had been any evidence of error the High Court could not, on that ground, in special appeal, alter the decree of the lower Court. [*Meer Mahomed Hossein* v. *Forbes*] 402

See DECLARATORY DECREE 2, 3.
— RESUMPTION.

EQUITABLE DOCTRINE.

See VENDOR AND PURCHASER.

EQUITY OF REDEMPTION.

See MORTGAGE 4.

ERROR IN ACCOUNT.

See INTEREST.

ERROR IN CALCULATION OF RENT.

See ENHANCEMENT OF RENT 2.

ESCHEAT.

Lands belonging to a *zemindary* granted by the *Zemindar* under an absolute hereditary *mokurruree* tenure, do not, on the death of the grantee without heirs, revert to the *Zemindar*; nor does the *Zemindar*, under such circumstances take by escheat a tenure subordinate to and carved out of his *zemindary*.

Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a *mokurruree* tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it.

The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespassers. [*Ranee Sonet Kowar* v. *Mirza Himut Bahadoor*] 608

ESTATE PUR ANTRE VIE.

See HEREDITARY TENURE.

ESTOPPEL.

A man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.

Their Lordships of the Judicial Committee would not depart from the ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had sold some doubt upon the finding. [*Munnoo Lall* v. *Lalla Choonee Lall*] 302

See COMPROMISE 2.
— LIMITATION 8.
— MESNE PROFITS.
— ADOPTION 4.

ESTOPPEL BY DEED, IF AMBIGUOUS, HOW ESTABLISHED.

See COMPROMISE 2.

EVIDENCE.

1. Where lands were held by a *jagirdar* under the sovereign of an independent State on a *jaidad* tenure, *i. e.*, on a grant of land, together with the public revenues thereof, on the condition of keeping up a body of troops to be employed when called on in the service of the sovereign, and on the conquest of the State by the East India Company, the *jagirdar* remained in the same position to the Company, *held* that the resumption of the lands by the Company, and the seizure of the arms and stores appertaining to the tenure, on the death of the *jagirdar*, was not an act of State, and therefore the Municipal Courts had jurisdiction to entertain a suit by the representatives of the *jagirdar* against the Government for the possession of the lands and for the value of the arms and stores. This was so, although at the time of the res-

umption, the Regulation law was not introduced into the territories in which the *jagir* was comprized.

Where an alleged original *sunnud* was lost, the Judicial Committee, in view of the strict nature of the proof required in cases of claim under ancient *sunnuds* by Regulations II. of 1819, s. 28, and XIV. of 1825, s. 3, and taking all the circumstances into consideration, refused to consider the title under it established.

Where the evidence showed that the arms and stores seized had been purchased by the *jagirdar* before the resumption, and there was no authority or evidence to show that those who held by *jaidad* were not entitled to things so purchased, *held* that the representatives of the *jagirdar* were entitled to recover the value of the arms and stores so seized. [*Forester* v. *The Secretary of State for India in Council*] 1

2. In a case of disputed succession to a *raj*, *A*, one son of the *Rajah*, deceased, was put into possession under Act XIX. of 1841, and a suit brought against him on behalf of another infant son *B*, failed on proof of the legitimacy of *A*. A third son *C* now claimed to be entitled against *A's* son on the ground that *A* was illegitimate, or was the offspring of an inferior marriage. *Held*, the decree in the former suit was not a bar to the further prosecution of this suit, nor would it have been had the issues in the two suits been precisely the same.

Quære—Does there exist in *India* (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize,) any Court capable of giving a judgment *in rem*? (See the Indian Evidence Act (I. of 1872, s. 41.) *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*] 32

3. The Privy Council will never interfere with the finding of an Indian Court upon a question of boundary, unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make it the ground for an order reversing or varying the decree.

Although the admissibility in *India* of copies in evidence must not be dealt with by the strict rules prevailing at a *nisi prius* trial in *England*, yet their Lordships were of opinion that, when a copy has been in any way received and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question, and the weight and value which he will attach to it. There is a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered and the whole cause of action depends on the proof of the original instrument; strict proof may properly be required in the latter case.

Dealing with the present document, their Lordships were not prepared to say that the High Court had miscarried in concluding it to be genuine; but the High Court did not rest upon that document wholly but proceeded upon the whole of the evidence in the case, which appeared to their Lordships amply sufficient to support the finding of the Court.

Unless there be very good grounds for dissenting and differing from the reports made by Deputy Collectors upon local investigations, the Courts even in *India*, and *a fortiori* the Courts in *England*, in dealing with boundary questions, ought to give great weight to them and to be guided by them. [*Ramgopal Roy* v. *Gordon Stuart & Co*] 73

4. The *onus* of proof of certain payments being on the Defendants (bankers) and the fact of those payments being distinctly out in issue, the mercantile books of the firm were produced in evidence and a general statement was made by one of the Defendants to the effect that the books were correctly kept: *Held* that, the books being at most coroborative evidence, the mere general statement of the kind was not sufficient to satisfy the burden of proof lying on the Defendants; particularly as with respect to many of the disputed items, they had the means of producing much better evidence.

Where the Defendants' case principally rests on documents purported to have been signed by the Plaintiff, they should be put in the hands of the latter who should be called upon to admit or deny his alleged signature, and those documents should be specifically proved and witnesses called upon to state if they saw the Plaintiff sign them, or, if not, whether they could speak to the handwriting and generally what took place on the occasion when they were executed.

So ruled in a suit for sums claimed as unaccounted for, where the Defendants' case principally rested on two *amanutnamahs* and the endorsements of payments thereon purported to have been made by the Plaintiffs.

Though no retrial ought to be directed solely to enable a party to amend his case and though doing so in *India* would be especially objectionable, yet considering how much the conduct of a trial in *India* depended upon the Judge and the possibility of the Defendants having been misled by the Judge's giving undue weight to a piece of evidence on their behalf, with other circumstances of the case, retrial allowed upon certain terms as to costs. [*Baboo Gunga Pershad* v. *Inderjeet Singh*] 486

See ALLUVION 1.
— MALICIOUS PROSECUTION.
— OUDH PROCLAMATION.
— PLAINT 2.
— H. L. ADOPTION 1, 5.
— " " INHERITANCE 2.
— " " WIDOW 2.

EVIDENCE ACT I. OF 1872.

See CESSION OF TERRITORY.

EXECUTION.

See INTEREST 1, 2, 3.
— SALE 2.

EXECUTION OF DECREE.

See ACT XIII. OF 1861.
— DECREE 2, 3.
— INTEREST 1.
— LIMITATION 1, 2, 10, 11.

EXECUTION COURT.

See INTEREST 1.

EXECUTION OF DEED.

See SUIT TO SET ASIDE A DEED.
— EVIDENCE 4.
— PURDANASHIN WOMAN 1, 2.

EXECUTON PENDING ATTACHMENT.

See CIVIL PROCEDURE CODE 1, 2.
— ATTACHMENT.

EXECUTION PROCEEDINGS.

See DECREE 4.
— H. L. UNDIVIDED FAMILY 1.

EXECUTION PURCHASER.

See CIVIL PROCEDURE CODE 2.
— DECREE 2.

EXPERT, CONSULTATION OF, BY ARBITRATORS.

See CIVIL PROCEDURE CODE 4.

FAILURE OF OBJECT.

See WILL.

FORECLOSURE.

See MORTGAGE 2, 6.

FORFEITURE.

See ACT OF STATE.
— ACT X. OF 1859.
— LIMITATION 6.

FRAUD.

See CHAMPERTY 1.
— COMPROMISE 1.
— RES-JUDICATA 3.
— M. L. GIFT 2.

GHATWAL.

See RESUMPTION.
— GRANT.

GRANT.

1. The rule of construction that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey. [*Babu Lekraj Roy* v. *Kunhya Singh*] ... 758

2. S. C., a *Hindu*, granted a *talook* to his sister, K, by a *sunnud* in the following terms: "You are my sister: I accordingly grant you as a *talook* for your support the three, villages, H. F. and K., belonging to my *semindary*, with all rights appertaining thereto, at a *tahut jummah*, of Rs. 861. Being in possession of the lands and paying rent according to the *tahut jummah* do you and the generations born of your womb successively (*santan sreni kreme*), enjoy the same. No other heir of yours shall have right or interest."

At the date of the *sunnud*, K. had one child, a daughter C. She had afterwards a son, who died in her lifetime without issue but whose widow, by his permission, adopted, after his death, a son C. L.

K. *held* undisputed possession of the *talook* during her lifetime, and by her will devised it to C., her daughter, and C. L., her grandson by adoption, in equal moieties.

On K's death H. C., as heir of his father S. C., took possession of the *talook*. Whereupon C. and C. L., claiming under the will of K., sued for possession.

Held by the Court of first instance, that C. took an absolute estate under the *sunnud* on the death of her mother K., but that having elected to take under her mother's will, and to admit the co-Plaintiff C. L., to a half share in the estate, both Plaintiffs were entitled to maintain the action.

Held by the High Court on appeal, that C., having been born before the date of the *sunnud*, took under it a life interest in the *talook* in succession to the life interest of her mother. But that as the Plaintiffs had not sued in respect of the life interest, but claimed under the will of K., which she was incompetent to make, the suit must be dismissed.

Held by the Judicial Committee of the Privy Council, that the earlier words of the *sunnud*, when read together, were to be taken as conferring an absolute estate of K.; and that the effect of the concluding words "no other heir of yours, &c.," was to make the absolute estate before given, defeasible in the event of a failure of issue living at the time of K's death, in which event the estate was to return to the donor and his heirs; but that as that event had not occurred, it followed that K. took an estate which she could dispose of by will, and consequently that the Plaintiffs were entitled to succeed in their suit. [*Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*] 815

GENTILE, DEATH OF, WITHOUT HEIRS.

See ESCHEAT.

GUARDIAN.

See COMPROMISE 1.
— CUSTODY OF CHILD.
— DECLARATORY DECREE 1.

HEIR.

See DECLARATORY DECREE 4.
— ESCHEAT.

HEREDITARY TENURE.

The real intention of the parties to a document is to be collected chiefly, no doubt, from the terms of the instrument itself but to a certain extent also from the circumstances existing at the time of its execution, and by the conduct of the parties since its execution.

An estate *pur autre vie* is very unusual and might be almost said scarcely known in *India*.

Jotes of considerable extent being held for generations, in an enhancement suit by the *Zemindar*, his right was established to enhance rent to such an extent that the then *jotedars* were obliged to relinquish their *jotes*. Whereupon a re-settlement was made with *R*, one of the former *jotedars*, contracting in the name of *S.*, his sister-in-law, of a portion of the relinquished property at a much lower rent than the enhanced rent, the *pattah* reciting the lease to be "at a settled rent" not enhancible by the lessor or his heirs on any account, the liability of the tenant being provided to continue unaltered for any loss arising from inundation and so forth. Subsequently the *Zemindar* being under the wrong impression of *S.* being dead at the time, admitted in a suit under section 4 Act IV. of 1840, the possession of *R. B.* on behalf of her minor son and heir to her husband *R* (deceased) as legal and brought rent suits against the minor and *R. B.* after *S.* had really died: *Held*, that the intention of the parties was to create a permanent tenure. [*Watson & Co.*, v. *Mohesh Narain Roy*] 507

See ESCHEAT.
— POLLIEM.

IKRARNAMAH.

See "ALLUVION" 2.
— UNDUE INFLUENCE.

IMPRISONMENT.

See DURESS.

IMMOVEABLE PROPERTY.

See LIMITATION 5.

INFANT.

See COMPROMISE 1.

INTEREST.

1. Where an order passed by her Majesty in Council on report of the Judicial Committee awards costs, but is silent as to interest on the costs so awarded, it is not competent to

the Court which has to execute the order to direct payment of the costs with interest.

The principle of the decisions in cases arising under ss. 10 and 11 of Act XXIII. of 1861 which have established a similar rule of practice in executing decrees passed by the Courts in *India*, approved.

Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the Court executing the order. [*Forester* v. *The Secretary of State for India*] ... 717

2. By the law and practice in *India*, independently of the provisions of Act XXXII. of 1839, a decree might award interest, as of course, on mesne profits from the date of the institution of the suit in which they were claimed. Such interest is not forbidden by the terms of the Act referred to. [*Hurropershad Roy Chowdhry* v. *Shama Pershad Roy Chowdhry*] 782

Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit.

Where the property of a judgment-debtor had been attached in execution for a sum claimed to be due under a decree, but which sum in fact included interest not awarded by the decree,—*held*, that an agreement, whereby the debtor obtained the release of his property on condition of paying by instalments the entire amount claimed inclusive of the interest, was not unlawful and void under cl. 2, s. 23 of the Indian Contract Act; and that the mistaken belief of the parties to the agreement that interest could be recovered by proceedings in execution was not a mistake of fact rendering the agreement voidable under s. 20 of that Act.

In a written agreement by a debtor to pay his debt by instalments, securing the payment by a mortgage of land, the amount of the debt was erroneously stated to be greater than it actually was. In a suit on the agreement, *held*, that such an error was ground for reforming the account, but not for setting aside the agreement. [*Seth Gokul Dass* v. *Murli*] 802

See CONTRACT 1.
— LIMITATION 9.
— MORTGAGE 5.

INTERPRETATION OF STATUTE.

See LIMITATION 11.

ISTIMRARI TENURE.

See ESCHEAT.

JUDGMENT IN *REM*.

See EVIDENCE 2.

JULKUR, AN INCORPORIAL HEREDITAMENT FIT TO BE EXERCISED UPON THE LAND OF ANOTHER.

See AUCTION PURCHASER.

JURISDICTION.

See ACT OF STATE.
— CESSION OF TERRITORY.
— EVIDENCE 1.
— PENSION ACT.
— REGISTRATION 2.
— RES-JUDICATA 2.

JURISDICTION, CESSER OF, BY CESSION OF TERRITORY.

See CESSION OF TERRITORY.

KADMI TENURE.

See ENHANCEMENT OF RENT 1.

KURTA.

See ACT I. OF 1845.

LACHES.

See ALLUVION 1.
— LIMITATION 8.

LADAVINAMAH.

See CONTRACT 2.

LAND SETTLED.

See ACCRETION.

LANDLORD AND TENANT.

See ENHANCEMENT OF RENT.
— ESCHEAT.

LEASE BY LESSOR OUT OF POSSESSION.

See EJECTMENT.

LEGITIMACY.

See DECREE 4.
— EVIDENCE 2.

LESSOR.

See EJECTMENT.

LETTERS PATENT.

See SALE 7.

LIBEL.

See MALICIOUS PROSECUTION.

LIGHT AND AIR.

See PRESCRIPTION.

LIMITATION.

1. An execution sale was stayed by consent for two months, and the execution-suit was struck off the file. During such period the execution-creditor applied to the Court to restore his execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in an other suit, alleging that he (the execution-creditor) had attached them; but it turned out that he had attached them in another suit. *Held*, the application being *bonâ fide*, the period of limitation began to run from the date of the disposal of the application by the Court. [*Roy Dhunput Singh* v. *Mudhomotee Dabia*] 131

2. *L* and *R*, the holders of a *patani*, estate, granted in 1856 a *darpatani* lease to *S* at an annual rent, the lease stipulating that *S* should have full power of sale and gift, but should not sub let without the *patanidar's* consent. The lease contained, no stipulation for the registration of any vendee or donee. In 1860 *S* sold the *darpatani* lease to *K*, the deed of sale which was duly registered providing for mutation of names in the *patanidar's* books. No such mutation was ever effected by *K*, who was never recognized as their tenant by *L* and *R*, the rent of the *darpatani* being paid in the name of *S*. In 1864, the rent due from the *patanidars* being in arrear, the *Zemindar*, proceeded to sell the *patani* under Regulation VIII. of 1819. Thereupon *K*, in order to protect his under-tenure, deposited in the Collectorate on 17th November 1864 a sum of money, on which the sale was stayed *K*, being then in arrear in the payment of his *darpatani* rent, claimed to set off the amount deposited in the Collectorate against the rent due to *L* and *R*. This *L* and *R* refused to allow, and they brought a suit in the Collector's Court against *S* and his sureties to recover the arrears of rent. In that suit *K* intervened claiming the benefit of the set-off, to which however the High Court on 26th June 1866 on appeal held that he was not entitled, the deposit being merely a voluntary payment by *K*. On 30th October 1867 *K* brought a regular suit against *S* and *L* and *R* to recover the amount of the deposit and obtained a decree, but the decision was reversed on appeal and the suit dismissed for want of jurisdiction. On 6th June 1869 *K* filed his plaint in the proper Court. *Held* that he was entitled to recover the amount deposited by him in the Collectorate (1), and that the suit was not barred as being *res-judicata*, by the decision of 26th June 1866.

Held also that whether the period of three years under s. 1, cl. 9 of Act XIV. of 1859, or of six years as provided by cl. 16, s. 1 of that Act, be the limitation applicable to such a suit, the suit was not barred, inasmuch as *K* was entitled to deduct the time during which he was *bonâ fide* prosecuting with due diligence a suit for the same purpose in a Court not having jurisdiction. [*Luckhinarain Mitter* v. *Khetjra Pal Singh*] 278

3. In judging of the *bonâ fides* of proceedings to obtain execution of a decree the whole course of those proceedings must be regarded. The fact that unexplained delays have occurred during the proceedings in execution of the decree, or that some of the proceedings were ineffectual, is not necessarily evidence of a want of *bonâ fides*. [*Benoderam Sen* v. *Brojendro Narain Roy*] 329

4. Where sixty years have elapsed from the date of a usufructuary mortgage, a suit by the mortgagor to recover possession of the mortgaged property is barred by cl. 15, s. 1, Act. XIV. of 1859 (1).

Where a mortgagee signed a *mookhtarnama* in which he stated that he would abide by any arguments which might be urged, and any documents which might be filed, by the *Mookhtar* thereby appointed, and the *Mookhtar* subsequently filed a written statement signed by himself alone in which he admitted the mortgagor's title,—*Held* that the *mookhtarnama* and written statement could not be read together as amounting to an acknowledgment sufficient to satisfy the requirements of cl. 15, s. 1, Act XIV. of 1859:—*held* also that the written statement could not be incorporated with the *mookhtarnama* so as to make it part of the document signed by the mortgagee.

Statutes of Limitation are in their nature strict and inflexible enactments, and ought to receive such a construction as the language in its plain meaning imports. [*Luchmee Buksh Roy* v. *Runjeet Ram Panday*] 283

5. The expression "immoveable property" in Act XIV. of 1859, s. 1, cl 12, must not be construed as identical with "lands or houses." It comprehends all that would be real property according to English law, and possibly more.

A *toda giras hak* (1) being a right to receive an annual payment, the liability for which is not a mere personal liability, but one which attaches to the *inamdar* (2), into whosesoever hands the village may pass, is "an interest in immoveable pro-

perty" within the meaning of cl. 12, s. 1, Act XIV. of 1859 (3).

The applicability of the particular sections of Act XIV. of 1859 must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. [*Maharana Futtehsanghji* v. *Desai Kullianraiji*] 306

6. Certain property, in the actual possession of a rebel, was confiscated by the Government in 1858. In a suit brought on 1st May, 1865 to recover the property, it appeared that the Plaintiffs were the sons and heirs of one *M.* who died in 1854, legally entitled to, though not in possession of, the property in question; that at the date of his death, and at the date of the confiscation, the Plaintiffs were minors, and that they came of age in 1861 and February 1864, respectively. *Held*, that the suit not having been brought within one year from the date of the confiscation was barred by sect. 20, Act IX. of 1859.

There is no saving clause in Act IX. of 1859 with respect to minors or parties under disability to sue, and such saving cannot be held to be implied upon any principle of equitable construction; nor can the saving clauses, contained in the general Limitation Act, XIV. of 1859, be imported into a special enactment.

Act IX. of 1859 is plainly retrospective in its operation, and applies to claims to forfeited property which had been confiscated before its passing. [*Mahomed Bahadur Khan* v. *The collector of Bareilly*] 363

7. The *talook* of a *Zemindar* was sold in 1854 for arrears of revenue, and possession was given to the purchaser in 1855: it was subsequently represented by the *Zemindar* to the Government that fifty of the villages had been sold wrongfully, inasmuch as they were *mocassa* villages, which had been alienated from the *zemindary* and paid a quit-rent only to the *Zemindar*. In 1860 the Government ordered an annual payment to be made to the *ex-Zemindar* by way of compensation; but he did not accept it, and he sued in 1868 for the recovery of the villages.

Held, that more than twelve years having elapsed since the sale and the dispossession, the Act XIV. of 1859 was a bar to the suit, notwithstanding the transactions between the Government and *ex-Zemindar*. [*Rajah Sri Chaitanya Chandra* v. *The Collector of Ganjam*] 389

8. The laches of a mortgagor in taking no steps for many years to enforce his alleged rights, may afford evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by s. 1, cl. 15, Act VIV. of 1859.

A Defendant who seeks to protect himself by the provisions of s. 5, Act XIV. of 1859, against the claim of a mortgagor suing within sixty years to recover mortgaged lands, must show clearly that he or the person from whom he derives his title was a *bonâ fide* purchaser.

Radhanath Das v. *Elliott* (1) followed.

On account of the Plaintiff's laches, the Judicial Committee disallowed mesne profits prior to the date of the institution of the suit; which had been allowed by the High Court. [*Juggernath Sahoo* v. *Syud Mahomed Hossein*]... 419

9. *B*, having borrowed money from *A*, executed in his favor a bond (which was afterwards duly registered), in which he engaged to repay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that, in the event of the said lands being sold in execution of decree before the day fixed for repayment, *A* should be at liberty at once to sue for the recovery of the debt. Before the term for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by *B*, subsequently and subject to the bond made to *A*. In a suit by *A* against *B* and the purchasers of the lands at the execution sale, *A* charged *B* personally, and also sought to realize the amount due on his bond by the sale of the mortgaged lands. *Held*, that the claim was in substance a suit for the recovery of immoveable property, or, of an interest on immoveable property, within the meaning of cl. 12, s. 1, Act XIV. of 1859, and, consequently, was governed by the twelve year's rule of limitation therein provided, and not by the rules provided by cls. 10 and 16 of the same section.

Semble. Although *A* was at liberty to sue from the date of the sale of the lands, limitation did not run against his claim from that date, but only from the date fixed in the bond for repayment. [*Juneswar Dass* v. *Mahabeer Singh*] 581

10. Where the High Court passes a decree on appeal from a *Mofussil* Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees.

An appeal prosecuted to a decree is a proceeding to enforce a decree within the meaning of s. 20 of Act XIV. of 1859. Also *held* there was such a proceeding where, on the judgment-debtor seeking to obtain leave from the High Court to appeal to the Privy Council, the execution-creditor intervened.

The ruling in *Chowdry Wahid Ali* v. *Mullick Inayet Ali* (2) that whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, not dissented from, except that it was suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree.

Quære.—Can the ruling in *Anundmayi Dasi* v. *Purno Chandra Roy* (3) be supported? [*Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy*] ... 62

11. A decree was obtained in the Court of the Deputy-Commissioner of *Delhi* on the 5th of October, 1866, prior to the date when Act XIV. of 1859

was extended to the *Punjab*, viz., the 1st of January, 1867. On the 22nd of October, 1869, an application admittedly *bonâ fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order. A subsequent application for execution was made on the 4th of May, 1871, which was also refused on a similar ground. On appeal the Commissioner and Chief Court conferred this order. *Held*, reversing the decision of the Court below, that execution of the decree was not barred by s. 21, Act XIV. of 1859.

In interpreting statutes, the words 'must' and 'shall' may, in some cases, be substituted for the word 'may' but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word 'may' should be taken as used in its natural, i. e., in a permission, and not in an obligatory sense.

In construing s. 21, Act XIV. of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the act," mean that nothing in the preceding section should prejudically affect the right of a creditor under a judgment in force at the time of the passing of act; and the words "but process of execution may be issued, &c.," mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the act was passed, or within three years next after the passing of the act, whichever should first expire.

An order passed by a Court rejecting a *bonâ fide* application by a judgment-creditor for the execution of his decree on the ground that the period allowed by law for execution had expired, *held* not to be an adjudication within the rule of *res-judicata*, or within s. 2, Act VIII. of 1859 [*Delhi and London Bank* v. *Orchard*] 721

See ACCOUNT.
— ACT I. OF 1869, 3.
— COMPROMISE 2.
— DECLARATORY DECREE 2.
— MORTGAGE 5, 6.
— H. L. DEWUTTER 3.
— " " INHERITANCE 3.
— " " PARTITION 2.
— " " WILL 2.
— " " ALIENATION 2

LOST SUNNUD.

See EVIDENCE 1.

MADRAS REGULATION XXV. AND XXXI. OF 1802.

See POLLIEM.

MAINTENANCE.

See CHAMPERTY 1.
— DECREE 2.

MALICE.

See CHAMPERTY 2.

MALICIOUS PROSECUTION.

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury.

In an action for damages for a malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable and probable cause. [*Baboo Gunnesh Dutt Singh* v. *Mugneeram*] 179

MALUS ANIMUS.

See BARRISTER.

MARRIAGE.

See "CUSTODY OF CHILD."

MESNE PROFIT.

In construing the provisions of s. 11, Act XXIII. of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognized it to be settled law that, where the decree is silent touching interest, or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest or mesne profits, but that the Plaintiff is at liberty to assert his rights thereto by a separate suit.

The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res-integra*, the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding.

The Plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the Defendant, execution was from time to time stayed by the Court on the Defendant giving security, to abide the event of the appeal, for the execution of the decree, and for payment of the mesne profits accruing, while the Plaintiff remained out of possession. The decree having been confirmed on appeal, the Plaintiff applied for execution in respect of the *interim* mesne profits.

Held in the Court below that, as these were not provided for by the decree, they could not, under

s. 11, Act XXIII. of 1861, be awarded in execution, but must be made the subject of a separate suit.

Held by the Judicial Committee that the proceedings whereby the Defendant led the Court to stay execution and continue him in possession, laid him under an obligation to account in the suit for the mesne profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to section 11; since even if the Defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne profits in question were not payable under the decree.

Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*. [*Sadasiva Pillai* v. *Ramalinga Pillai*] 519

See INTEREST 2.
— LIMITATION 8.

MINOR.

See ADOPTION 4.
— DECLARATORY DECREE 1.

MISJOINDER.

See ALIENATION 2.

MISTAKE.

See CONTRACT 2.
— ENHANCEMENT OF RENT 2.
— INTEREST 3.

MOCASSA VILLAGE.

See LIMITATION 7.

MOKRURREE.

See ESCHEAT.
— RESUMPTION.

MORTGAGE.

1. In taking the accounts as between a mortgagor and a mortgagee in possession, the interest may be set off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt. [*Radhabenode Misser* v. *Kripa Moyee Debea*] ... 61

2. By a bond dated 10th February 1857, a certain village was mortgaged by one *G* to the Appellants and their father as security for a loan; the bond providing that, "if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you." The interest of *G* in the village was described as that of a *Malguzar*, and his proprietary right therein was declared by the Revenue Authorities shortly after the execution of the mortgage, but his payments of revenue being in arrear, the Board of Revenue granted a lease of the village for ten years to the Appellants' father. The mortgagees in a suit on the bond obtained the following decree on 3rd November 1860:—"As the Defendant acknowledges the Plaintiffs' claim, it is ordered that a decree be given to the Plaintiffs for Principal and interest and costs against the Defendant and the mortgaged property." In proceedings in the Civil Court taken under this decree, the mortgagees asked for possession of the village, and obtained, on 17th July 1862, an order in pursuance of which they were put in possession, an appeal by *G* being rejected. *G* took various steps to recover possession of the mortgaged property, or a declaration of his proprietary interest therein, but failed in his endeavours; an application for a grant of the proprietary right in the village, and an appeal from an order cancelling his *potta*, being rejected by the Revenue Authorities on 8th December 1864, and 27th July 1865 respectively; and on 12th August 1867 *G* conveyed the village by deed of sale to the Respondents. In a suit brought by them to redeem the mortgage and obtain possession of the property.

Held the suit was not barred by the order of the Civil Court of 17th July 1862, nor had the orders of the Revenue Officers of 8th December 1864 and 27th July 1865, effected such a transfer of any right which *G* might have had to the Appellants, as to render the sale to the Respondents invalid.

Held also that the effect of the bond was to create a simple mortgage, and not a conditional deed of sale; and that the proceedings taken under the decree of 3rd November 1860, and the order made therein of 17th July 1862, by virtue of which the mortgagees obtained possession of the mortgaged property, did not operate so as to extinguish the right of redemption.

The rule that a *bai-bil-wafa* does not become absolute upon breach of the condition as to payment, without proceedings for foreclosure, obtains in the Central Provinces of *India*.

Pattabhiramier v. *Vencatarow Naicken* (1) distinguished. [*Gokuldass* v. *Kriparam*] 279

3. G. S., was, with others of his branch of the family, joint proprietor of eight annas of *mouzas* G., P., T., R., and M. On the application of some of the joint proprietors, a *butwara* or partition under Regulation XIX. of 1814 was ordered by the Collector. Pending this partition, G. S., by deed of conditional sale, mortgaged his eight annas interest in *mouzas* G., P., and R., and in express terms excluded from the mortgage his eight annas of *mouza* T. R., and made no mention of his interest in *mouza* M. under the partition when completed, G. S., had allotted to him the whole of *mouzas* P., and R., 36 *beegas* in G., and another *mouza*, F., not mentioned in the mortgage deed. The right, title, and interest of G. S., in the several *mouzas* thus allotod to him was subsequently sold to the Defendants, in execution of decrees against him.

The mortgagee obtained an order for foreclosure of his mortgage under the provision of Regulation XVII. of 1806 and subsequently sued the representatives of G. S., and the Defendants for a determination of his title to, and possession of, all the *mouzas* P., and F., and eight annas of T. R., and that portion of *mouza* M., which had been allotted to G. S.,

Held, that the mortgage by G. S., of his undivided share might be enforced against the properties allotted to him under the *butwara*, in lieu of such share, both as against G. S., himself and as against the Defendants, purchasers of his right, title, and interest in execution of decrees against G. S.

The mortgage, being of the undivided share of G. S., could not affect the interests of the other sharers; and the mortgagee, who took the security subject to the right of those sharers to enforce a partition, and thereby convert what was an undivided share of the whole into a defined portion, held in severalty, could not successfully have sought to charge any other parcel of the estate in the hands of the former co-sharers.

The case of *Nawab Sidhee Nuzur Ali Khan* v. *Ojoodgaram Khan* (1) *approved of*. [*Rugnath Lall* v. *Ramoodeen Chowdry*] 333

4. The contract of mortgage by conditional sale is a form of security known throuhout *India*, and which by the ancient law of *India*, which must be taken to prevail in every part of *India* where it has not been modified by actual legislation or established practice, is enforceable according to its letter.

The decision of the Judicial Committee in *Pattabhiramier* v. *Vencatarow Naicken* (1), considered and approved.

From the year 1858, the Courts of the Madras Presidency, and from the year 1864, the Courts of the Presidency of *Bombay*, have erroneously and in contravention of the law of *India* as declared by the earlier decisions, adopted with regard to this class of securities doctrines which the English Courts of Equity have applied to mortgages in *England*.

Quære, whether in dealing with future cases the Judicial Committee ought to follow the new course of decision which has sprung up in those Presidencies, or their own decision in the case of *Pattabhiramier* v. *Vencatarow Naicken* (1)?

The essential characteristic of a mortgage by conditional sale, is, that on the breach of the condition of repayment the contract executes itself, and the transaction is closed and becomes one of absolute without any further act of the parties or accountability between them.

Where land was mortgaged on a condition that the rents should be applied first in payment of the Government revenue, next in payment of the salary of a manager, and afterwards in reduction of the debt, and it was further stipulated that instalments of a fixed amount should be paid up to a certain date by the mortgagor to the mortgagee, and that on that date a settlement of accounts should be made, and in the event of there being a balance against the mortgagor and his not paying the same on a date fixed the mortgagee should become the purchaser at a fixed value of so much of the land as would satisfy such balance retaining his right to sue the mortgagor personally for any further sum that might remain due owing the whole of the land as valued growing insufficient to satisfy such balance: *Held*, that this was not a contract of mortgage by conditional sale. [*Thumbaswamy Mudelly*, v. *Mahomed Hossein Rowthen*] 531

5. *Z*, being indebted to *A*, executed in his favor a written mortgage of certain lands, in which it was agreed that if the debt was not repaid within a fixed time, *A* should be put into possession of the lands. Subsequently *Z* executed in favor of P, to whom also he owed money, a second mortgage of the same lands subject to the same condition. *P* not receiving payment within the stipulated time, sued *Z* on the mortgage and obtained a decree for possession of the lands, under which he was put into possession in the year 1846. After *P* had obtained his decree, *A*, whose debt had likewise remained unpaid, brought a suit as first mortgagee against *Z* and *P* for the possession of the lands, and obtaining a decree,

recovered possession in the year 1847, dispossessing *P*. In the year 1870, the heirs of *Z* having paid off the debt due to *A*, resumed possession, whereupon the heirs of *P* applied to be restored to possession in execution of the decree obtained by *P* in 1846. This application having been rejected on the ground that that decree had been fully executed when *P* obtained possession under it, the heirs of *P* instituted a suit against the heirs of *Z* to recover possession and for interest during the time they were dispossessed.

Held by their Lordships of the Judicial Committee, reversing the decision of the High Court, that the heirs of *P* were entitled to possession on *A*'s mortgage being paid off, and that their cause of action accrued and limitation ran against them from the time when the heirs of *Z* resumed possession.

Held, also, that they were not entitled to a decree for the interest accuring during the time they were dispossessed. [*Narain Singh* v. *Shinbhoo Singh*] 673

6. The condition of foreclosure required by s. 8, Regulation XVII. of 1806, is, that the mortgagor should be furnished with a copy of the petition referred to in the section, and should have a notification from the Judge in order that he may, within a year from the time of such notice, redeem the property.

In an action brought to recover possession as upon a foreclosure, it is essential for the Plaintiff to satisfy the Court that the above condition has been complied with.

In such a case, the service of the notice must be established by evidence. The mere return of the *Nazir* on the back of the Judge's *Perwannah* to the effect that the mortgagor had been duly served, is not legal evidence of service.

The functions of the Judge under s. 8 are merely ministerial; see *Forbes*, v. *Ameeroonissa Begum* (1).

The year during which the mortgagor may redeem, runs not from the date of the *Perwannah* or the issuing of it by the Judge, but from the time of service.

[*Mohesh Chunder Sein* v. *Mussumat Tarinee* (2), approved.

Where there are several mortgagors, and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt, and one entire right against all, service of the notice upon some only of the mortgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it.

Quare.—Whether there may not be cases of mortgages of separate shares, in which by proceedings properly framed foreclosure may take place in respect of some of such shares only?

The mortgagee when he seeks to foreclose must discover and serve notice on those who are the then owners of the estate [*Norender Narain Singh* v. *Dwarka Lal Mundur*] ... 771

See Act I. of 1869 No. 3.
— Limitation 4, 8.

MORTGAGE BY CONDTIONAL SALE. (BAI- BIL-WAFA.)

See Mortgage 2, 3, 4.

MORTGAGE, SIMPLE.

See Mortgage 2.

MORTGAGE USUFRUCTUARY.

See Limitation 4.

MORTGAGOR.

See Limitation 8.

MUNICIPAL COURT.

See "Act of State."
— Evidence 1, 2.

NOTICE.

See Beng. Reg. VIII. of 1819.
— Champerty 1.
— Enhancement of Rent 1.
— Dewuttur 2.
— Mortgage 6.
— Vendor & Purchaser.

NOTICE OF ENHANCEMENT.

See Enhancement of Rent 1.

NOTICE TO QUIT.

See Escheat.

NOVATION.

See Champerty 1.

OBJECTIONS.

See Practice Privy Council 4, 6.

ONUS PROBUNDI.

See Act I. 1859 3.

OUDH ESTATES ACT, 1869.

See Act I. of 1869. No. 1, 2, 4.

OUDH PROCLAMATION.

1. A judge cannot, without giving evidence as a witness import into a case his own knowledge of particular facts, as the means of knowledge will not then be capable of being tested.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially it is so in the *Mofussil* courts in *India*.

A custom is a rule which in a particular family, or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly.

Secs. 16-19 of Act I. of 1869 have no retrospective effect.

No special mode of transfer is required by the Hindu Law, even a verbal transfer is sufficient.

The 8th paragraph of the *Oudh* Proclamation of March, 1858, declared *C*, (deceased) *Zemindar* of *Mourawan* and five other persons therein mentioned, thenceforward sole hereditary proprietors of the lands which they held when *Oudh* came under the British rule. Of these lands, which form part of the subject of these suits, summary settlements were made with *G.* (one of *C's* sons) by the Government between April 1, 1858 and October 10 of 1859, to whom a *talookdary sunnud* was granted before the passing of Act I. of 1869, he on his part entering into a *kabooliyat* for the same. But in the 2nd schedule annexed to the Act, *C's* name, and not his, was entered.

In a document dated the 7th of February, 1860, relating to a property in the district of *Oonao*, and by other documents similar in effect relating to properties in other districts, the said *G.* made the following statements:—"I have been requested by Government to submit an application on the subject of primogeniture, with a view that the *talook* may not be split into pieces, as I would wish. Now, the custom that has been followed in my family for generations past is this—that the eldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the *talook*. Under the custom of the family the other brothers are at liberty to have their shares separated, should they wish it. The head has no power under the old custom, to alienate the estate without consulting every sharer. I, therefore, wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed."

In partition suits among the descendants of *C*, and of his brother, together constituting a Hindu joint family under the *Mitakshara*, all the property, the subject of the suits, having been found to be the joint property of the said family, the contention on behalf of the Appellants in the 1st appeal was that all the estates included in the *sunnud* to their father *G*, and summary settlements whether previously joint property of the family or not, became the separate self-acquired property of *G*; that he was the sole *malguzar* thereof, that he and his sons were the sole beneficial owners of it; and that he had no power to transfer it by will or by alienation *inter vivos*:—

(1) *Held*, that the *sunnud* and summary settlements were a mere grant by the Government to one member of the family of property which belonged to the family jointly, and were not intended to enure to the sole benefit of the grantee, and did not affect the rights of the family. As regards such property granted to *G.*, (if any) which was not previously part of the family estates, it was granted for services presumably rendered with the use of the joint family funds, and could not, therefore, be separate self-acquired property of *G.* within the meaning of Hindu Law. [*Hurpershad* v. *Sheo Dyal*] 611

2. Plaintiff claimed certain houses in *Lucknow* and a certain *Mouzah* in the province of *Oudh*. *Held* that Government having given up altogether their rights to all the houses in *Lucknow* under the confiscation, it is unnecessary to determine the effect of Lord *Canning's* and Sir *James Outram's* proclamations regarding the houses, and the question of limitation regarding them, if the Defendant was in possession before the proclamation, must be determined in the same manner as if there never had been any confiscation at all.

As regards the *Mouzah*, *held*, the effect of Lord *Canning's* proclamation of 1858 was to put an end to all previous titles, and whatever title either party has to the *Mouzah* must have been acquired by some grant of the Government subsequent to the proclamation, and within 12 years previous to the commencement of the suit. The question of limitation therefore does not arise, and Defendant being in profession Plaintiff must recover on his own title.

Certain issues framed and case remanded accordingly for re trial. [*Prince Mirza Jehan Kudr* v. *Newab Afsur Bahu Begum*] 865

See Act I. of 1869, 7.

OUDH TALOOKDAR'S RELIEF ACT.

Under the exceptional legislation (*Oudh Talookdar's Relief Act* XXIV. of 1870), and under the exceptional circumstances of the case as regards the person to appeal being the person against whose order the appeal is to be preferred, and the opposite party preferring an appeal after the expiration of six weeks from the date of that order &c. *held* that the appeal preferred in the court below, though after the said six weeks was properly allowed. [*Ramjisdas* v. *Rajah Bhagwan Buz*] 843

PALKI HUQ.

Suit to establish a claim, as of hereditary

right, to an annual payment for *Palki Huq*, or palanquin allowance, the only issue settled being, whether the right claimed was perpetual, or whether the Government was competent to make it cease whenever they pleased to do so. *Held*, upon the special ground that under the native rulers this allowance was treated as permanently annexed to the office of *Desai* of the *Pergunna Broach*, and was confirmed in 1808, by the British Government as appurtenant to the office, that the claimant was entitled to the *Palki* allowance claimed.

The Court was unable to concur with the High Court of *Bombay* that upon the facts the claimant had under the provisions of *Bombay* Regulation No. V. of 1827, Clause 1, Section 1, acquired a title by prescription to maintain his suit, whatever might have been the original title of his ancestors to the *Palki* allowance claimed.

The Court was by no means satisfied, that, the allowance, though payable out of the Government Revenue of a particular *Pergunna*, could properly be said to be *immoveable property* within the meaning of Clause 1, Section 1 of *Bombay* Regulation No. V. of 1827. It did not constitute a charge which could be enforced against the land, or since 1808, against the revenues of the land prior to the claim of Government.

The utmost right, was, to receive, after the perception of the revenues by Government, a certain annual sum of money, out of the Collector's treasury; and the regulation afforded no bar to the trial of the question between the Government and the claimant upon its merits. [*The Government of Bombay* v. *Desai Kullianrai Hakoomutrai*] ... 103

PARDAHNASHIN WOMAN.

1. The Plaintiff sought to make two *Pardah* ladies liable on a document which he alleged had been executed by a third person as their agent. *Held* (reversing the decision of the High Court), strict proof of the agency must be given. [*Mussumat Azeezoonnissa* v. *Baqur Khan*] 100

2. A Court when dealing with the disposition of her property by a *Pardah* woman, ought to be satisfied that the transaction was explained to her, and that she knew what she was doing; especially in a case where, without legal assistance, for no considertion, and without any equivalent, she has executed a document, written in a language she does not understand, which deprives her of all her property. In the case of a *Pardahnashin* woman, who has no legal assistance, the ordinary presumption, that if a person of competent capacity signs a deed he understands the instrument to which he has affixed his name, does not arise.

The decision of the High Court that the endowment created by the document was not of such a public character as would sustain a suit under Act XX. of 1863, not dissented from. [*Ashgar Ali* v. *Delroos Banoo Begum*] 749

See SUIT TO SET ASIDE A DEED.

PARTITION.

See MORTGAGE 3.

PARTNERSHIP.

1. Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common; but where a contract is entered into between partners and a third person for the protection of that person as a creditor, whereby it is agreed that he shall receive in consideration of advances commission on the net profits of the partnership business, and large powers of control over the business are given to him, but no power to direct transactions, the Court, if satisfied that the contract was one of loan and security, will not interpret it as constituting a partnership. [*Mollow, March* v. *The Court of Wards*] ... 168

2 A contract between a partner and his co-partners for remuneration to the former for the management of the partnership business by a Commission on the sale, during his lifetime, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on, except at a loss: nor does it imply an obligation to pay the managing partner compensation in case the partnership is dissolved for that reason. [*Cowasjee Nanabhoy* v. *Lalibhoy Vulluboy*] ... 645

PAYMENT OF DEBT.

See PARTNERSHIP.

PENSION'S ACT XXIII. OF 1871.

A Plaintiff alleging that, as the hereditary

Deshmukh of certain *Mehals*, he was entitled to be paid directly by the *ryots* of these *Mehals* a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land revenue" and as such excluded from the jurisdiction of the Civil Courts by Section 4 of "the Pensions Act, 1871." [*Vasudev Sadashiv Modak*, v. *The Collector of Ratnagiri*] 701

PLAINT.

1. Where the Government has recognized a person as having a right to bear particular titles, a plaint in a suit against such person does not contain "the description of the Defendant" in accordance with s. 26 of Act VIII. of 1859 if such titles are omitted. In such a case the Plaintiff should, on the objection being taken by the Defendant, be ordered to amend the plaint; and if such order is not complied with, the plaint should be rejected. [*Maharajah of Vizianagram* v. *Rajah Lakshmi Challaya*] ... 165

2. A Hindu widow sued to recover the share she was entitled to as heiress of her husband in the family property, claiming a portion in her absolute right, and a portion as one of the joint-*shebaets* of certain idols, that latter property being *Dewuttur* property. As to a portion of the *Dewuttur* property, the Lower Court found in her favour; but regarding the portion claimed in her absolute right, her suit was dismissed. The Subordinate Judge found the portion of the property to be the property of a certain idol and held, upon the suggestion on Plaintiff's behalf, that failing to prove her absolute right, she was entitled to a share as a joint-*shebaet*, that she could not recover in that capacity as she had not sued as *shebaet* and failed to maintain her allegation in the plaint.

Held, upholding the decision of the High Court, that the objection which had been made to the reception of her claim by the Subordinate Judge was an objection rather of form than of substance and the Plaintiff was entitled to the relief she prayed for.

Regarding certain Government papers, which formed a portion of the Plaintiff's claim, the Defendants contended that the papers with the accumulations, had been by an agreement of the whole family then in existence devoted to the service of an idol, the contention on Plaintiff's behalf being that the supposed agreement of dedication, even if actually executed, was colourable and collusive, was not intended to have effect and was merely entered into for the purpose of defeating the possible rights of the widow and keeping the property in the hands of the male-members of the family:—

Held, affirming the decision of the first Court and reversing that of the High Court, that an agreement proved, by very strong evidence, to have been not merely executed, but acted upon for a number of years, could not be possibly set aside as invalid, merely upon the suggestion that the amount set aside was an exorbitant amount and that there possibly might have been some intention to defraud widows and other persons. [*Radhamohun Mundul*, v. *Jadoo Monee Dossee*] 482

3. Plaintiff brought the suit on the allegations that Defendants 1 to 3 owed him some money, that in satisfaction thereof, and on receipt of a further sum of money they sold to him a certain *Patani Mehal* and caused a *Kabala* thereof to be executed by their mother the auction purchaser, *i. e.* Defendant No. 4, and the Defendants, Nos. 1 to 3, being the real owners, became witnesses to the deed.

That in the *Kabala* there was a distinct stipulation to the effect, "If any one making any objection to the sale by me of the said *mehal* give you trouble in any way, then I will put matters straight. If I fail to do so I will return the consideration money. If I do not return it you will realize it by means of a suit.

Plaintiff being dispossessed by a third party, sued the Defendants 1 to 4 for release of the estate or refund of the consideration money.

The first Court held that the plaint and *Kabala* do not disclose a cause of action against anybody. The High Court on appeal held that they do, but against the mother, the *benameedar*, *i. e.* the Defendant No. 4 only.

Held that the plaint and *Kabala* do disclose a cause of action against all the Defendants, inasmuch as it is averred that the sons caused their mother to sell this property, and that they assented to the instrument of sale by becoming attesting witnesses to it, and the stipulation in the deed was intended to provide against a general defect of title. [*Bisheswari Debya* v. *Govind Pershad Tewari*] ... 626

See AGREEMENT.

PLEADINGS.

See AGREEMENT.

See DECREE 1.
— H. L. ADOPTION 2.
— „ „ WIDOW 2.

PLEAS IN BAR.

See DECREE 3.

POLLIEM.

The affirmative words of Madras Regulation XXV. of 1802, s. 2, the preamble thereto forming no part of the enactment, did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all *Zemindars* an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The words "proprietors of lands" as used both in the *Bengal* Code of 1793, and in the *Madras* Code of 1802, have a technical signification. They refer to "*Zemindars*, independent *talookdars*, and others, who pay the revenue assessed upon their estates immediately to Government." So also the words "proprietary possession" in the recital of Regulation XXV. of 1802, means the possession of a person who is a proprietor according to the technical meaning of the term.

According to the true construction of *Madras* Regulation XXV. and XXXI. of 1802, the Legislature recognizes the right of private property, and does not assert a right on the part of Government to deprive or dispossess *Zemindars* in their lifetime, or their heirs after their deaths, independently of any considerations connected with the realization of the public revenue. It provides for the protection of the revenue from invalid *lakraj* grants, and for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue.

There is no long uniform current of decisions at *Madras* sufficient to show that every *polliem* not permanently settled, is necessarily only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it had been held, are matters judicially determinable on legal evidence.

In *India* the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary *zemindary*. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a *polliem* and an ordinary *zemindary*.

Under Hindu law, it is not necessary in order to render a child legitimate, that the procreation as well as the birth should take place after marriage. [*Oolagappa Chetty* v. *Arbuthnot*] 318

POSSESSION.

See ALLUVION 1, 2, 4.
— EJECTMENT.

POTTAH.

See ENHANCEMENT OF RENT 1.
— HEREDITARY TENURE.

POWER OF ALIENATION.

See DEWUTTER 1, 2.

POWER TO DIRECTORS TO BORROW AND MORTGAGE.

The ratification by a company of particular acts done by its directors in excess of the authority given them by the articles of the Company, does not extend the powers of the directors so as to give validity to acts of a similar character done subsequently. [*Irvine* v. *Union Bank of Australia*] ... 692

POWER TO THE GOVERNOR-GENERAL IN COUNCIL.

By the terms of the Act 24 & 25 Vict, c. 104, the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council.

An exercise of legislative authority by the Governor-General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the Statute 24 & 25 Vict, c. 104, and by the Letters Patent issued under that Statute.

By the 9th section of Act XXII. of 1869, passed by the Governor-General of *India* in Council, the Lieutenant-Governor of *Bengal* was empowered, from time to time, to extend, *mutatis mutandis*, to the *Jaintia*, *Naga*, and *Khasi Hills*, the provisions contained in other sections of the Act, whereby the administration of civil and criminal justice within the district called the *Garo Hills* was, from a date

to be fixed by the said Lieutenant-Governor, to be withdrawn from the jurisdiction of the Courts of civil and criminal judicature constituted by the Regulations of the *Bengal* Code and the Acts of the Legislature of *British India*, and to be vested in such officers as the Lieutenant-Governor might appoint. *Held* by a majority of the *Calcutta* High Court that as the Indian Legislature was to be regarded as an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself, the above provisions purporting to authorize the Lieutenant-Governor of *Bengal* to extend Act XXII. of 1869 to the *Jaintia*, *Naga*, and *Khasi Hills*, since they involved a delegation of legislative power, were void and of no effect. *Held* by the Judicial Committee of the Privy Council, that the decision of the majority of the High Court was erroneous and rested on a mistaken view of the powers of the Indian Legislature. That legislature has powers expressly limited by the Act of the Parliament which created it, but has, when acting within those limits, plenary powers of legislation as large and of the same nature as those of Parliament itself.

When plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is not uncommon, and, in many circumstances, may be highly convenient. [*Queen* v. *Burah*] 834

PRACTICE.

See ACCOUNT.
— ACT I. OF 1845.
— DECREE 1.
— LIMITATION 2, 4.
— OUDH PROCLAMATION.
— APPEAL CIVIL 2.
— BENGAL REGULATIONS.
— DECLARATORY DECREE 2.
— DIVORCE.
— ESTOPPEL.
— EVIDENCE 3.
— REGISTRATION 1.

PRACTICE—PRIVY COUNCIL.

1. Where a case has been heard by the High Court on special appeal, and on appeal to the Privy Council it is desired to include in the appeal the decisions of the lower Courts on the facts, an application for special leave to do so, should be made previous to the hearing. The Judicial Committee will not, as a rule, allow a petition of appeal from those decisions to be put in at the hearing, *nunc pro tunc*. [*Golam Ali* v. *Kallykishen Thakoor*] 164

2. Special leave to appeal granted to try the question whether, under the Indian Registration Act VIII. of 1871, a *Zillah* Judge can review an order of his own Court refusing to register a document. [*Meer Reaust Hossein*, v. *Hudjee Abdoollah*] ... 315

3. Special leave to appeal granted in a suit which had been consolidated by consent of both parties. Where Defendant in such consolidated suit had taken the value at the rates fixed in the plaint, which together exceeded Rs. 10,000 and had obtained the benefit of an appeal to the High Court upon the facts by so adopting that valuation :—

Held, that the Defendant could not afterwards object to that valuation, and that leave to appeal to Her Majesty in Council should not have been refused on the ground of value. [*Kristo Indro Saha* v. *Huromones Dassee*] 317

4. A party who in observance of the rule of valuation prescribed by the stamp law of the country in which he sues, has paid stamp duty upon a sum lower than the appealable amount, is not thereby precluded from obtaining leave from the Courts of that country to appeal to Her Majesty in Council, if he can shew that the value of the property in dispute does reach the appealable amount. [*Baboo Lekraj Roy*, v. *Kanhya Singh*] 373

5. Where a report, or supplemental report, has been made by Commissioners, to whom accounts have been referred for investigation under Act VIII. of 1859, sect. 181, the Privy Council will not entertain any objections thereto which have neither been brought to the notice of the First Court nor made in any of the grounds of appeal in the Courts in *India*. [*Seth Gujmull* v. *Mussumat Chahee Kowar*] 417

6. An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest moment, but may be entertained at any stage of the appeal, and is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.

An appeal being called on, and before the case was gone into on the merits, the objection was taken by the Respondent and appeared to be well founded. The Appellant thereupon applied to the Judicial Committee to grant him special leave to appeal, *nunc pro tunc*. *Held*, that it was competent to the Judicial Committee to grant such special leave, but leave was refused under the particular circumstances of the case. [*Gujadhur*

Pershad, v. *The Two Widows of Eman Ali Beg*] 495

7. Objection not taken in the grounds of appeal before the High Court not allowed to be pressed before the Judicial Committee. [*Forbes* v. *Meer Mahomed Hossein.*] ... 264

PRESCRIPTION.

1. The law of prescription applicable to *India* is the English law previ us to the passing of the Prescription Act, 2 & 3 Will. IV., c. 71. In order to establish a right to light and air, an uninterrupted user of at least twenty years, with the acquiescence of the owner of the servient tenement, must be shown (1).

In a suit to restrain the Defendants from obstructing the light and air through certain windows of a house belonging to the Plaintiffs, it was shown that the enjoyment of the alleged right began on 14th April 1850, the windows then being in a sufficiently finished state to create the right. In March 1870 the Plaintiff received notice from the Defendants of their intention to erect a building which would have the effect of obstructing the passage of light and air through the Plaintiff's windows. The building was actually commenced on 23rd March 1870, but it was not actually raised to such a height as to amount to an obstruction until some days after the twenty years had elapsed. *Held* that there was not an enjoyment for twenty years with the acquiescence of the Defendants such as entitled the Plaintiffs to maintain the suit.

Quære.—Whether proof of constructive knowledge on the part of the Defendants would not be sufficient to show their acquiescence. [*Elliott* v. *Bhoobun Mohun Bonnerjee.*] 236

2. The right to water flowing to a man's land through an artificial watercourse, constructed on a neighbour's land, must rest on some grant or arrangement, proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal origin.

Such a right may be presumed from the time, manner, and circumstances under which the easement has been enjoyed. [*Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*] 856

PRESUMPTION.

See ENHANCEMENT OF RENT.

PRINCIPAL AND AGENT.

See ACCOUNT.

PRINCIPAL & SURETY.

R sued *M*, *B*, *C*, and *P* for money due for goods supplied. Separate *solehnamahs* were filed by each of the four Defendants, in which they admitted the debt, and each undertook to pay one-fourth thereof, with interest, by instalments, and each further agreed that if the other three should make default and the amount due by them should not be realized by the sale of their property, then he should be liable to make good the deficiency. A decree was passed by the Court in accordance with the terms of the *solehnamahs*. *C* and *P* each paid up their fourth shares, but *M* and *B* having failed to pay, *R* applied for execution against *C* and *P* in respect of the liability of *M* and *B*, *Held*, that in the absence of proof that the whole property of *B* had been exhausted, *R's* application could not be allowed.

Where a decree for payment of a certain sum with interest was passed against certain Defendants as principal debtors and against other Defendants as sureties, and it appeared that the decree-holder had allowed time to the principal debtors for the purpose of increasing the amount of interest,—*held*, that the decree-holder was not entitled to interest after the time when he might and ought to have put up the property of the principal debtors for sale, when possibly it might have realized the whole of the debt then due. [*Ramanund Koondoo* v. *Chowdhry Soonder Narain Sarungy*] 862

PROCEEDINGS TO ENFORCE DECREE.

See LIMITATION 3.

PROOF.

See ALLUVION 2.
— EJECTMENT.
— EVIDENCE 4.
— ONUS PROBANDI.

PROPRIETOR OF LAND.

See POLLIEM.

PROSECUTION.

See MALICIOUS PROSECUTION.

PURCHASE

D, a *Hindu*, died, leaving three sons, *S*, *SC*, and *R*, who on his death made a partition of his estate, and *S* covenanted with *SC* to discharge all claims made against the estate of *D*. In 1828, *B*, who claimed a

portion of the share taken by *SC* on partition with mesne profits, filed a bill in the Supreme Court against *SC* and others as representatives of *D*, and obtained a decree for Rs. 2,00,000. Pending this litigation *SC* died, leaving six sons *J*, *M*, *H*, *P*, *C*, and *SM*, and a will made before the birth of *SM*, by which he left all his property to his sons other than *SM*. On the death of *SC*, *J*, as one of the executors of his will, compromised *B*'s suit so far as it related to the estate of *SC*, for Rs. 80,000; and afterwards, in the same capacity, sued the representatives of *S* to recover that amount and the costs in the suit brought by *B*, and obtained a decree for Rs 1,70,000. In the meantime *H* died, leaving the Plaintiffs his sons and heirs, and his brothers *J*, and *M*, his executors. *J* renounced the executorship. *M*, on 3rd June 1854, as executor of *H*, executed a deed of assignment, by which he conveyed to *J* and *SM*, for Rs. 5000, the interest of the Plaintiffs in the decree obtained by *J*, and subsequently at a sale of property belonging to the representatives of *S* in execution of the decree, *J* himself became the purchaser. In 1857, in an administration suit, which had been brought by the Plaintiffs to compel *M* to account for the assets received by him from the estate of *H*, the Master was directed to take an account, which was accordingly done. In a suit brought by the Plaintiffs, the sons of *H*, against *J*, *M*, and *SM*, to set aside the deed of 3rd June 1854,—*Held*, that notwithstanding the renunciation of executorship by *J*, he stood in a fiduciary relation to the Plaintiffs, and the assignment being found to have been made for an inadequate consideration, was ordered to be set aside on the Plaintiffs paying the purchaser, *J*, the amount of the purchase-money.

A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside. [*Dhonender Chunder Mookerjee* v. *Mutty Lall Mookerjee*] 408

See ACT I. OF 1845.
— CIVIL PROCEDURE CODE 1, 2, 3.
— EVIDENCE 1.
— SALE 6.

PURCHASER.

See ESTOPPEL.
— LIMITATION 2, 8.

PURCHASER IN AUCTION.

See EJECTMENT.
— EVIDENCE 4.
— MALICIOUS PROSECUTION.
— SUIT TO SET ASIDE A DEED.
— H. L. ADOPTION 4.
— MORTGAGE.

PURCHASER, UNREGISTERED, OF A DARPATANEE TALOOK.

See LIMITATION 2.

PATANEE.

See LIMITATION 2.
— SALE 5.

QUESTIONS OF FACTS.

See APPEAL 1.

RATIFICATION.

See POWER TO DIRECTORS.

RAYATI KADMI TENURE.

See ENHANCEMENT 1.

REBEL'S PROPERTY.

See LIMITATION 6.

REDEMPTION.

See ACT I. OF 1869, 3.
— MORTGAGE 4.

REFERENCE.

See ACCOUNT.

REFORMATION.

See ACCRETION.

REFUND OF REVENUE.

See RESUMPTION.

REGISTRATION.

1. Registration of landed property in the name of one member of a family is not conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property.

In cases from Non-Regulation provinces, wherein the procedure is somewhat loose, and where the merits depend much upon local custom and local enquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation provinces, to act on the principle of not disturbing the judgment under appeal unless it is substantially wrong. [*Hyder Hossain* v. *Mahomed Hossain*] ... 46

2. Ss. 22 and 24 of Act XX. of 1866 make it imperative that the instruments therein referred to shall be presented for registration within four, or at most eight, months from the date of their execution; but the Act fixes no time within which the registration must be completed.

Where the registration of an instrument has been declared by a competent Court to be invalid, the instrument, if originally presented in due time, may again be submitted for registration, although the four months provided by s. 22, Act XX. of 1866, and the further period of four months allowed by s. 24, have both expired.

A registering officer who registers a deed of sale without the vendor who executed the deed having appeared before him, acts in contravention of s. 36, Act XX. of 1866; but there are no words in that section which declare that the registration of a deed under such circumstances shall be null and void.

Quære.—Whether the words of that section are not merely directory to the registering officer for the benefit of the parties to the deed; and whether his acting without the appearance of the parties as provided by the Act is more than a defect of procedure within the meaning of s. 88.

In considering the effect to be given to s. 49, Act XX. of 1866, that section must be read in conjunction with s. 88, and with the words of the heading of Part x, "Of the effects of Registration and Non-registration." It is not clear that the words of s. 49, "unless it shall have been registered in accordance with the provisions of this Act," are not confined to the procedure on admitting to registration, without reference to any matters prior to registration, or to the provisions of ss. 19, 21, or 36, or other provisions of a similar nature.

For the purposes of Act XX. of 1866, "District Court" means, 'the Principal Court of original jurisdiction in a District, and includes the High Court in its ordinary original civil jurisdiction." The High Court of the North-West Provinces, which has no ordinary original civil jurisdiction, is consequently not a "District Court" to which a petition may be presented under s. 84 of the Act, and an order passed by that Court, on such a petition, directing the registration of a deed is made without jurisdiction.

Certain lands having been attached in execution of a decree obtained by *A* against *B*, *C* intervened under s. 246, Act VIII. of 1859, claiming their release, on the ground that before the attachment they had been conveyed to him by *B* under a deed of sale, and he prayed that the execution-sale, might be stayed to enable him to put in the deed after having it registered. The Court however refused to stay the sale, and the lands were sold in execution. More than a year from the date of the Court's refusal to stay the sale, *C* sued to establish his right to the lands. *Held* that the suit was not barred by limitation under s. 246, Act VIII. of 1859, since the refusal of the Court to postpone the sale was not an order under that section, but was a mere refusal to order a postponement under s. 247. [*Sah Mukhun Lall Panday* v. *Sah Koondun Lall*] ... 509

3. The Registration Act of 1871 gives power to the Government to appoint Districts and Sub-Districts for the purpose of registration; but the "District Courts" mentioned in the Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary *zillah* Courts.

Semble.—The final words of the 76th section of the Registration Act, which declare that "no appeal lies from any order made under this section" apply to an order rejecting, as well as to an order admitting, an application for registration.

Quære.—Whether after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registartion by means of a regular suit? *Futteh Chund Sahoo* v. *Leelumber Singh Dass* (1) referred to and distinguished.

An order rejecting an application for registration, under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a decree within the meaning of Act VIII. of 1859, as to fall within the operation of the sections of that Act whichp rovide for the admission of a review.

S. 38, Act XXIII. of 1861, which enacts that "the procedure, prescribed by Act VIII. of 1859, shall be followed as far as it can be in all miscellaneous cases and proceedings which, after the passing of the Act, shall be

instituted in any Court," renders the whole procedure of Act VIII. of 1859 including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence. [*Reasut Hossein* v. *Hadjee Abdoolla*] ... 641

REGISTRATION ACT.

The words of s. 35 of the Indian Registration Act, VIII. of 1871, which provide that "If all or any of the persons by whom the document (i. e, the document presented for registration) purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document," taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor, an idiot or a lunatic.

Since such a construction would cause great difficulty and injustice and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned.

The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Registration Act.

Sah Mukhum Lall Pandey v. *Sah Koondun Lall* (1) referred to and approved. [*Mohammed Ewaz* v. *Birj Lall*] ... 735

REGULATIONS.

See BENGAL REGULATION.

RE-HEARING.

An order passed by the Judicial Committee of the Privy Council after hearing an appeal is final, and an application for a re-hearing will not be granted except upon the ground that the applicant has by some accident, without blame or default on his own part, not been heard, and the order has inadvertently been made as if he had been heard.

Rajunder Narain Roy v. *Bijoy Govind Singh* (1) and *Ex parte Kistonath Roy* (2) approved. [*Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*] 840

RELIEF, CONSEQUENTIAL.

See DECLARATORY DECREE 1, 2, 3, 4.

REMAND.

See EVIDENCE 4.

RENT.

See ENHANCEMENT.

— ESCHEAT.

RENT, RECOGNITION OF TENANCY BY RECEIPT OF.

See ESCHEAT.

REPRESENTATION.

See ACT XXIII. OF 1861.

RES JUDICATA.

1. Where a party, failing to obtain judgment for the possession of land claimed by her in her first suit as *taufir*, brought a fresh suit claiming the land as property belonging to her *taluok* according to the true boundary line, *held* that her suit was barred by s. 2 of Act VIII. of 1859.

Where Respondents were in the same interest, but severed in their defences, only one set of costs was allowed, and that to the Respondent who first entered appearance. [*Woomatara Debia*, v. *Unnopoorna Dassee*] 144

2. *A* brought a suit in the Court of *S* against *B* for certain land as being an accretion to an estate in the district of *S*. *B* claimed it as being part of his estate in the district of *G*, to which district he alleged the land had in a former decision been found to belong. The Court of *S* held that the land was an accretion to *A*'s estate in the district of *S*. In a subsequent suit brought by *B* in the Court of *G* against *A* for the land to

which the subject of the former suit had been found to be an accretion,—*Held*, that the holding in the former suit necessarily decided that the land claimed by *B* was in the district of *S*, and therefore that the Court of *G*, under Act VIII. of 1859, s. 14, had no jurisdiction. [*Pahalwan Singh* v. *Maharajah Muheshur Buksh Singh*] ... 163

3. A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.

Quære.—Whether a donor can avoid his own deed on the ground of his own fraud? [*Rumanugra Narain* v. *Mahasundar Kunwar*] 277

4. *B*, as adopted son and heir of *G*, instituted a suit to set aside certain *putni* leases, under which certain persons claimed to hold lands which had belonged to *G*. The defence was, that *B* was not the legally adopted son of *G*, and an issue on this point having been settled, *K*, who claimed to be the reversionary heir of *G*, was made a Defendant under s. 73 of Act XIII. of 1859; and it was eventually decided in that suit that *B* was the duly adopted son of *G*. *Held*, that a subsequent suit by *K* against *B* to set aside the adoption could not, on the principles laid down in the case of *Soorjeemonee Dayee* v. *Suddanund Mohapatter* (1) be maintained.

Kriparam v. *Bhagawan Dass* (2) overruled. [*Krishna Behari Roy* v. *Bunwari Lall*] 559

5. *C*, a *Hindu*, subject to the *Mitakshara* law, adopted *S* and afterwards *B*, and made a will whereby, after providing for his widow, the family worship, &c., he made a division of his real and personal property between his two adopted sons. Provision was also made for forfeiture by either of the sons in case they disputed the will, in which event the whole estate was to go to the other son. This will was registered and filed in the Collector's Court. *S* was subsequently disowned by *C*, and declared to have forfeited his right to anything under the will. In 1859, *S* brought a suit against *C*, *B*, and certain persons who claimed portions of the property under deeds executed by *C*, to cancel those deeds, to cancel the will, to set aside the adoption of *B*, and for maintenance. In this suit he alleged that *C* had no power to make any of the devises of real estate contained in the will, inasmuch as the whole estate, consisting of property inherited by *C* and property acquired by him from the income of such inherited property, was ancestral. The only issue raised in that suit referring to the will was whether it was assented to by *S*. The first Court found that it had been so assented to; that the adoption of *B* was valid; and that *S*'s conduct justified *C* in disinheriting him: the suit was accordingly dismissed. *S* appealed to the High Court and in his grounds of appeal raised the same contention as before, *viz.*, that the whole of the real property was ancestral, and therefore *C* had no power to dispose of it without his consent. The High Court, in 1863, varied the decree of the first Court, and held that the will must be set aside so far as it affected the right of *S* in the ancestral property, but that the ancestral property only included that inherited, and not that acquired by *C* from the income of the inherited property. In a suit brought by *S*, after the death of *B* and *C*, against *B*'s widow and the parties to the former suit, or their representatives, to obtain possession of the whole estate of *C* on the ground that both the inherited property and the property acquired from the income thereof were ancestral.

Held (reversing the decision of the High Court), that although the issue as to the assent of *S* to the will clearly embraced only a portion of the controversy between the parties, the Court had jurisdiction, and indeed was bound, to decide whether or not the will was operative as to all or to any and what portion of the property, and that its decision on that point was binding on the parties.

According to the general law relating to *res-judicata*, where a question has been necessarily decided in effect, though not in express terms between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form.

S. 2, Act VIII. of 1859, does not prevent the operation of this general law. The words "cause of action" in that section must be construed in reference to the substance rather than the form of the action. [*Soorjomonee Dayee* v. *Suddanund Mohapatter*] 285

6. In a suit governed by the *Mitakshara*, in which *A*, a Hindu widow, was the Plaintiff, and *B* was one of the Defendants, the Plaintiff sought and obtained a decree for possession of certain lands to which she claimed to be entitled as mother and heiress of her deceased son.

B subsequently brought a suit against *A*, alleging that he and not *A*, had become entitled thereto on the death of *A*'s son, under a *koolachar*, or family custom, which excluded female heirs, and gave him a preferential right among male heirs, and

thereby sought to recover from her possession of the same lands, and alternatively to obtain a declaration that he was as such heir if then living entitled to possession of them on her death, and that a deed executed by her alienating a portion of them, was valid only for her lifetime.

Held, that the decision in the former suit that *A* was entitled to the lands as mother and heiress of her deceased son, was conclusive against *B*'s claim for possession during her lifetime, on the ground that she was not the heiress; but that the Plaintiff was not barred by the adjudication in the former suit from setting up the family custom with the object of showing that on *A*'s death he would be entitled to succeed her, if living, and was by reason of such heirship entitled to obtain a declaratory decree as to the deed of alienation.

Since a declaratory decree is a matter of discretion, a claim for a declaration ought not to be remanded by an Appellate Court for further enquiry which is likely to entail delay and expense, where the Plaintiff's claim is contingent on his surviving the Defendant, and where the declaration will not be binding on parties with possibly preferential titles who have not been joined in the suit.

The impartibility of property does not *per se* destroy its nature as joint family property, or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate. [*Tekait Doorga Pershad Singh* v. *Tekaitni Doorga Konwari*] 827

7. The Plaintiff sued to recover possession of certain houses and grounds as belonging to his *zemindary*, setting forth that the premises in question had been occupied by his paternal grandmother, on whose death the Defendants had taken wrongful possession. The Defendants claimed to be legally entitled to the premises in question, and contended that the Plaintiff's suit was barred under section 2, Act VIII. of 1859, by reason that the Plaintiff had already, during his grandmother's lifetime, brought a suit against her and the Defendant's father, as a co-Defendant, to establish his right to the same premises, which suit had been dismissed. The Defendants also pleaded limitation.

It appeared that in the former suit the relief sought by the Plaintiff was substantially to restrain his grandmother from acts of waste in alienating property which had belong to her deceased husband by assigning it to her co Defendant; but that as regards the property now claimed, although it was mentioned in the plaint, no charge had been made that she has assigned it, or intended to assign it, to her co-Defendant, nor any allegation to show that the co-Defendant had any interest in it.

Held, reversing the decisions of the Lower Courts, that, under the circumstances, the decision in the former suit was not a decision in a suit between the same parties, or parties under whom they claimed, and that the cause of action in the present suit was not determined in the former suit.

Held also, that the Defendants plea of limitation could not be determined without a finding as to whether the Plaintiff's grandmother, who died within the period of limitation, had held the premises with the Plaintiff's leave, or as a trespasser. [*Zemindar of Pittapuram* v. *The Proprietors of Mutta of Kolanka*] 860

See DECREE 4.
— DECLARATORY DECREE.
— DEWUTTER 1.
— LIMITATION 2.
— FORECLOSURE 2.

RESULTING TRUST.

The very principle of a resulting trust is, that the property has been purchased with money belonging to another, with an implied trust that it should belong to that other person.

But, if it was the intention of the person to whom the money belonged, that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts. [*Mussumat Ameeroonnissa Khanum* v. *Mussumat Ashrufoonnissa*] 58

RESUMPTION.

Where, prior to the permanent settlement, grants of land had been made on *ghatwali* tenure at a fixed rent and the Government subsequently dispensed with the performance of the *ghatwali* services on the part of the *Zemindar*,—*Held*, in a suit by the *Zemindar* to resume the lands, that as long as the *ghatwals* were willing and able to perform the services, the *Zemindar* had no right to put an end to the tenure on the ground that the services were no longer required.

Quære.—Whether, in the absence of any usage, the words "*mukarrari istimrari*" mean, permanent during the life of the grantee, or permanent as regards hereditary descent?

A purchaser at a sale for arrears of Government revenue is not entitled under Reg. XLIV. of 1793 to cancel a *ghatwali* tenure created subsequently to the permanent settlement.

Quære.—Whether he would be entitled to enhance the rent?

Where lands granted on *ghatwali* tenure were, in accordance with a decision of the Special Commissioner, resumed by Government, who made a settlement with the *ghatwals*, under which the latter continued to pay to the Government half the sum assessed as revenue, reserving the other half to themselves, and the resumption proceedings were subsequently reversed by the Privy Council,—*Held* that the *ghatwals* were entitled to a refund of the sum paid by them to Government, less the sum which the *Zemindar* ought to have received from them for rent during the time they had paid to Government. [*Rajah Leelanand Singh* v. *Thakoor Munorunjun Singh*] ... 239

See EVIDENCE 1.

RESUMPTION ORDER.

See ACT I. OF 1869 2.

RETRIAL.

See EVIDENCE 4.

REVENUE SALE.

See "ACT I OF 1845."
— LIMITATION 7.

REVERSAL OF CONCURRENT FINDINGS OF FACTS.

See COMPROMISE 1.
— M. L. DOWER 1.

REVIEW.

Where a party applying for a review of judgment after the expiry of the period of ninety days allowed by s. 377, Act VIII. of 1859, had not, as required by that section, shown any just and reasonable cause for not preferring his application within the prescribed period, the order admitting the review was *held* to have been improperly granted, and was set aside with all subsequent proceedings thereon. [*Luckmun Singh* v. *Turbunee Buksh*] 437

See ACT I. OF 1845.
— REGISTRATION 3.

REVOCATION OF WILL.

See ACT I. OF 1869, S. 5.

RIPARIAN PROPRIETOR.

See ALLUVION 1, 2, 3, 4.

RYOT.

See ENHANCEMENT OF RENT.

SALE.

1. Where a sub-tenure had been granted, but no power was reserved to the grantor in the sunnud to sell the tenure free from encumbrances in case of default in payment of rent, *held* that, in a sale for arrears of rent under Reg. VIII. of 1831, the purchaser did not take free from encumbrances created by the grantee.

The decision in *Shahabooddeen* v. *Puttah Ali* (5) affirmed. [*Forbes* v. *Luchmeeput Singh*] 27

2. The Plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and meanwhile the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court,) the title of the Plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed.

Under the Code of Civil Procedure, property may be attached without view to immediate sale.

A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power. [*Saroda Prosaud Mullick* v. *Luchmeeput Sing*] 77

3. A sued, under Act X. of 1859, the widow of Z, as widow of Z and guardian of Z's son, for arrears of rent due by Z. He obtained a decree in 1862 against the widow as Z's representative, but it was declared that Z's son was not liable, on the ground that he had been adopted into another family. In a regular suit, A obtained a decree declaring Z's son to be the heir of his natural father Z. Certain estates of the deceased were then, in 1867, put up for sale under Act XI. of 1859, in execution of A's decree for rent, and A became the purchaser. The certificate stated that the sale was of the right and interest of the widow, and that it took place under the decree in the regular suit. B, the holder of a prior decree for rent against Z, having failed to obtain execution against the same property, then sued A and Z's son for a declaration that he was entitled to sell the property on the ground that it had come to Z's son as Z's heir, and that only the interest of the widow (who had no interest) had been purchased by A. *Held* (reversing the decision of the High Court) A was entitled to the property.

The case of *Isan Chunder Mitter* v. *Buksh Ali*

Soudagur (1) approved of. [*The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh*] 117

4. Act XI. of 1859 is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of former Statutes, whereby the Crown was empowered to sell estates for non payment of revenue.

S. 5 of the said Act applies to estates which are under attachment issued under Act VIII. of 1859, and which are in the hands of a manager appointed on the application of the judgment-debtor for the purpose of liquidating the debts. Such attachments are not superseded by the appointment of such manager.

The words "arrears of estates under attachment" apply to cases where a portion only of an estate is under attachment, as well as to cases in which the whole estate has been attached. [*Bukwares Lall Sahoo* v. *Mohabeer Proshad*] ... 338

5. The provisions of Regulation VIII. of 1819 with respect to the sale of under-tenures for arrears of rent being applicable to sales under decrees for rent made under s. 105, Act X. of 1859:

Held, that where a sale has been effected of a "*patani talook*" under that section, it must be presumed, in the absence of evidence to the contrary, that the tenure was one transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale; in other words it must be presumed to be a tenure such as is described in the preamble to Regulation VIII. of 1819, and the effect of the sale was to annul all incumbrances created by the *patanidar*. [*Brindabun Chunder Sircar* v. *Brindabun Chunder Dey*] ... 365

6. A person, who with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase money, merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit.

An estate of which *R* was one of the registered shareholders was sold for arrears of revenue, and the amount realized, after deducting the arrears and the expenses of the sale, remained in deposit with the Collector. *S* the holder of a decree against *R*, notwithstanding objections made by *R*, caused the interest of *R* in the surplus proceeds in the hands of the Collector to be attached and sold in execution of his decree. At the execution sale *R's* interest was bought by *B*, and from the money paid by him the judgment-debt of *S*, and the debts of other judgment-creditors of *R*, were satisfied. In the meanwhile *R* brought a suit to set aside the revenue sale of the estate, and obtained a decree in his favour in the High Court. *B* then applied to the Collector for *R's* share of the surplus proceeds, but his application was refused. In a suit by *B* against *R* to recover the price he had paid at the execution sale:

Held, reversing the judgment of the High Court, that such a suit could not be maintained. [*Ram Tuhul Singh* v. *Biseswar Lal Sahoo*] ... 477

7. In execution of a decree against Respondents, a certain estate held at Government revenue Rs. 8,146 was attached, and a sale proclamation was issued mentioning the decretal amount to be a little more than what it actually was, and the Government revenue to be Rs. 3,146. The sale was postponed at the request of the Judgment-Debtor, a copy of the sale notification to that effect being posted in the Court. The property was then sold and purchased by the Appellant. The Judgment-Debtors applied for setting aside the sale on the ground of irregularity and inadequacy of consideration, but it was rejected. On review, the Court without service of notice on the auction purchaser, and on the ground that there was some mistake in the account, that the property was sold at an inadequate price, and that the said price and its interest was deposited by the Judgment-Debtor ordered the sale to be set aside. The auction-purchaser applied for confirmation of the sale, which application was rejected.

The High Court under section 15 of the Letters Patent Act held that there was no material irregularity, the mistake as to the amount of the Government revenue being in favour of the Judgment-Debtor, and confirmed the sale.

Held that there was a material irregularity, the mistake as to the amount of the Government revenue was against the interest of the Judgment-Debtor, as the value of estates are determined according to the amount of the Government revenue, but it was further held that inasmuch as it was on the application of the Judgment-Debtor himself that the sale was postponed, he agreeing that the attachment and the notification of sale should be maintained, the application amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. The High Court order was interpreted to mean that the sale be confirmed by the officer who ought to have confirmed it. The order of the High Court was accordingly affirmed. [*Girdhari Singh* v. *Hurdeo Narain Singh*] ... 637

8. A writ of *fieri facias* issued to the sheriff authorizes him to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

But if the sheriff acts *ultra vires*, *e. g.*, if he seizes and sells property not within his jurisdiction, he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell.

Since there is not in *India* the difference between real and personal estate which obtains in *England* and moveable and immoveable property there are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the sheriff in respect of sale in that country is

governed by the law relating to chattels, rather than by that relating to the sale of real estate.

A sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor, who has received the purchase-money, if it should appear that the sheriff has acted under his authority and by his express directions. [*Dorab Ally Khan*, v. *Abdoul Azeez*] 818

SALE FOR ARREARS OF GOVERNMENT REVENUE.

See ACT I. OF 1845.
— LIMITATION 7.

SALE OF RIGHT, TITLE AND INTEREST OF HINDU WIDOW.

See DECREE.

SECOND MORTGAGE.

See MORTGAGE 5.

SERVICE OF NOTICE.

See BENGAL REGULATION III. OF 1819.
— ENHANCEMENT OF RENT 1.

SERVICE TENURE.

See EVIDENCE 1.

SPECIAL APPEAL.

See ENHANCEMENT OF RENT 2.
— PRACTICE 1, 2.

SPECIAL LEAVE TO APPEAL.

See BENGAL REGULATION VIII. OF 1819.
— CUSTODY OF CHILD.
— FAMILY CUSTOM 2.

SPECIFIC PERFORMANCE.

See AGREEMENT.

STAMP BELOW APPEALABLE VALUE.

See PRACTICE PRIVY COUNCIL 4.

SUBSEQUENT ENCUMBRANCES.

See MORTGAGE 5.

SUBSEQUENT JUDGMENT ON REVIEW.

See ACT I. OF 1845.

SUCCESSION.

See ACT I. OF 1869, 6.

SUIT TO SET ASIDE A DEED.

1. In a suit by the heirs of a Mahomedan *Pardanashin* lady to set aside a deed of sale executed by her, whilst living apart from her relations, in the house of the purchaser, who had occasionally acted as her *makhtar*,—*Held* that some evidence to impeach the deeds should be given by the Plaintiffs before the onus of supporting it is thrown on the purchaser.

Where, in such a suit, the substantial relief prayed for is that the deeds should be set aside, the Court is not justified in substituting therefor a mere declaration of the Plaintiffs' title. [*Tuvoordeen Tewary* v. *Nawab Syed Ali Hossein*] ... 868

2. A party seeking to set aside a transaction on the ground of inadequacy of consideration, must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition. [*The Administrator-General of Bengal* v. *Juggeswar Roy*] 760

SUIT AGAINST A CERTIFIED PURCHASER AT A REVENUE SALE.

See ACT I. OF 1845.

SUIT BY A CERTIFIED PURCHASER.

See CIVIL PROCEDURE CODE 3.

SUIT FOR CANCELLATION OF LEASE.

See ACT X. OF 1859.

SUIT FOR RECOVERY OF POSSESSION.

See LIMITATION 7.

SUIT FOR RECOVERY OF UNSATISFIED PORTION OF MONEY, DECREE NOT MAINTAINABLE.

See DECREE 3.

SUIT FOR SPECIFIC PERFORMANCE OF CONTRACT.

See AGREEMENT.

SUIT TO RECOVER INTEREST ON DECREES AS DAMAGES.

See INTEREST 3.

SUIT TO SET ASIDE ADOPTION.

See H. L. ADOPTION 4.

SUIT TO SET ASIDE AN ORDER UNDER S. 208 OF ACT VIII. OF 1859.

See DECREE 4.

SUIT TO SET ASIDE MERE ALLEGATION NOT MAINTAINABLE.

See DECLARATORY DECREE 4.

SUIT TO SET ASIDE SALE.

See PURCHASER BY A TRUSTEE.

SUMMARY SETTLEMENT WITH A MEMBER OF A HINDU FAMILY.

See OUDH PROCLAMATION.

SUNNUD.

See ACT I. OF 1869, 1, 6, 7.
— EVIDENCE 1.
— GRANT 2.

SUSPENSION.

See BARRISTER.

TANKS, ANCIENT.

The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of *India*, and upon the settlement of the country has, in many instances, devolved upon *Zemindars*. Such *Zemindars* have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such *Zemindars* with regard to their tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed.

Such a *Zemindar*, if the banks of any tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby.

Withers v. *The North Kent Railway Co.* (1) approved. *Rylands* v. *Fletcher* (2) distinguished. [*Madras Railway* v. *The Zemindar of Carvate nagarum*] 391

TALOOK, DURPATANEE, UNREGISTERED, ASSIGNEE OF.

See LIMITATION 2.

TALOOK IN OUDH CREATED BY SUNNUD AFTER CONFISCATION, RIGHT OF SUCCESSION TO.

See ACT I. OF 1869, 6.

TALOOKDAR.

See ACT I. OF 1869, 1, 2, 4, 5, 6.

TEMPORARY SETTLEMENT.

See ACT I. OF 1869.

TENANCY.

See ESCHEAT.

TITLE.

See EJECTMENT.

TITLE OF HONOUR.

See PLAINT 1.

TITLE UNDER SUNNUD.

See ACT I. OF 1869, 7.

TODA GIRAS HAK.

See LIMITATION.

TRANSFER.

See H. L. TRANSFER.

TRUSTEES.

The founder of a Hindu temple who provides that the *urallers* (trustees or managers) thereof for the time being, shall be the *Karnavans* (chiefs) of four distinct families, may be supposed to have established this species of corporation with the object of securing the due performance of the worship and the due administration of the property of the temple by the instrumentality of a class of person whom he has selected on grounds of special fitness; and it cannot be supposed that he intended to empower such trustees at their mere will to transfer their office and its duties, with all the trust property, to a person unconnected with the families from which the trustees were to be taken, to be used according to his discretion. There is no authority under the general principles of Hindu law for holding that such trustees have power to make such a transfer.

Where a custom relied on as sanctioning such a transfer, implies the right to sell the trusteeship for the pecuniary advantage of the trustees, that circumstance alone may justify a decision that the custom relied on is bad in law.

Where from the absence of direct evidence of the nature of a Hindu religious foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution.

The cases of *Gridharee Dass* v. *Nundo Kishore Dass Mohunt* (1), and *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (2), referred to and approved. [*Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*] 687

See ACT I. OF 1869.

TRUST, CREATION OF, BY DECLARATION OR AGREEMENT.

See ACT I. OF 1869.

UNDIVIDED SHARE.

See MORTGAGE 3.

UNDUE INFLUENCE.

Where an *Ikrarnamah*, executed by three young men, (two of them being under age) parting with a half of their property, without any consideration very shortly after they have come to their property, whilst they were not fully acquainted with their rights, or without any professional advice, and under circumstances likely to overawe them and materially to affect the free exercise of their will, was set aside. [*Prem Narain Singh* v. *Purasram Singh*] ... 713

See CHAMPERTY 1.

USER.

See PRESCRIPTION.

USUFRUCTUARY MORTGAGE.

See LIMITATION 4.

VARIANCE.

See OUDH PROCLAMATION.

VENDOR AND PURCHASER.

It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an enquiry that, if prosecuted, would have led to a discovery of the real title. [*Ramcoomar Koondoo* v. *Mc queen*] 160

VALUATION.

See PRACTICE PRIVY COUNCIL 3.

WAIVER OF OBJECTION.

See CIVIL PROCEDURE CODE 4.
— SALE 7.

WIDOW.

See H. L. WIDOW.

WILL.

The doctrine of *Cy-près* as applied to charities rests on the view of that charity in the abstract is the *substance* of the gift, and the particular disposition merely the *mode*, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.

It cannot be laid down as a general principle that the *cy-près* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is any thing analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or require so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cy-près* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it fails should go to the residue.

In applying the *cy-près* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cy-près* scheme to benefit that locality.

Unless the *cy-près* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it. [*Mayor of Lyons* v. *The Advocate-General of Bengal*] ... 561

See GRANT 2.

WITNESS.

See MALICIOUS PROSECUTION.

WRONGFULL CONVERSION.

See DAMAGES.

YEAR OF GRACE.

See MORTGAGE 6.

ZEMINDAR.

See ESCHEAT.

PART II.

HINDU LAW.

ACCUMULATION.

1. Immoveable property purchased by a Hindu widow with the profits of her husband's estate, there being no proof of any distinct intention on her part to sever such purchases from the estate and appropriate it to herself, held to form part of her husband's estate.

Sreemutty Soorjeemony Dossee v. *Denabundoo Mullick* (1) distinguished. [*Gouda Kooer*, v. *Kooer Oodey Singh*] ... 370

2. A Hindu widow has no greater power of alienation over the profits than she has over the *corpus* of her husband's estate; whatever she purchases out of those profits is an increment to that estate; *secus*, where she holds under a deed which in express terms gives her an estate for life with a power to appropriate the profits.

Such a deed must be construed according to the plain ordinary meaning of its terms; and words may not be imported into it, from any conjectural view of its intention, which would have the effect of materially changing the nature of the estate thereby created.

Sreemutty Rabutty Dossee v. *Sibchunder Mullick* (1) explained. [*Mussumat Bhàybutty Daee* v. *Chowdry Bholanath Thakoor*] 528

ADOPTION.

1. In a suit as to the validity of the adoption of a claimant to the *Nattore raj*, held, notwithstanding a finding of the Judge of first instance that the adoption was not proved, that the evidence fully supported the adoption.

The presumption is that the object of an endowment by a Hindu for the worship of idols is to preserve the *sheba* in the family, rather than to confer a benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise. [*Rajah Chundernath Roy* v. *Kooar Gobindnath Roy*] 119

2 A second adoption cannot take place in the lifetime of the first adopted son

Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted son, *held*, the Plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor. [*Gopee Loll* v. *Mussumat Sree Chundraolee*] ... 217

3. According to the law prevalent in the *Pravida* country, a Hindu widow, without having her husband's express permission, may, if duly authorised by his kindred, adopt a son to him.

The Collector of Madura v. *Moothoo Ramalinga Sathuputhy*, (1) referred to and approved.

Semble, in the case of an undivided family the requisite authority to adopt must be sought within that family, and cannot be given by a single separated and remote kinsman.

Speculations founded on the assumption that the law of adoption now prevalent in *Madras* is a substitute for the old and obsolete practice of raising up seed to a husband by actual procreation are inadmissible as a ground of judicial decision. [*Sri Raghunadha* v. *Sri Brozo Kishoro*] 583

4. The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits, her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in *Bengal*, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble. The operation of s 33, Reg. X. of 1793, which, read together with s. 2, Reg. XXVI. of 1793, prohibits a landholder under

the age of eighteen from making an adoption, without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quære, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the Plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the Plaintiff. [*Jumoona Dassya* v. *Bamasoonderi Dassya*] 602

5 According to the Hindu Law, a widow who has received from her deceased husband and express power to adopt a son in the event of his natural-born son dying under age and unmarried, may on the happening of that event make a valid adoption.

Bhoobun Moyee Debee v. *Ram Kishore Acharge Chowdhry* (1) distinguished.

Under the law which prevails in the *Dravida* country, a widow without any permission from her husband may if duly authorized by his kinsmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband.

The observations of the Judicial Committee in the *Ramnad case* (2) to the effect "that there should be such evidence of the assent of kinsmen as suffices to shew that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive," considered and explained. [*Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*] 669

See DECLARATORY DECREE.
— INHERITANCE 6.

ALIENATION.

1. According to Mithila law, the owner of self-acquired property has full power of disposition over it. [*Rajah Bishen Perkash Narain Singh* v. *Bawa Misser*] ... 272

2. The limitation of one year, provided by s. 246 of Act VIII. of 1859, is subject, in the case of a minor, to be modified by ss. 11 and 12 of Act XIV. of 1859.

Mahomed Bahadur Khan v. *The Collector of Bareilly* (1) distinguished, on the ground tha it was decided on an Act of a very special nature.

The benefit of ss. 11 and 12 of Act XIV. of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of the Hindu family joint in estate and subject to the *Mitakshara* law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.

Quere, where a member of a joint Hindu family governed by the *Mitakshara* law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his lifetime his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the *Mitakshara* law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-Defendant in the suit.

Where a Division Bench of a High Court refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the Respondent, without a cross appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred. [*Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*] 573

3. Since by the *Hindu* law the illegitimate son of a person belonging to one of the "twice born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate, being in performance of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the *Mitakshara*.

Quære—Where under the *Mitakshara* law a father who has no child born to him is competent without legal necessity, to alienate the whole or any part of the ancestral estate; or whether the rights of

unborn children are so preserved as to render such alienation unlawful? [*Rajah Parichat* v. *Zulim Singh*] 728

See ACCUMULATION 2.
— WILL 3.

ANCESTRAL ESTATE.

Ancestral property which descends to a father under the Mithila law is not exempted from liability to pay his debts because a son is born to him. Such exemption can only be pleaded when the nature of the debts incurred by the father is such as would free the son from the usual obligation of discharging his father's debts out of the ancestral estate.

A decree, properly obtained against the father, can be executed by sale of such ancestral estate, and the interest of the sons as well as of the fathers will be bound by it. A purchaser at such sale is not bound to inquire into the circumstances under which the decree was made. [*Muddun Thakoor* v. *Kantoo Lall*] 380

See ALIENATION 3.

BENAMEE.

See INHERITANCE 1.

BENARES SCHOOL.

See INHERITANCE 6.

DAUGHTER'S SON.

See INHERITANCE 3.

DAYABHAGA.

See INHERITANCE 2.

DEVISE TO HEIRS.

See SELF-ACQUIRED PROPERTY.

DEWUTTUR.

1 As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable.

It is competent, however, for the *sebait* in charge of property dedicated to the worship of an idol, in his capacity of *sebait* and as manager of the estate, to incur debts and borrow money for the proper expense of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power to incur such debts is to be measured by the existing necessity for incurring them, the authority of the *sebait* being in this respect analogous to that of a manager for an infant heir.

It being competent for a *sebait* to borrow money for necessary purposes, it follows that judgments obtained against a former *sebait* in respect of debts so incurred, are binding upon succeeding *sebaits*, who form a continuing representation of the *dewuttur* property.

But, before applying the principle of *res judicata* to such judgments, the Court should be satisfied, that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried, and decided in the suits which led to them.

Execution of such judgments should be decreed only against the rents and profits of the *dewuttur* property. [*Prosunno Kumari Debya* v. *Golab Chand Baboo*] ... 449

2. A Plaintiff who seeks to set aside an alienation of lands on the ground that they are *dewuttur*, i. e., dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular *mehal* have been applied for a considerable period to the worship of an idol, is not sufficient proof that the *mehal* is *dewuttur*.

The *sebait*, or manager, of a *dewuttur* estate has authority where the purposes of the endowment require it to raise money by alienating a part of the estate, his position being analogous to that of a manager of an infant heir under the Hindu law. The cases of *Hunoomanpersad Panday* v. *Mussumat Babooee Munraj Koonwaree* (1) and *Prosunno Kumari Debya* v. *Golab Chand Baboo* (2) referred to and approved.

The written conveyance of certain lands stated them to be *dewuttur*, and to be alienated to raise money to repair the temple of the idol. In a suit to set aside the alienation, it appeared that, at the time of the transaction, the temple required repairs, but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed, *held*, that the sale was valid.

Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would

not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced. [*Konwur Doorganath Roy* v. *Ram Chunder Sen*] ... 681

3. In 1813 certain lands were dedicated by deed to the religious service of an idol, and in 1820 that dedication was confirmed in a partition-deed. The Plaintiff sued to set aside alienation of the property and to have the trusts of the dedication-deeds declared. The holders of the property alleged that a subsequent partition-deed had been executed in 1845, and that the dealings of the family had shown an intention to revoke the trusts. *Held*, that it lay upon the holder to prove the revocation of the trust, and that, on failure to do so, they could not set up the law of limitation in answer to the Plaintiff's suit. [*Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee*] 23

EDUCATION.

See SELF-ACQUIRED PROPERTY.

ENDOWMENT.

See ADOPTION 1.
— DEWUTTUR.
— TRUSTEES.

FAMILY CUSTOM.

1. In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that although by such settlement any incidents of the old tenure of the estate were impliedly at an end, get settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown.

Quære.—Whether Regulation XI. of 1793 or Regulation X. of 1800 would govern a case where the claim rested only on a continuing family usage?

Held on the evidence, that from the acts of the members of the family the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure, and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. [*Rajkishen Singh* v. *Ramjoy Surma*] ... 174

2. On the evidence given in this case *held* that, according to the usage prevailing in *Delhi* and other towns in the North-Western Provinces, among the sect of the *Jains* known as *Saraogee-Agarwalas*, a sonless widow takes an absolute interest in the self-acquired property of her husband, has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes place of a son begotten.

Quære—Whether no such an adoption the widow is entitled to retain possession of the estate either as proprietor, or as manager of her adopted son.

A declaratory decree ought not to be made unless there is shewn to be a right to some consequential relief, which, if asked for, might have been given by the Court, or unless a declaration of right is required as a step to relief in some other Court. *Katama Nachiar* v. *Dorasinga Tevar* (1) approved.

A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

Semble—Where a Defendant sets up a nuncupative will as entitling him to property in respect of which the Plaintiff asks for a declaration of his right, a right to have such will declared null and void arises in cases where property legally passes by a will of that nature, since a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred.

A Defendant obtained special leave to appeal to Her Majesty in Council on the ground that the case involved questions of law of great importance to the *Jain sect* of

which was a member. On the appeal coming on for hearing he contended that the suit should have been dismissed by the Courts below as a claim for a declaration of right in respect of which no consequential relief was sought or could be given. *Held* that, considering the special grounds on which the Defendant had obtained leave to appeal, the somewhat technical character of the defence he now put forward, and the general circumstances of the case, he ought not to be allowed to insist on this objection. [*Sheo Singh Rai* v. *Mussumat Dakho*] ... 807

3. Although an estate be not what is technically known in the north of *India* as a *raj*, or what is known in the south of *India* as a *pollicm*, the succession thereto may, under a *kulachar*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the *Mitakshara* law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is *impartible* does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general *status* of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between *Hindus* and in the *Mitakshara* itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate possess in the event of the holder dying without issue to *his younger brother or his eldest son*, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed. [*Chowdhry Chintamun Singh* v. *Mussumat Nowlakho Konwarie*] 537

4 By the general Hindu law where a subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons, the succession as between sons by different wives (other than the first wife) of equal caste, is to be determined by the priority of birth of the sons and not by the priority of marriage of their respective mothers; and therefore with respect to the succession to an impartible *zemindary* in the district of *Tinnevelly* in the presidency of *Madras*, the son of the third wife is, in the absence of proof of any special custom or family usage to the contrary, to be preferred as heir to a subsequently born son of the second wife.

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence. [*Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*] 108

GIFT.

See WILL 1, 4.

HUSBAND AND WIFE.

See WIDOW 2.

ILLEGITIMATE SON.

See ALIENATION 3.

IMPERTIBILITY.

See INHERITANCE 7.
— PRIMOGENITURE 4.
— PARTITION 1.

INFANT.

See ADOPTION 4.

INHERITANCE.

1. Suit by Plaintiff to obtain a declaration of his right to a share of an estate, which he claimed to be joint family property, and to have his share alloted to him; the Defendant contending that it was not joint property, but separate acquisitions after the separation of the family. *Held*, that the cesser of commensality was only material to the determination of the issues in the cause, in so far as it removed or qualified the presumptions which the Hindu Law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family, and as part of the family estate; and That, though a cesser of commensality had taken place, the property claimed was joint family property. [*Mussumat Anundee Koonwur* v. *Khedoo Lal*] 50

2. In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the Defendant at a sale in execution of a decree passed

against the estate of *R.*, one member of the family, for his separate debt, the Defendant sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own; and that while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in dispute was the separate property of *R. viz.*, that during *R's* life-time the other members of the family allowed him to appear to the world as the sole owner thereof, and on one occasion when *R. B* the *kurta*, and a third member of the family entered into a security-bond with the Collector, whereby *R.* pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any co-sharers."

On the other hand the Plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, although the purchase was made in the name of *R* alone, filed the family account-books and the private account-books of *R* for the same purpose, as well as certain letters which passed between *B.* and *R* relative to the purchase of the property.

Held, 1*st*, that the evidence as to the separate trading, funds, and property of the several members of joint family, and their independent dealing with such property, disclosed such a state of things as might be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon the Plaintiff the onus of establishing the joint nature of the property claimed by clear and cogent evidence;

2*ndly*, that the provisions of s. 260, Act VIII. of 1859, apply to ordinary *benami* purchases at execution sale, but do not affect purchases of property by one member of a joint Hindu family in his own name, but with the joint funds;

3*rdly*, that the mere fact that *R*, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates, did not disentitle those members to recover from the Defendant the purchaser at a sale in execution of a decree against *R*, their own share of such estates;

4*thly*, that the misrepresentation as to his separate ownership made by *R*, in the security-bond given to the Collector, could not be regarded in the present suit as more than an admission inconsistent with the title now asserted by the Plaintiff, the Defendant not having purchased on the faith of such misrepresentation;

5*thly*, that the letters between *B* and *R*, relative to the purchase by the latter of the estate in dispute, were admissible as against the Defendant. [*Bodh Sing* v. *Gunesh Chunder Sen*] 253

3. Where a Hindu widow, who takes by inheritance from her husband, is dispossessed, the period of limitation as against the reversionary heir claiming the succession after the widow's death is, in the absence of fraud, to be reckoned, not from the time of the widow's death, but from the time from which it would have run against the widow had she lived and sued to recover the inheritance—*Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) approved.

In the English Common Law Courts, and, *a fortiori*, in the Courts of Law in *India*, where the pleadings are less technical, an admission of a fact on the pleadings by implication, is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.

An admission, or even a confession of judgment by one of several Defendants in a suit, is no evidence against another Defendant.

In a suit instituted before Act XIV. of 1859 came into operation, the periods of successive minorities might be deducted in reckoning the term of limitation.

R, holding ancestral estates in Bengal, jointly with his brothers as an undivided Hindu family, died, leaving a widow, *S*, and three unmarried daughters, *B*, *S*, *M*, and *N*, on her husband's death, *S* continued to reside with his brothers, and was supported out of the income of the joint estate. During the life-time of *S*, her daughters married, and *B* became a widow without having had a child. After *S's* death, and during the life-time of *S M*, *N* also became a childless widow. *S M* died after her mother, leaving a son *R K*. *R K*, on attaining majority, sued to recover with mesne profits a 4-annas share in the ancestral estates to which he claimed to be entitled on his mother's death as heir of *R*, and from which he alleged that he had been dispossessed by the representatives of *R's* brothers, whom he

made Defendants in the suit, joining *B* and *N* with them as Co-Defendants. Some time after the institution of the suit, a petition was filed, purporting to proceed from *B* and *N*, by which they admitted that the Plaintiff was the heir of *R*, and that they had no defence to offer.—*Held*, 1*st*.—That limitation could not be taken to have run against the Plaintiff's claim during the life-time of *S*, who, in the absence of proof that she had received only maintenance, as distinguished from participation in the profits of the estate, must be presumed to have had possession of the share in the estate which she inherited as her husband's widow, 2*nd*.—That *B* being a childless widow at the time of her mother's death, could take no interest in her father's estate. 3*rd*.—That, on their mother's death, *S M* and *N* as heirs of their father took a joint estate in his succession: and on *S M's* death, the estate which had come to her and *N* jointly, survived to *N*, since the fact of the latter being at that time a childless widow, did not destroy the right of survivorship which she had previously acquired by inheritance. 4*th*—That *N* being the heir of *R*, *R K* had not, during her life-time, any right to any part of the estate, and that his position was not altered by the petition, purporting to proceed from *B* and *N*, such petition not amounting to a conveyance or disclaimer of title in his favor. 5*th*—That, if the petition could have been treated as a relinquishment on the part of *N* of her rights in the Plaintiff's favor, it would have been necessary to enquire whether *N* was not herself barred by limitation at the time when she transferred her rights. [*Aumirtolall Bose* v. *Rajoneekant Mitter*] 430

4. By the Hindu law of inheritance as contained in the *Mitakshara*, the great-grandson of the great great great-grandfather of the deceased is a nearer heir to the deceased than his father's sister's son.

The case of *Bhyah Ram Singh* v. *Agurh Singh* (1) followed.

The custom of Hindu law, under which a father, in default of male issue, might appoint a daughter to be as a son, or appoint her to raise a son for him, if not obsolete, as appears to be the opinion of the text writers, is one which in modern times does not seem to have been brought under the consideration of the Courts of Justice in *India*.

Assuming the custom to exist, inasmuch as it breaks in upon the general rules of succession, whoever claims by virtue of it to succeed as heir, must bring himself clearly within it. There seems to be no sufficient authority for holding that a father may delegate the power to appoint. [*Thakoor Jeebnath Singh* v. *The Court of Wards*] ... 490

5. According to the *Dayabhaga*, a brother of the whole blood in a joint family succeeds in preference to a brother of the half-blood to the share of a deceased brother.

Rajkishore Lahoory v. *Govind Chunder Lahoory* (1) approved. [*Sheo Soondary* v. *Pirthee Singh*] 724

6. In the case of inheritance by daughters on default of nearer heirs, no preference is awarded by the authorities recognised by the *Benares* school of Hindu law in Upper *India* to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

Passages in the *Dattak Mimamsa* and the *Dattak Chandrika*, which prescribe that a *Hindu* wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although binding upon the conscience of pious *Hindus* as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

The maxim *quod fieri non debuit factum valet* is recognised to some extent by other schools of law in *India* besides that of *Bengal*.

Semble.—Under the law of the *Benares* school a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy. [*Sreemutty Uma Deyi* v. *Gokoolanund Das Mahapatra*] ... 786

7. P, an impartible *zemindary* descendible by inheritance according to the custom of primogeniture, passed, on the death of the father, to V, the eldest of three undivided Hindu brothers. In 1829 V executed an instrument appointing M, his second brother, to be *Zemindar* of P. This instrument recited that by the death of R, his uncle, without male issue, V had become entitled to succeed to his estates, unless R's widow, then pregnant, should be delivered of a son. The instrument then provided that in the event of the said widow giving birth to a son V should retain the *zemindary* P, but that if she gave birth to a daughter, V and his offspring should have no interest in the said *zemindary*, of which M, should be sole *Zemindar*, allowing maintenance to C, the third brother. R's widow gave birth to a daughter. V entered on possession of R's estates, and M took over the *zemindary* P. C died without issue. M died in 1835 and was suc-

ceeded by his only son D, who died in 1861, leaving a widow but no sons.

In a suit instituted in 1873 by S, a son of V, to recover certain villages belonging to the *zemindary* P, from Defendants in possession and claiming as purchasers for value from D, *Held* by the Judicial Committee, reversing the judgments of the Courts below, that the instrument of 1829 was a renunciation by V for himself and his descendants of all interest in P, either as the head, or as a junior member of the joint family, and that its effect was to make P, with its incidents of impartibility and peculiar course of succession, the property of the brothers M and C, as effectually as if in the case of an ordinary partition between the elder brother on the one hand, and the two younger brothers on the other, a particular property had been assigned to the latter; and that consequently as between D and the descendants of V, the *zemindary* was the separate property of the former, whose rights, if he left any undisposed of, passed on his death to his widow, notwithstanding the undivided status of the family, in accordance with the rule of succession affirmed in the *Shivagunga* case. [*Periasami* v. *Periasami*] 795

See ADOPTION 2.

JOINT PROPERTY.

See PRIMOGENITURE.
— PARTITION 4.

KURTA.

See ACT I. OF 1845.

LEGITIMACY.

See POLLIEM.

LIABILITY OF REVERSIONER

See WILL 3.

MAINTENANCE.

Plaintiff sued as adopted son of *Choytun Churn*. Defendant is the widow of the said *Choytun Chrun*. Plaintiff's adoption was proved.

Held that in determining the amount of maintenance to which the Defendant is entitled, the elements to be considered are, the position and status of the deceased husband and of the widow, the value of the estate, and the ordinary expenses of living, as well as other expenses required for her religious and other duties incident to the status in life which she might occupy.

Held further that the amount of maintenance ought not to be reduced as a punishment for her having unjustly defended the suit on the question of adoption. (*Sreemutty Nittokissory Dassee* v. *Jogendro Nath Mullick*] 792

See ALIENATION 1.
— WIDOW 1.
— WILL 1.

MANAGER.

See ACT I. OF 1845.

MARRIAGE.

See ADOPTION 4.

MITAKSHARA.

See ALIENATION 2, 3.
— INHERITANCE 1.
— OUDH PROCLAMATION.
— PRIMOGENITURE 4.
— UNDIVIDED FAMILY 1.

MITHILA LAW.

See ALIENATION 1.
— ANCESTRAL ESTATE.

MOHUNT.

The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them. The only law as to *Mohunts* and their office, functions, and duties is to be found in customs and practice which are to be proved by custom.

A *Zemindar* claiming a customary right of confirmation of the election of a *Mohunt* must prove the custom.

A *kararnamah* taken in troubled times from the guardian of an infant *Mohunt*, acknowledging the right of the *Zemindar* to control and remove the *Mohunt*, is of little, if any, weight, as evidence of the custom.

The superintending authority over, and the right to visit religious endowments and prevent and redress abuses in their management; exercised by the old rulers of the country, passed to the British Government, and was exercised by it before Regulation VII. of 1817 of the Madras Presidency, which merely defined the manner in which that power was thenceforth to be exercised. [*Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*] 344

PARTITION.

1. A custom of impartibility must be strictly proved in order to control the operation of the ordinary *Hindu* law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition. [*Thakur Durryao Singh* v. *Thakur Dari Singh*] 301

2. In a suit by three members of *Hindu* family, alleged to be joint, against the fourth, who was the head of that family to obtain a partition of the joint property, it appeared that the family had been beyond all questions originally a joint one and that there had been from time to time partitions in that family, according to its custom. It further appeared that the Plaintiffs obtained possession of certain portions of the estate of their ancestor by way of seer, as it was called, which were argued to have been accepted by the Plaintiffs by way of partition in lieu of the share to which they would have been entitled, the contention on the other hand being that no partition was contemplated, but the seer lands were assigned in lieu of money payments by the head of the family in respect of their shares of the joint estate:

Held that a partition may be effected by agreement, although no actual division of the property may have been made by metes and bounds or otherwise, *Appovier* v. *Rama Subba Aiyan* approved of and followed.

Held, upon the evidence and circumstances of the case, that the Plaintiffs continued to be joint and undivided in estate notwithstanding the assignments of seer land, and had not lost their right now to insist on a partition of the joint family property.

Held, further, that the Plaintiffs' claim was not barred by limitation (Act XIV. of 1859, sec., subsec. 13) as there had been no partition, and as the proceeds of the seer lands had been substantially payments by the Defendants down to the time of the action brought within the meaning of that section. [*Runjeet Singh* v. *Kooer Gujraj Singh*] 304

3. In all cases of division of joint property, not carried out by a partition by metes and bounds, the question whether the status of the family has been thereby altered is a question of intention of the parties, to be inferred from the instruments which they have executed and the acts which they have done to effect such division.

An *ikrarnamah*, which did not recite a previous status of indivision, and did not in terms declare that the parties thereto should thenceforth be an undivided family, was construed nevertheless to mean that the parties would thenceforth hold and enjoy the property, which was the subject of it, in severalty.

Appovier v. *Rama Subba Aiyan* (1) followed. [*Baboo Doorga Pershad* v. *Mussumat Kundun Koowar*] 341

4. Touching the question of separation of the joint property of a Hindu family, the principle is established that there may be a division of right and interest which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his separate share in severalty, severs the joint interest and extinguishes the rights springing from united family ownership. The question of intention must arise in all such cases and be determined in each upon its own circumstances [*Appovier* v. *Rama Subba Aiyan*. 11. Moore's I. A. 75 and 3 cases in 13 Moore's I. A. pp. 113, 181, 497 and another in L. R. 1. I. A. pp 55, approved and followed.]

Joining in granting a lease is in no way inconsistent with the lessors being owners of separate shares. Until an actual partition of lands, they would be in the position of tenants in common in *England* and would for convenience join in granting leases.

Where the defence suggested for the first time before the Privy Council is raised neither by the Defendants' answer, the issues, nor the ground of appeal, it will be improper to give effect to it unless the evidence to support it is so clear and uncontradicted that it cannot, without manifest injustice, be disregarded. [*Maharajah Ram Kishen Singh* v. *Rajah Sheonundun Singh*] 498

5. Although a suit by a member of a joint

Hindu family against his co-sharer for a separate share of the joint estate be not a terms a suit for partition, yet, if it appear that the intention of the Plaintiff was of obtain the share which he would be entitled to on a separation, and the decree passed in the suit assigns him that share, such decree does in fact effect a partition, at all events, of rights, which, under the doctrine laid down in the case of *Appovier* v. *Rama Subba Aiyan* (1), is effectual to destroy the joint estate. [*Joynarain Giri* v. *Grishchunder Myti*] 871

PERFORMANCE OF CEREMONIES

See WILL 4.

POWER OF ALIENATION.

See DEWUTTUR.

PRIMOGENITURE.

See FAMILY CUSTOM 3.

PURCHASE.

See GENERAL ACT I OF 1845.

REMUNERATION.

See INHERITANCE 3.

RESIDENCE

See WIDOW 1.

REVERSIONARY HEIR.

See INHERITANCE 3.

REVOCATION OF BY PAROL

See ACT I. OF 1869, 5.

SELF-ACQUIRED PROPERTY.

The rule of the Judicial Committee of the Privy Council not to permit the concurrent judgments of two Courts on a question of fact to be disputed may be relaxed in a case where the question of facts is closely mixed up with questions of law.

Quære, whether when a *Hindu* devises to his son's property which in the absence of such devise they would take as his heirs, the sons shall be considered to take as devisees or as heirs.

Quære, where a member of a *Hindu* family subject to the *Mitakshara* law has received a general education at the expense of the join family funds, but is shown to have derived no material wealth from these funds, does property which he afterwards acquires by the exercise of his industry and intelligence in successful trading become joint in the contemplation of the *Hindu* law? Decisions of the indian Courts bearing on the question observed on. [*Paulliem Valloo Chetty*, v. *Paulliem Sooryah Chetty*] 698

See ALIENATION 1.

SEPARATE PROPERTY.

See FAMILY CUSTOM 4.
— INHERITANCE 7.

SHEBAIT.

See ADOPTION 1.
— DEWUTTUR 1, 2.

SON'S INTEREST.

See ANCESTRAL ESTATE.

STRIDHUN.

See ADOPTION 1.

SUCCESSION.

See ALIENATION 2.
— INHERITANCE 2, 6.
— WIDOW 2.

SUDRAS.

See GENERAL DECLARATORY DECREE 1.

TRANSFER.

See OUDH PROCLAMATION—GEN.

TREATMENT OF A DAUGHTER'S SON AS A SON, INDICATION OF AN INTENDED SUCCESSOR.

See ACT I OF 1869, 5.

TRUST.

See WILL 1.

UNCHASTE.

See WIDOW 1.

UNDIVIDED FAMILY.

1. The right, title, and interest of one Co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally, under the law of the *Mitakshara*, as well in *Bengal* as in *Bombay* and *Madras*.

The purchaser at such a sale acquires merely the right to compel a partition as against the other Co-sharers which the judgment-debtor possessed.

Quære.—Whether, under the law of the *Mitakshara*, in *Bengal*, a voluntary alienation by one Co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid? [*Deendyal Lal* v. *Jugdeep Narain Singh*] 730

2. In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that every thing in the possession of any one member of the family belongs to the common stock. The onus of establishing the contrary rests on him who alleges separate property.

But this presumption does not arise where it appears that there has been a division of the family property, and a separation in the family, all the members of which are living separately. [*Bannon* v. *Kashee Ram*]... 781

See ADOPTION 3.
— ALIENATION 2.
— INHERITANCE 1, 2, 5.
— PARTITION 1.

WIDOW.

1. A Hindu widow is not bound to reside in her deceased husband's family house; and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity, or for any other improper purpose.

Arrears of maintenance may be awarded. [*Rajah Pirthee Singh* v. *Ranee Rajkooer*] 259

2. In a suit by the sons of *T*, a *Hindu*, by one of his wives, against his daughter by another wife, for the recovery of certain properties, chiefly upon the basis of a *dowl* or deed of specification by *T* which purported to confirm his wives' possession of certain property, during their lives, in lieu of maintenance, restraining their power of alienation; the Defendants, by certain ancient deeds shewed the transfer to her mother by her father of an absolute interest in some *talooks*, reserving a quit rent, and the title of her mother to certain other properties and gave parol evidence of not a very satisfactory character to prove the purchase of the rest out of her mother's *Jowtook*:

Held, that, from the pleading and under the circumstances of the case, the documents produced by the Defendant, could not be concluded to be forged;

That in the absence of evidence of the title and seisin on the part of *T*, it was made out that the Defendant was entitled to an absolute estate in the properties in question; and that *T*, could not cut down his wife's interest to a life-interest by any *dowl* he might make, and that accordingly the *dowl*, even if genuine, was inoperative. [*Mohima-Chunder Roy* v. *Doorga Monee*] ... 452

3. According to the *Hindu* law of inheritance the separate property of a person dying without male issue, and leaving more than one widow, is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship.

The view that, according to the custom prevailing in Southern *India*, the senior widow by date of marriage succeeds in the first instance, the others inheriting in their turn as they survive, but being only entitled in the meantime to be maintained by the first, is not supported by the decisions of the Courts, nor by the sanction of any text writer of paramount authority in the *Madras* Presidency.

Widows who take a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the estate between themselves. But where, from the conduct of one or more of their numbers, separate possession of a portion of the inheritance is the only likely means to secure for each peaceful enjoyment of an equal share of the benefits of the estate, an order for separate possession and enjoyment may be made.

Jijoyiamba Bayi Saiba v. *Kamachi Bayi Saiba* (1), referred to and approved. [*Sri Gajapathi Nilamani Patta* v. *Sri Gajapathi Radhamani Patta*] 753

WILL.

1. In construing transfers by gift among Hindus, a benignant construction is to be used, and the donor's intention carried out, if ascertainable, to the extent and in the form which the law allows. Thus, if an estate be given by a Hindu to *A* without words of inheritance, it will, in the absence of a conflicting context, give an estate inheritable as the law directs; if to it be added an imperfect description of it as a gift of inheritance not excluding the inheritance imposed

by law, an estate of inheritance would pass; if a gift be in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction is to be rejected; if a gift be to *A* and his heirs to be selected from a line other than that specified by law, and expressly excluding the legal course of inheritance, the gift is only good so fas as consistent with the law—*A* would take a life-estate, and the other limitations would fail. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and by Hindu law no person can succeed as heir to estates described in terms which in English law would designate estates tail.

In order to make a gift under a will good by Hindu law, the donee, except in the case of an adopted child, or a child *en ventre sa mère*, must be a person in existence capable of taking at the time when the gift takes effect. A child adopted after a man's death in pursuance of a power given by him, is in contemplation of law begotten by that man.

The law of wills among Hindus is analogous to the law of gifts; and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred. A person capable of taking under a will must be such a person as could take a gift *inter vivos* and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator. *Sreemutty Soorjee money Dossee* v. *Denobondoo Mullick* (1) distinguished.

Trusts are not unknown to Hindu law; they can be created for carrying out such intentions as the law recognizes.

There is no reason why a Hindu should not, by will, create an estate for life.

Where the testator left his property to *A* for life with remainders, showing that *A* should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail, *held*, that *A* could not be declared entitled to more than a life-estate.

Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid; and that as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property.

The will directed that, as to the personalty, the trustees were, after all annuities and legacies had fallen in and been satisfied, to stand possessed of, and interested in, the *corpus* in trust absolutely for the person or person's entitled under the limitations in the will to the beneficial or absolute enjoyment of the real property. The High Court gave the tenant for life the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, but excluded him from any right to the subsequently accruing interest; *held*, that he was entitled to the interest of the personalty after such falling in and satisfaction.

Where a son had received as a gift from his father property producing at the time Rs. 7,000 a year, their Lordships, without deciding whether a son could be deprived of maintenance, considered that he had received an adequate maintenance.

All the existing parties interested in a will being before the Court, a decree can be made as to the rights of all parties. *Lady Langdale* v. *Briggs* (2) distinguished. [*Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*] 82

2. P C T, a *Hindu*, died, leaving an only son G M T, and having made a will in English form, whereby, after declaring that he had already made sufficient provision for G M T and that he was to take nothing under the will, he gave all his property to trustees, as to the personalty upon trust "to collect and get in the same (save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use)," and after paying debts and such legacies as were not by the will postponed in payment, to invest the residue, and pay out of the income certain annuities, and the postponed legacies as they became due, and to pay the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of the real property or the profits thereof; and as to the realty, upon trust until the debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities if the personalty should be inadequate, and subject thereto to pay the residue to the person for the time being entitled to his real estate under the limitations thereinafter contained "for the absolute use of such person." The

testator further directed that the trustees should hold the estate generally for the use and benefit of such person so far as was consistent with the trusts and provisions of the will: that out of the income, after paying the necessary costs of managing the estate "including the expense of the establishments in the "*mofussil*, and *Calcutta*" such person should receive Rs. 30,000 per annum; and that, as soon as the legacies and annuities were paid and had fallen in, the trustees should convey the real estate unto and to the use of the person or persons who should be entitled to the beneficial interest therein. The testator then devised (subject to the devise to the trustees) his "real property" and also his "library, horses, carriages, farm yeard, furniture of the *boitokanah*, jewels, gold, and silver plates, &c.," to J M T for life, and to the sons of J M T successively in tail male, with subsequent limitations over in the English form. The will then contained the following proviso:—

"Provided always, and I hereby declare that, if any devisee, or tenant for life..... shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and use as his residence in *Calcutta*, the said *boitokanah* house, and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations a foresaid shall at once succeed" as if the person committing any breach of such conditions had then died. The testator died in August 1868; and shortly afterwards G M T brought a suit to set aside the trusts and limitations in the will, except so far as they were for the payment of debts, legacies and annuities, in which suit the final order of the Privy Council of 9th August 1872, declared all the limitations subsequent to the life-interest given to J M T to be void and inoperative; and further declared that J M T was entitled to a life-interest in the realty, and also in the personalty directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made and to the provisions in the will not declared to be void, and also, until the legacies and annuities fell in and were satisfied, to Rs. 2,500 a month out of the realty, and also to the surplus rents of the same and the surplus interest of the personalty; and that upon the failure or determination of the life-interest of J M T, G M T was entitled as heir-at-law to the real and personal property.

The proviso for cesser was not among the provisions of the will which were declared void. J M T was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the *boitokanah* house: and J M T who had a family dwelling-house of his own, used, up to November 1869, to attend at the *boitokanah* daily for the transaction of business. In November 1869 J M T quarrelled with his co-trustees, and ceased to go to the *boitokanah*. In April 1870 he demanded from the other trustees that possession of the *boitokanah* should be given to him, and upon their insisting on the right to occupy the portion of the *boitokanah* used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favor: the trustees appealed, and ultimately, in July 1871, the appellate Court made a declaration that it was consistent with the trusts of the will that J M T should enter into possession; and the trustees were ordered to deliver to him possession of the *boitokanah*, except the portion of the ground floor occupied for the business of the estate. After obtaining this decree, J M T found that the *boitokanah* was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, J M T, in December 1871, brought a suit to compel them to effect the necessary repairs: the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently repairs were begun which were completed in October 1872.

In a suit by G M T, alleging that J M T had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the *boitokanah* house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the Plaintiff was entitled to take advantage.

Held that as the clause provided for the cesser and determination of the life-interest of *J M T* in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened.

Held that the clause could not be construed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and *J M T's* estate perfected by a conveyance.

But *held*, on the evidence, that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872 was not unreasonable.

Where in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition, exclusive residence is not supposed to be meant; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence, is a sufficient compliance with the condition. [*Ganendro Mohan Tagore* v. *Rajah Jutteendro Mohun Tagore*] ... 395

3. A *Hindu*, by a petition to the Collector of *Patna*, recited the deaths of his son, of his brother without leaving issue, his brother's wife, and his own wife, and then proceeded to dispose, as if by testament, of his property as follows. "Only D K, widow of my son, who, too, excepting her two daughters born of her womb, S and D, has no other heirs, is my heir. Except D K none other is, nor shall be, my heir and *malik* .....Furthermore, to the said D K, too, these very two daughters named above, together with their children who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and *malik*"

D K survived the testator: S predeceased him without issue: D survived him and then died leaving S. R, her only son and heir. D K, in 1854, after the testator's death, sold part of the lands mentioned in the petition to M. for Rs. 41,000, of which Rs. 14,000 were devoted to pay off a mortgage thereon.

In a suit by S R against M and D K, to protect his future right and title to the property sold by cancelment of the deed of sale,—*held*, that the intention of the testator must be construed to have been that D K should not take an absolute estate, but that she should be succeeded therein by her two daughters (1). D K, therefore, could not convey to M an estate beyond her own life, and S R was entitled to a decree declaring his right to the property on the death of D K, credit being given to M for the Rs. 14,000 paid by him in respect of the mortgage, which otherwise S R would have had to redeem. [*Moulvie Muhomed Shumsool Hooda* v. *Shewukram*] 405

4. *G*, a childless Hindu, by his will directed as follows:—"And as I am desirous of adopting a son, I declare that I have adopted *K*, third son of my eldest brother. My wives shall perform the ceremonies according to the *Shastras*, and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property moveable and immoveable, in my own name or *benami*, left by me, also that adopted son. When he comes to maturity the executors shall make over everything to him to his satisfaction." . . . "God forbid, but should this adopted son die, and my younger brother *Nilruttun* have more than one son, then my wives shall adopt a son of his. If at that time *Nilruttun* has not a son eligible to adoption, they shall adopt another son of *Saroda*, and the wives and executors shall perform all the afore mentioned acts."

In a suit by *N*, one of *G's* widows, as an heiress of her husband, to set aside the will and recover half of the property—

Held, that on the evidence the will was proved and that its effect was a gift of the property to the adopted son as a designated person, independently of the expected performance of certain ceremonies by the testator's widows.

Quere—whether the performance of the ceremonies was necessary for the completion of the adoption; and if so, the power having been given to two widows, could one alone perform them effectually. [*Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*] 952

See OUDH PROCLAMATION.
—FAMILY CUSTOM 2.

PART III.

MAHOMEDAN LAW.

ACKNOWLEDGMENT OF BROTHERHOOD.

The Plaintiff, *E*, and *M* were the illegitimate sons and daughter of *B*, a Mahomedan woman *E* died, and, after his death, the Plaintiff sued his widow and *M*, to recover his share of the property of *B* which he claimed as co-heir of *E*. He relied upon a recital in a petition in which *E* the Plaintiff, and *M*, describing themselves as the sons and daughter of *B*, had prayed for a certificate under Act XXVII. of 1860. *Held* that this was not such an acknowledgment of the Plaintiff by *E* as to constitute between them the status of full brotherhood and heirship by Mahomedan law.

Semble.—The acknowledgment by one man of another as his brother is not by Mahomedan law valid, so as to be obligatory on the other heirs, but is binding against the acknowledger. [*Mirza Himmut Bahadoor* v. *Sahebzadee Begum*] ... 331

ADOPTION OF MAHOMEDAN RELIGION FOR PURPOSE OF MARRIAGE.

See CUSTODY OF CHILD.

ALIENATION.

See RIGHT OF CREDITORS.

AMOUNT OF DOWER.

See DOWER 2.

ASSENT OF WIFE.

See MARRIAGE.

BIGNAMY.

See CUSTODY OF CHILD.

CUSTODY OF CHILD.

A child, the offspring of a Christian marriage, was living after her father's death under the protection of her mother. A married man, a Christian, came to live with her mother, and, in order to legalize their intercourse, he and the mother became Mahomedans, and were married in Mahomedan form. About three years after, when the child had attained the age of fourteen, some of her relatives applied for and obtained an order, under Act IX. of 1861, that the girl be removed from the guardianship of the mother and her second husband and placed under a Christian guardian. The girl deposed that she wished to remain with her mother and to become a Mahomedan. Special leave having been given to appeal to the Privy Council, the order was upheld.

Quare.—Whether a marriage according to Mahomedan rites between a married Christian man and a Christian woman, both of whom became Mahomedans in order to effect the marriage, is valid. [*Skinner* v. *Orde*] 34

DEBTS.

See RIGHT OF CREDITORS.

DEMAND.

See DOWER 3.

DOWER.

1 Where the widow of a Mahomedan obtained actual and lawful possession of the estates of her husband under a *claim to* hold them as one of the heirs and for her dower, it was *held* that she was entitled to retain possession until her dower was satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received.

The Courts below, without ascertaining the amount of the widow's dower, decreed possession of the estates to the heirs. Such decree was reversed on appeal, and the amount of dower was ascertained. [*Bebee Bachun* v. *Sheikh Hamid Hossein*] 39

2 Where dower is "prompt," limitation does not begin to run until the dower is demanded, or the marriage is dissolved by death or otherwise.

The amount claimed, *viz.* Rs. 16,25,000, not having been disputed in the Court of original jurisdiction, was allowed.

Quare.—Whether, in the case of a divorce, a cause of action accrues in respect of deferred dower, before the repudiation has become irrevocable, or the dower has been demanded. [*Mussumat Mullooka* v. *Mussumat Jumeelu*] 220

3 The prompt or exigible dower of the Mahomedan law may be regarded as a debt always due and demandable during the subsistence of the marriage, and certainly payable on demand.—On a clear and unambiguous demand by the wife for payment, and refusal by the husband to pay such dower, a cause of action accrues, against which limitation begins to run.

An application under s. 299, Act VIII. of 1859 by a Mahomedan woman for leave to sue her husband for exigible dower *in forma pauperis*, may be taken to express her intention of bringing an action for dower, only if she obtains leave to do so as a pauper. Until she has the Court's permis-

sion to sue, her application does not amount to a demand by way of action.

A counter-petition by the husband objecting to the pauper suit being allowed, and denying his liability to pay the dower, does not alter the character of the proceedings, since no opposition on his part can constitute a cause of action, unless there has been a previous demand by the wife; the option being with her to demand the dower or not, and to elect her time for demanding it. [*Runee Khajoorooniesa* v. *Ramee Ryeeroonissa*] ... 526

EXIGIBLE DOWER.

See DOWER 3.

GIFT.

1. Where there is on the part of a father or other guardian of a minor a real and *bonâ fide* intention to make a gift to the minor, the Mahomedan law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor.

Where the subjects of a gift are definite shares in certain *zemindaries*, the nature of the right in which is defined and regulated by the public acts of the British Government, so that they form for revenue purposes distinct estates, each having a separate number in the Collector's books, and each liable to the Government only for its own assessed revenue, the proprietor collecting a definite share of the rents from the *ryots*, and having a right to this definite share and no more, the rule of the Mahomedan law as to *musâ'id*, which makes the gift of undivided property invalid, does not apply.

Quære.—Whether the law relating to *musâ'id* applies to those cases in which the owner gives all his own interest in undivided property.

A Plaintiff sued to set aside certain documents which he alleged to have been forged by the Defendant. At the trial of the case in the Court of first instance the only issue directed to those documents was:—"Are the three written agreements said to have been given by the Plaintiff to the Defendant genuine and valid deeds?" It was not contended by the Plaintiff in that Court that the agreements had been obtained from him while he was a minor by undue influence, nor was that objection taken in the grounds of appeal against the judgment of the Court. *Held*, that it was too late to take the objection for the first time in the Court of Appeal.

Semble.—In respect of a transaction in which a Mahomedan, the proprietor of an estate paying revenue to Government, disposes of that estate, the period of minority is that of eighteen years, as fixed by s. 2, Regulation XXVI. of 1793. [*Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*] 423

2. In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the Defendant, who thereupon field an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the Plaintiff's interest, was allowed. The Defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct. *Held*, by the judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the Plaintiff was to be allowed to be heard against so much of the original judgment as was unfavorable to her, the Defendant must similarly be heard against so much of the same judgment as was unfavorable to him.

The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property and to confer it on the donee. It is incumbent on those who set up transactions of this nature, to shew very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, *held* to be an attempt to give, under color of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son had been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife. [*Ramee Khajoorooniesa* v. *Musumat Roushun Jehan*] 629

GUARDIAN AND WARD.

See CUSTODY OF CHILD.

ILLEGITIMACY.

See ACKNOWLEDGMENT OF BROTHERHOOD.

INHERITANCE.

See MARRIAGE.

MARRIAGE.

A ceremony of marriage was performed between Mahomedan minors in the Fazolee (nominal) form; the girl's father being dead and the marriage being contracted by her paternal grandmother. Thereafter the girl died, having attained the age of puberty, without ever meeting or communicating with her husband, and without ever expressing in any way assent to or dissent from the marriage:—

Held, that by the law of the *Sheeah* sect which governed the case, the marriage, since the assent of the girl after attaining puberty was not shewn, was imperfect from the want of the necessary ratification, and could not create any rights or obligations.

Though by the law of the *Soonnees* the option of dissent must be declared by the girl as soon as puberty is developed; yet by the doctrine of the *Sheeahs* the matter ought to be propounded to her so that she may advisedly give or withhold her assent.

Held, further, that under such circumstances the paternal grandmother of the girl was not entitled to inherit her estate; that the mother as her surviving parent was entitled to a third share thereof, and that the Appellants, her half-brothers, and sisters were entitled (without prejudice to any claims by third parties) to the residue. [*Nawab Mulka Johan* v. *Mahomed Ushkurree Khan*] 244

PRESUMPTION OF MARRIAGE.

See GIFT 2.

RIGHT OF CREDITORS.

The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage.

But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of *lis pendens*. [*Syud Bazayet Hossein* v. *Dooli Chund*] 853

SHEEAHS.

See MARRIAGE.